MEMORANDUM

on

Jordanian draft Law on Guarantee of Access to Information

London
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ARTICLE 19 · 6-8 Amwell Street · London EC1R 1UQ · United Kingdom
Tel +44 20 7278 9292 · Fax +44 20 7278 7660 · info@article19.org · http://www.article19.org

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1. Introduction

This Memorandum provides an analysis of the Jordanian draft Law of Guarantee to Access to Information ('draft Law'), which we understand was adopted by the government of Jordan this month and will be presented to Parliament in December 2005.

This Memorandum analyses and provides comments for use in the deliberations on the draft Law by the Parliamentary Sub-Committee. ARTICLE 19 understands that revisions to the draft Law may be made at this time.

ARTICLE 19's analysis and comments are made within the framework of the international standards governing freedom of expression, with particular reference to Jordan's treaty obligations under the *International Covenant on Civil and Political Rights* (ICCPR). This Memorandum provides recommended amendments to bring the draft Law more fully in line with these standards.

Our main concerns with the draft Law are the restrictions made on the right to access information (this should be an unqualified right of access, not subject to demonstrating a legitimate interest in the information and satisfying a citizenship requirement) and the restrictions on what type of information can be requested (the prohibition on information relating to discrimination is untenable, as is the blanket categorisation of information as Classified and therefore beyond the operation of the access to information regime). Furthermore, the exceptions to disclosure regime needs to be overhauled to ensure that all exceptions are clearly directed at protecting legitimate aims and incorporate the required substantial harm test and balancing the prevailing public interest in disclosure. Also, the appeal process for a refused request for information and the scope of the powers and functions of the Information Commissioner and the Information Council need to be more clearly delineated. It is also critical that a provision is created to provide protection for whistleblowers. Finally, we emphasize that it is fundamental to require a proactive obligation on government departments and agencies to disclose information regarding their functioning and activities to ensure a proper environment of open and accountable government and that all information is maintained in an easily accessible manner.

ARTICLE 19 seeks to make a constructive contribution through this Memorandum to the promotion and protection of freedom of expression and access to information in Jordan. The Jordanian government, at the highest level, has committed itself over several years to a process of modernisation and democratisation and, as noted above, has also voluntarily entered into treaty agreements with other States according to which it has undertaken to respect human rights, including freedom of expression. Welcoming these reform initiatives, ARTICLE 19 has been active in Jordan for several years, providing expertise on a range of other legislative proposals.[1] This Memorandum aims to assist legislators to ensure that an improved draft Law governing access to information is promulgated, one which will help Jordan realise its positive ambitions and to implement its international obligations in the area of freedom of expression.

[1] See, for example, Memorandum on Jordan's proposed 1998 Press and Publications Law, July 1998; Memorandum on the Provisional Audiovisual Media Law, February 2005.

2. International Standards

2.1 Freedom of Information in International Law

The right to access information held by public bodies, often referred to as 'freedom of information', is a fundamental human right recognised in international law. It is crucial as a right in its own regard as well as central to the functioning of democracy and the enforcement of other rights. Without freedom of information, State authorities can control the flow of information, 'hiding' material that is damaging to the government and selectively releasing 'good news'. In such a climate, corruption thrives and human rights violations can remain unchecked.

For this reason, international bodies such as the United Nations Special Rapporteur on Freedom of Opinion and Expression[2] have repeatedly called on all States to adopt and implement freedom of information legislation.[3] In 1995, the UN Special Rapporteur on Freedom of Opinion and Expression stated:

> The Special Rapporteur, therefore, underscores once again that the tendency of many Governments to withhold information from the people at large … is to be strongly checked.[4]

His comments were welcomed by the UN Commission on Human Rights, which called on the Special Rapporteur to "develop further his commentary on the right to seek and receive information and to expand on his observations and recommendations arising from communications".[5] In his 1998 Annual Report, the Special Rapporteur reaffirmed that freedom of information includes the right to access information held by the State:

> [T]he right to seek, receive and impart information imposes a positive obligation on States to ensure access to information, particularly with regard to information held by Government in all types of storage and retrieval systems…."[6]

In November 1999, the UN Special Rapporteur was joined in his call by his regional counterparts, bringing together all three special mandates on freedom of expression – the United Nations Special Rapporteur on Freedom of Opinion and Expression, the Representative on Freedom of the Media of the Organisation for Security and Cooperation in Europe and the Special Rapporteur on Freedom of Expression of the Organisation of American States. They adopted a Joint Declaration which included the following statement:

> Implicit in freedom of expression is the public's right to open access to information and to know what governments are doing on their behalf, without which truth would languish and people's participation in government would remain fragmented.[7]

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[2] The Office of the Special Rapporteur on of Opinion and Expression was established by the UN Commission on Human Rights, the most authoritative UN human rights body, in 1993: Resolution 1993/45, 5 March 1993.
[3] See, for example, the Concluding Observations of the Human Rights Committee in relation to Trinidad and Tobago, UN Doc. No. CCPR/CO/70/TTO/Add.1, 15 January 2001. 14. The comments of the UN Special Rapporteur on freedom of Opinion and Expression are discussed at length below.
[4] Report of the Special Rapporteur, 4 February 1997, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/1997/31.
[5] Resolution 1997/27, 11 April 1997. 12(d).
[6] Report of the Special Rapporteur, 28 January 1998, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/1998/40. 14.
[7] 26 November 1999.

The right to access information held by or under the control of a public body has been guaranteed through Article 19 of the *Universal Declaration on Human Rights* (UDHR), adopted in 1948,[8] and through Article 19 of the *International Covenant on Civil and Political Rights* (ICCPR), adopted in 1966.[9] Article 19 of the UDHR, which was adopted as a United Nations General Assembly resolution, states:

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

While the UDHR is not directly binding on States, parts of it, including Article 19, are widely regarded as having acquired legal force as customary international law.[10] The ICCPR is a formally binding legal treaty ratified by 154 States;[11] it ensures the right to freedom of expression and information in terms similar to the UDHR. Both Article 19 of the UDHR and Article 19 of the ICCPR have been interpreted as imposing an obligation on States to enact freedom of information laws. The UN Human Rights Committee, the body established to supervise the implementation of the ICCPR, has long commented on the need for States to introduce freedom of information laws. In its 1994 Concluding Observations on the implementation of the ICCPR in Azerbaijan, for example, the Committee stated that Azerbaijan "should introduce legislation guaranteeing freedom of information…"[12]

A rapidly growing number of States have now recognised the importance of freedom of information and have implemented laws giving effect to the right. In the last fifteen years, a range of countries including India, Israel, Japan, Mexico, South Africa, South Korea, Sri Lanka, Thailand, Trinidad and Tobago, Guatemala, the United Kingdom and most East and Central European States have adopted freedom of information laws. In doing so, they join a large number of other countries that have enacted such laws some time ago, including Sweden, the United States, Finland, the Netherlands, Australia and Canada.

2.1.1 The Content of Freedom of Information

A survey of international law and best practice shows that to be effective, freedom of information legislation should be based on a number of general principles. Most important is the principle of maximum openness: any information held by a public body should in principle be openly accessible, in recognition of the fact that public bodies hold information not for themselves but for the public good. Furthermore, access to information may be refused only in narrowly defined circumstances, when necessary to protect a legitimate interest. Finally, access procedures should be simple and easily accessible and persons who are refused access should have a means of challenging the refusal in court.[13]

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[8] *UN General Assembly Resolution 217A (III)*, adopted 10 December 1948.
[9] *UN General Assembly Resolution 2200A (XXI),* adopted 16 December 1966, in force 23 March 1976.
[10] For judicial opinions on human rights guarantees in customary international law, see *Barcelona Traction, Light and Power Company Limited Case* (Belgium v. Spain) (Second Phase), ICJ Rep. 1970 3 (International Court of Justice); *Namibia Opinion*, ICJ Rep. 1971 16, Separate Opinion, Judge Ammoun (International Court of Justice); *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980) (US Circuit Court of Appeals, 2nd Circuit). For an academic critique, see M.S. McDougal, H.D. Lasswell and L.C. Chen, *Human Rights and World Public Order*, (Yale University Press: 1980), pp. 273-74, 325-27. See also United Nations General Assembly Resolution 59 (1), 1946.
[11] As of 27 April 2005. The ICCPR was ratified by Jordan in May 1975.
[12] UN Doc. CCPR/C/79/Add.38; A/49/40, 3 August 1994, under "5. Suggestions and recommendations".
[13] For an overview of these general principles, see ARTICLE 19's *The Public's Right to Know* (London:

In his 2000 Annual Report to the UN Human Rights Commission, the UN Special Rapporteur endorsed ARTICLE 19's overview of the state of international law on freedom of information as published in *The Public's Right to Know: Principles on Freedom of Information Legislation* and called on Governments to revise their domestic laws to give effect to the right to freedom of information. He particularly directed States' attention to nine areas of importance:

> [T]he Special Rapporteur directs the attention of Governments to a number of areas and urges them either to review existing legislation or adopt new legislation on access to information and ensure its conformity with these general principles. Among the considerations of importance are:
>
> - Public bodies have an obligation to disclose information and every member of the public has a corresponding right to receive information; "information" includes all records held by a public body, regardless of the form in which it is stored;
>
> - Freedom of information implies that public bodies publish and disseminate widely documents of significant public interest, for example, operational information about how the public body functions and the content of any decision or policy affecting the public;
>
> - As a minimum, the law on freedom of information should make provision for public education and the dissemination of information regarding the right to have access to information; the law should also provide for a number of mechanisms to address the problem of a culture of secrecy within Government;
>
> - A refusal to disclose information may not be based on the aim to protect Governments from embarrassment or the exposure of wrongdoing; a complete list of the legitimate aims which may justify non-disclosure should be provided in the law and exceptions should be narrowly drawn so as to avoid including material which does not harm the legitimate interest;
>
> - All public bodies should be required to establish open, accessible internal systems for ensuring the public's right to receive information; the law should provide for strict time limits for the processing of requests for information and require that any refusals be accompanied by substantive written reasons for the refusal(s);
>
> - The cost of gaining access to information held by public bodies should not be so high as to deter potential applicants and negate the intent of the law itself;
>
> - The law should establish a presumption that all meetings of governing bodies are open to the public;
>
> - The law should require that other legislation be interpreted, as far as possible, in a manner consistent with its provisions; the regime for exceptions provided for in the freedom of information law should be comprehensive and other laws should not be permitted to extend it;

1999) (ARTICLE 19 Principles). These Principles are the result of a study of international law and best practice on freedom of information and have been endorsed by, amongst others, the UN Special Rapporteur on Freedom of Opinion and Expression in his report to the 2000 session of the United Nations Commission on Human Rights (UN Doc. E/CN.4/2000/63, annex II), and referred to by the Commission in its 2000 resolution on freedom of expression (Resolution 2000/38). They were also endorsed by Mr. Santiago Canton, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression in his 1999 Report, Volume III of the Report of the Inter-American Commission on Human Rights to the OAS.

- Individuals should be protected from any legal, administrative or employment-related sanctions for releasing information on wrongdoing, viz. the commission of a criminal offence or dishonesty, failure to comply with a legal obligation, a miscarriage of justice, corruption or dishonesty or serious failures in the administration of a public body.[14]

This constitutes strong and persuasive guidance to States on the content of freedom of information legislation.

2.1.2 Limits to Freedom of Information

One of the key issues in freedom of information law is defining when a public body can refuse to disclose information. Under international law, freedom of information may be subject to restrictions, where those restrictions meet the requirements stipulated in Article 19(3) of the ICCPR:

> The exercise of the rights [to freedom of expression and information] may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> (a) For respect of the rights or reputations of others;
> (b) For the protection of national security or of public order (ordre public), or of public health or morals.

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

1. The information concerns a legitimate protected interest listed in the law;
2. Disclosure threatens substantial harm to that interest; and
3. The harm to the protected interest is greater than the public interest in having the information.[15]

1. Legitimate Protected Interest

Freedom of information laws must contain an *exhaustive* list of all legitimate interests on which a refusal of disclosure is based. This list should be limited to matters such as law enforcement, the protection of personal information, national security, commercial and other confidentiality, public or individual safety, and protecting the effectiveness and integrity of government decision-making processes.[16]

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

2. Substantial Harm

Once it has been established that the information falls within the scope of a legitimate aim listed in the legislation, it must be established that disclosure of the information would cause substantial harm to that legitimate aim.

[14] *Ibid*. 44.
[15] See ARTICLE 19's *The Public's Right to Know*, note 13, at Principle 4.
[16] *Ibid.*

In some cases, disclosure may benefit as well as harm that aim.

3. Harm outweighs public interest benefit in disclosure

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

Cumulatively, the three-part test is designed to guarantee that information is only withheld when it is in the overall public interest. If applied properly, this test would rule out all blanket exclusions and class exceptions as well as any provisions whose real aim is to protect the government from harassment, to prevent the exposure of wrongdoing, to avoid the concealment information from the public or to preclude entrenching a particular ideology.

3. Analysis of the draft Law

3.1 Overview

The draft Law establishes an access to information regime whereby a Jordanian may request access to information in which he or she has a legitimate interest or cause in the information (Article 4), subject to restrictions such as whether the information is classified (Article 3) or whether the information requested relates to discrimination on the basis of religion, race, ethnicity, gender or colour (Article 7). An exceptions to disclosure of information regime is outlined in Article 13 of the draft Law. An Officer is appointed for each government department to respond to requests for information and that Officer must facilitate access to information and ensure its expedient disclosure (Article 5). A refusal of a request for information must be in writing and be justified and rationalized by the Officer (Article 6). Any applicant may file a complaint in the event of refusal (Article 20(B)). An Information Commissioner and Information Council are established to administer and promote the access to information regime (Article 16), including the consideration of complaints (Article 16(2)). An external right of appeal also lies to the Higher Court of Justice (Article 20(A)).

3.2 Scope of the draft Law

We consider it would be beneficial to insert a Preamble into the draft Law to reaffirm the commitment of the draft Law to the promotion of freedom of information. This could also be a second paragraph of the presently existing Article 1. Such a provision would assist in securing the intentions of the draft Law in facilitating the broadest possible access to information, and could serve as an interpretation guide where the scope of any Article is in doubt.

We recommend the following drafting:

> A Law to promote maximum disclosure of information in the public interest, to guarantee the right of everyone to access information, and to provide for effective mechanisms to secure that right.

In addition, we note that there are three provisions in the draft Law which have particular bearing on the scope of the draft Law - the statement of the right of access in Article 4, the definitions contained in Article 3 and the prohibition in Article 7 on requesting information concerning discrimination. Under the draft Law, only citizens of Jordan have a right to request information in which he or she can establish a legitimate interest or cause for the request. The type of information which can be requested is restricted in a number of ways, outlined in Articles 3 and 7. We note at the outset that placing restrictions on whom can request information, and the information which may be requested, reverses the fundamental principle which underpins freedom of information legislation, namely the principle of maximum openness.

3.2.1 Right of Access

Article 4 of the draft Law provides that "Each Jordanian is entitled to have access to the information he/she requests pursuant to the provisions of this law, if he/she has legitimate interest/cause for that." This provision qualifies the general right of access in two significant regards – only citizens of Jordan are entitled to request information from public bodies, and an applicant must show that he or she holds a legitimate interest or cause for that request.

We recommend the removal of both of these qualifiers. Firstly, under international law, every person should have the right to access information, regardless of nationality, residential or any other status. Article 19 of the International Covenant on Civil and Political Rights provides: "*Everyone* shall have the … freedom to seek, receive and impart information" (emphasis added). In addition, Article 2 of the ICCPR requires States to implement the rights guaranteed by it to all persons within their jurisdiction, without distinction of any kind, including on the basis of national origin. This means that freedom of information laws should guarantee access to information for everyone. This principle has been implemented in the freedom of information laws of other countries, such as the United States,[17] the United Kingdom[18] and Japan, [19] to name but a few.

Secondly, the principle of maximum openness establishes a presumption that all information held by public bodies should be subject to disclosure and that this presumption may be overcome only in very limited circumstances (see Section 2.1.2 above). This principle encapsulates the basic rationale underlying the concept of freedom of information to make it clear that access to official information is a basic right. The overriding goal of legislation should be to implement maximum disclosure in practice and it is inconsistent with this fundamental principle to require the applicant to establish a legitimate interest or cause for making the request.

[17] 5 USC 552 grants the right of access to "any person". This has been interpreted as including foreign citizens, corporations and even governments: *Stone v. Import-Export Bank of the United States*, 552 F.2D 132 (5th Cir. 1977, *reh'g denied*, 555 F.2d 1391 (5th cir. 1977), *cert denied*, 434 US 1012 (1978).
[18] Freedom of Information Act 2000, Section 1.
[19] Law Concerning Access to Information Held by Administrative Organs, Law No. 42 of 1999, Article 3.

Thirdly, we recommend inserting a second clause in Article 4 recognising the right of everyone to access privately held information that is necesssary for the enforcement of any right. This empowers individuals to request information concerning a broad range of issues, including socio-economic rights such as the right to housing, clean air or water. This approach has been adopted in the South African freedom of information legislation.[20]

As a result, Article 4 critically confines the scope of the draft Law. For this reason, we urge pressing for a redrafting of Article 4 in the following terms:

> (a) Everyone shall have the right to freedom of information, including the right to access information held by public bodies, subject only to the provisions of this Law.
>
> (b) Everyone shall have a right of access to information held by private bodies where this is necessary for the exercise or protection of any right, subject only to limited and specific exceptions.

Also, we recommend the inclusion of a provision expressly recognising that the access to information legislation prevails over other legislative provisions seeking to restrict access to information. If such a provision is not included, the presumption in favour of disclosure is seriously undermined. For example, the current drafting of Article 13(1) of the draft Law seeks to exempt all secrets and documents protected pursuant to any other legislation. This provision is fundamentally inconsistent with the guiding principle of maximum disclosure and we call for the removal of Article 13(1) of the draft Law and for it to be replaced with a provision expressly recognising the primacy of a presumption in favour of access. We refer to our comments made below at Section 3.2.2 in relation to the definition of Classified Information. All information should be subject to disclosure unless it meets the requirements of the 3-part test for exceptions. It is not acceptable to exempt information from disclosure on the basis of criteria external to the draft Law's provisions. Sensitive information which is protected under other legislation can be exempted from disclosure if it relates to a legitimate interest such as national security and it meets the 'substantial harm' and 'outweighing the public interest in disclosure' requirements of the test. Accordingly, we recommend that Article 13(1) is deleted and recommend the following drafting as a stand-alone provision in the draft Law:

> (1) This Law applies to the exclusion of any provision of other legislation that prohibits or restricts the disclosure of a record by a private or public body.
>
> (2) Nothing in this Law limits or otherwise restricts the disclosure of information pursuant to any other legislation, policy or practice.

3.2.2 Range of information which may be requested

Article 3 draws a distinction between three different types of information - Information, Classified Documents and Ordinary Documents. These definitions act as a restriction on the type of information which can be requested. A further restriction on the type of information

[20] See the South African Constitution, Section 31(1)(b), and the Promotion of Access to Information Act, 2002. For an example of how this operates in practice, see the 2003 decision of *Andrew Christopher Davis v Clutcho (Pty) Limited*, 10 June 2003, Cape of Good Hope Provincial Division of the High Court of South Africa (unreported but discussed at: http://www.deneysreitz.co.za/news/news.asp?ThisCat=5&ThisItem=352).

which may be requested is contained in Article 7, which prohibits disclosure of information which relates to discrimination based on religion, race, ethnicity, gender or colour.

It is central to freedom of information legislation that information is defined as broadly as possible. All records held by a public body should be subject to disclosure, regardless of the form in which the information is stored, its source and its date of production. The definitions outlined in Article 3 are unnecessary and create confusion. The only legitimate restriction on the disclosure of information is if the restriction complies with the exceptions regime outlined in Article 13 of the draft Law. The official status of the document cannot determine the disclosure status of the information contained therein. In our opinion, the distinction made between Information and Classified Documents is untenable in light of the applicable international standards, and the term Classified Documents should be removed from the draft Law.

There are also a number of Articles in the draft Law which are related to the definition of Classified Information, and these should be amended accordingly. Article 9 provides that where part of the requested information is classified, the balance of the record should be disclosed. Article 9 should be moved to the exceptions regime in Article 13 of the draft Law so that the severability consideration forms part of the exceptions regime. It should be redrafted as follows to be consistent with the 3-part test for exceptions:

> **Severability**
> If a request for information relates to a record containing information which, subject to this Part, falls within the scope of an exception, any information in the record which is not subject to an exception shall be communicated to the requester.

Article 10 provides a distinction for disclosure on the basis of the date of its classification. This provision should be deleted, as it has no application in accordance with the amendments.

In relation to the definition of Ordinary Documents, this provision purports to qualify the range of information which may be requested excluding "information that may abuse the rights or reputation of others or that violate public health or morals". Again, this is a criteria which is properly addressed the exceptions regime outlined in Article 13 of the draft Law. It is not legitimate to create a blanket exclusion for certain categories of information, and the reasons for this are outlined at Section 3.3 below. Accordingly, in our opinion, the term Ordinary Documents should be removed from the draft Law.

In light of the above comments and recommendations, we propose the following amendment to the definition of Information, to ensure that all information is properly encompassed:

> For the purposes of this Law, Information includes any recorded information, regardless of its form, source, date of creation, or official status, whether or not it was created by the body that holds it and whether or not it is classified.

Article 7, as noted above, prohibits disclosure of information which relates to discrimination based on religion, race, ethnicity, gender or colour. On the basis of the reasoning noted above, it is not legitimate to restrict information from consideration for disclosure on the basis of the type of information. All information should be subjected to

the exceptions regime outlined in Article 13 of the draft Law. Accordingly, we consider Article 7 should be removed from the draft Law.

3.2.3 Destruction of records

To ensure the availability of records in accordance with the principle of maximum disclosure, the draft Law should provide that obstruction of access to, or willful destruction of records is a criminal offence. We recommend the following provision for insertion as an additional Article of the draft Law, addressing miscellaneous issues:

> (1) It is a criminal offence to wilfully: –
> (a) obstruct access to any record contrary to the provisions of this Law; or
> (b) destroy records without lawful authority.
>
> (2) Anyone who commits an offence under sub-section (1) shall be liable on summary conviction to a fine not exceeding [insert appropriate amount] and/or to imprisonment for a period not exceeding two years.

The maintenance of information within public bodies, including when records may be destroyed, is discussed in further detail below at Section 3.6.2.

3.2.4 Public Bodies

In terms of the public bodies which are subject to the freedom of information legislation, Article 3 defines Department to include "the Ministry, department, authority, body, public official institution or company that manages a public facility". In our view, this definition seeks to encompass all public bodies as being subject to the provisions of the draft Law. On the basis of the following reasoning, we propose below an alternative definition of Information for the draft Law.

For the purpose of disclosure of information, the definition of 'public body' should focus on the type of service provided rather than on formal designations. The definition should include all branches and levels of government including local government, elected bodies, bodies which operate under a statutory mandate, nationalised industries and public corporations, non-departmental organisations, judicial bodies, and private bodies which carry out public functions (such as maintaining roads or operating rail lines). Private bodies should also be included if they hold information whose disclosure is likely to diminish the risk of harm to key public interests, such as the environment and health.

We recommend the following definition of 'Public Body' which more clearly articulates the scope of those bodies covered by the access to information regime:

> For the purposes of this Law, public body includes any body: -
> (a) established by or under the Constitution;
> (b) established by statute;
> (c) which forms part of any level or branch of Government;
> (d) owned, controlled or financially financed by funds provided by Government or the State; or
> (e) carrying out a statutory or public function
>
> provided that the bodies indicated at (e) above are public bodies only to the extent of their statutory or public function.

In addition, as discussed above at Section 3.2.1, ARTICLE 19 considers that everyone should also have access to privately held information that is necessary for the enforcement of any right.

Recommendations

- Insert a Preamble as recommended above at Section 3.2;
- Redraft Article 4 as recommended above at Section 3.2.1, providing an unqualified right of access to all persons in Jordan;
- Delete Article 13(1) and insert a provision expressly recognising that the draft Law supersedes inconsistent legislative provisions limiting access to information;
- Remove the definitions of Classified Information and Ordinary Documents;
- Amend Article 9 and remove Article 10 to reflect the removal of the term Classified Information from the draft Law;
- Redraft the definition of Information in accordance with the recommendation outlined at Section 2.2.2 above;
- Remove Article 7 from the draft Law;
- Insert a provision criminalising the obstruction of access to, or the wilful destruction of, records; and
- Replace the definition of Department with a definition of Public Body as outlined above.

3.3 The Exceptions Regime

As detailed in Section 2.4 of this Memorandum, international law requires public institutions to release information held by them unless they can demonstrate that:

1. the information relates to a specific protected interest;
2. disclosure of the information would or would be likely to cause significant harm to that interest; and
3. the harm to the protected interest from disclosure of the information is greater than the public interest in releasing the information.

In order for the draft Law to adhere to international standards, Article 13 should be amended to insert a 'substantial harm' qualifying requirement for each legitimate interest exception; and insert an overriding public interest requirement. We recommend the following 'public interest' provision to apply to the subsections of Article 13:

> Notwithstanding any provision in this Article, a body may not refuse to indicate whether or not it holds a record, or refuse to communicate information, unless the harm to the protected interest outweighs the public interest in disclosure.

In relation to the amendment of the subsections of Article 13, Articles 13(2), (4), (3), and (5) seek to protect a legitimate interest and just need some modification to include a 'substantial harm' qualifying requirement.

Article 13(2) provides that information that is accessed in agreement with another country may be exempted from disclosure. Information of this nature is best protected under a

general application clause relating to commercial and confidential information. We recommend the following drafting, which builds in the 'substantial harm' test, requiring a causal connection rather than a blanket category exemption:

> A body may refuse to communicate information if: –
>
> (a) the information was obtained from a third party and to communicate it would constitute an actionable breach of confidence;
> (b) the information was obtained in confidence from a third party and: –
> i. it contains a trade secret; or
> ii. to communicate it would, or would be likely to, seriously prejudice the commercial or financial interests of that third party; or
> (c) the information was obtained in confidence from another State or international organisation, and to communicate it would, or would be likely to, seriously prejudice relations with that State or international organisation.

This provision would accommodate Article 13(7). Accordingly, we recommend the deletion of Article 13(7) in favour of the above provision.

Similarly, Article 13(4) provides a blanket exclusion for information which includes analyses, recommendations, suggestions or consultations, as well as correspondence and related information between government administrations. A more appropriate approach is a provision concerning information which can be characterised as protecting the effectiveness and integrity of government decision-making processes. If information can be characterised as relating to a legitimate protected interest such as this, the information should then be subjected to the tests of 'substantial harm' and 'outweighing the public interest in disclosure' requirements of the test. Accordingly, we recommend substituting Article 13(4) with the following provision:

> (1) A body may refuse to indicate whether or not it holds a record, or refuse to communicate information, where to do so would, or would be likely to: –
>
> (a) cause serious prejudice to the effective formulation or development of government policy;
> (b) seriously frustrate the success of a policy, by premature disclosure of that policy;
> (c) significantly undermine the deliberative process in a public body by inhibiting the free and frank provision of advice or exchange of views; or
> (d) significantly undermine the effectiveness of a testing or auditing procedure used by a public body.
>
> (2) Sub-section (1) does not apply to facts, analyses of facts, technical data or statistical information.

This provision would also apply to information covered by Article 13(6), as currently drafted. Accordingly, we recommend the deletion of Article 13(6) in favour of the above provision.

Article 13(3) addresses information concerning national defense, government security or foreign policy. National security is a legitimate protected interest. Matters of foreign policy

would be covered by the amended Article 13(2), outlined above. We note that the scope of the term 'government security' is somewhat ambiguous. Matters encompassed by this term are a legitimate protected interest to the extent that the operations of the government are protected. We recommend the insertion of the following provisions:

> (1) A body may refuse to indicate whether or not it holds a record, or refuse to communicate information, where to do so would, or would be likely to, cause serious prejudice to: –
> (a) the prevention or detection of crime;
> (b) the apprehension or prosecution of offenders;
> (c) the administration of justice;
> (d) the assessment or collection of any tax or duty;
> (e) the operation of immigration controls; or
> (f) the assessment by a public body of whether civil or criminal proceedings, or regulatory action pursuant to any enactment, would be justified.
>
> (2) A body may refuse to indicate whether or not it holds a record, or refuse to communicate information, where to do so would, or would be likely to, cause serious prejudice to the ability of the government to manage the economy of the Kingdom of Jordan.
>
> (3) A body may refuse to indicate whether or not it holds a record, or refuse to communicate information, where to do so would, or would be likely to, cause serious prejudice to the legitimate commercial or financial interests of a public body.
>
> (4) Sub-sections (1) or (2) do not apply insofar as the request relates to the results of any product or environmental testing, and the information concerned reveals a serious public safety or environmental risk.

This provision would also encompass the information sought to be protected by Article 13(8). Accordingly, we recommend the deletion of Article 13(8) in favour of the above provision.

In relation to the protection of national security in Article 13(3), we recommend the following provision which incorporates the 'substantial harm' component of the test:

> (5) A body may refuse to indicate whether or not it holds a record, or refuse to communicate information, where to do so would, or would be likely to, cause serious prejudice to the defence or national security of the Kingdom of Jordan.

Article 13(5) seeks to protect the information contained in an individual's personal files held by the government. This is a legitimate protected interest. As currently drafted, the scope of the provision is somewhat unclear – for example, the term 'professional secrets' is ambiguous. It also does not impose any limitations on the protection of personal information – there can be valid qualifications on the withholding of such information. Accordingly, we recommend the following alternative provision to protect personal information:

> (1) A body may refuse to indicate whether or not it holds a record, or refuse to communicate information, where to do so would involve the unreasonable disclosure of personal information about a natural third party.
>
> (2) Sub-section (1) does not apply if: –
> (a) the third party has effectively consented to the disclosure of the information;
> (b) the person making the request is the guardian of the third party, or the next of kin or the executor of the will of a deceased third party;
> (c) the third party has been deceased for more than 20 years; or
> (d) the individual is or was an official of a public body and the information relates to his or her function as a public official.

In addition to the provisions of Article 13, we consider it is useful to have provisions protecting the legitimate interests of legal privilege, and public or individual safety. Accordingly, we provide the following provisions as potential additions to Article 13:

> A body may refuse to indicate whether or not it holds a record, or refuse to communicate information, where the information is privileged from production in legal proceedings, unless the person entitled to the privilege has waived it.
>
> A body may refuse to indicate whether or not it holds a record, or refuse to communicate information, where to do so would, or would be likely to, endanger the life, health or safety of any individual.

There should be an express provision built into Article 13 which recognises that to meet the 'substantial harm' part of the test, the time sensitivity of the information must be considered:

> (1) The provisions of Article 13 apply only inasmuch as the harm they envisage would, or would be likely to, occur at or after the time at which the request is considered.
>
> (2) Articles 13(2)(c), 13(3)(1), 13(3)(2) and 13(3)(5) do not apply to a record which is more than 30 years old.

Finally, Article 5(B) is essentially a duplication of the exceptions regime in Article 13. The criteria elaborated here belong in Article 13, and we further note that protecting public morals cannot be considered a legitimate consideration in the disclosure of information and we recommend that Article 5(B) is removed from the draft Law.

Recommendations

- Insert a provision into Article 13 recognising that a record must be disclosed if the public interest outweighs the harm to the protected interest;
- Amend Article 13(2) as outlined above and delete Article 13(7) in favour of the new Article 13(2);
- Replace Article 13(4) as outlined above and delete Article 13(6) in favour of the new Article 13(4);
- Replace Article 13(3) with the new provisions outlined above and delete Article 13(8) in favour of the new Article 13(3);
- Replace Article 13(5) as outlined above;

- Delete Article 13(1);
- Insert the additional provisions outlined above relating to public or individual safety, and legal privilege as legitimate protected interests;
- Insert a provision into Article 13 expressly recognising that time sensitivity should be included in the consideration of 'substantial harm'; and
- Delete Article 5(B).

3.4 Access Procedures

3.4.1 Requests for information

Articles 5 to 8 outline the procedure for requesting access to information. Article 5 provides that the Officer of the relevant government department must facilitate access to information and ensure its expedient disclosure, subject to the limitations on content outlined in Article 5(B). Article 6 requires any request to be in writing, clearly identifying the information requested, and the Officer must provide a reply within thirty days. Article 7 prohibits requesting information regarding religious discrimination, of a racial or ethnic nature, or discrimination based on gender or colour. Article 8 requires the applicant to bear the cost of photocopying or duplicating the requested information.

The administrative procedures for accessing requested information are reasonable and not oppressive, with the exception of the criteria listed in Article 6(A). This provision imposes excessive requirements identifying who is requesting the information – it is unclear why the requester's place of residence must be disclosed or the discretion given for "any other particulars determined by the Council". Given the presumption in favour of disclosure which underpins freedom of information legislation and the right of everyone to request access, the procedure for making a request should be as straightforward and minimal as possible, and should not discourage requests in any way. Imposing unnecessary identification requirements suggests monitoring of requests for information which is politically-charged or controversial, which may discourage the making of requests. Accordingly, we recommend Article 6(A) is amended to require only the bare minimum administrative requirements to enable information to be disclosed to the applicant. Finally, as noted above, we consider that Article 7 does not pursue a legitimate aim and should be removed from the draft Law.

3.4.2 Refusal of requests

Article 11 provides that if a request for information is refused, the decision should be justified and rationalized. Further, Article 11 provides that if no response is given within a specified time, the request will be deemed to be refused. Article 12 provides that if the requested information is not available or has been destroyed due to the lapse of time, the Officer must explain this to the applicant.

The only suggested amendment to Article 11 is to require the Officer to give written "adequate reasons" why the request is denied and notifying the applicant of his or her right of appeal, and to limit the specified time as no more than twenty days. No amendments are proposed for Article 12.

In addition to the standard refusal procedure, we suggest inserting a provision which allows refusal on the basis of a vexatious or repetitive request, which will assist in protecting the legitimacy of the disclosure regime. We recommend the following drafting:

> (1) A public or private body is not required to comply with a request for information which is vexatious or where it has recently complied with a substantially similar request from the same person.
>
> (2)A public or private body is not required to comply with a request for information where to do so would unreasonably divert its resources.

Recommendations

- Amend Article 6(A) to require only the bare minimum requirements to affect access to information;
- Remove Article 5(B) from the draft Law;
- Article 11 should be amended as outlined above; and
- Insert a provision allowing refusal of a request for information on the basis of being a vexatious or repetitive request.

3.5 Appeals

Article 16 outlines the function and powers of the Information Council. These include the examining complaints by applicants and settling these complaints in accordance with the instructions issued for this purpose. Any complaints must be referred to the Information Council by the Information Commissioner (Article 16(2)).

Article 17 states the functions and authorities of the Information Commissioner, which include receiving complaints from applicants in the event of refusal and transmitting them to the Council (Article 17(4)).

Article 20(A) provides that a right of appeal lies with the Higher Court of Justice for a refusal of a request for information. The application for review must be lodged within thirty days of the time period specified by the law. Article 20(B) provides that an applicant can file a complaint with the Information Commissioner if the Officer refrains from providing the requested information. Filing a complaint will sever the deadline of the appeal provided for in Article 20(A).

This is a well structured appeals procedure, with both an internal review and judicial review mechanism. Our main suggestion is to make the order of review more clear. Generally, internal review should precede judicial review. The reason for this is that there should be a review procedure readily available which is designed to operate rapidly and cost as little as reasonably possible. We also consider it critical that the Information Council has the full investigatory powers in making its determination. This issue is addressed at Section 3.7.2 below.

It is also crucial that there is an avenue of judicial review of this decision. This appeal should include full power to review the case on its merits, rather than just considering whether the Information Council has acted reasonably (*Principle 5*). We recommend that Article 20(B) should be moved to Article 11, creating Article 11(B). We recommend the following restructuring and slight amendment of the relevant Articles:

NEW Article 11(B): In the event of refusal of an application, the applicant may file a complaint with the Information Commissioner, seeking review of the refusal. This complaint must be filed within two months of the date of notification of refusal, and must adhere to the instructions prepared for this purpose under Article 17(1).

Article 16(2): Examine complaints filed by applicants with the Information Commissioner. The Council will consider the complaint and make a ruling on whether the complaint should be reverted to the Officer for reconsideration, with written reasons given for the Council's decision. The Council will make its ruling in accordance with instructions issued for this purpose prepared by the Information Commissioner.

Article 17(4): Receive complaints from applicants whose request for information has been refused. Within two weeks of receipt of the complaint by the Information Commissioner, all complaints will be provided to the Information Council for review of the complaint in accordance with Article 16(2).

Article 20(A): The Higher Court of Justice shall have competence to review a refused request for information which has been considered by the Information Council. The Higher Court of Justice will have jurisdiction to review both the request for information on its merits as well as review of the Information Council's determination. Applications to the Higher Court of Justice may be lodged within three months of the Information Council's determination.

Recommendations

- Amend Articles 16(2), 17(4) and 20(A) as outlined above; and
- Insert a new Article 11(B) as outlined above.

3.6 Measures to promote open government

3.6.1 Obligation to Publish

We recommend inserting a proactive obligation on government bodies to publish and disseminate widely documents of significant public interest. This obligation should be subject only to reasonable limits based on resources and capacity.

The draft Law should establish both a general obligation to publish and key categories of information that must be published. The Information Commissioner should also provide guidance on the minimum standards of the duty to publish. Accordingly, we recommend the insertion of the following two provisions after Article 4 in the draft Law:

Duty to Publish
Every public body shall, in the public interest, publish and disseminate in an accessible form, at least annually, key information including but not limited to: –
(a) a description of its structure, functions, duties and finances;
(b) relevant details concerning any services it provides directly to members of the public;
(c) any direct request or complaints mechanisms available to members of the public regarding acts or a failure to act by that body, along with a summary of any requests, complaints or other direct actions by members of the public and that body's response;

(d) a simple guide containing adequate information about its record-keeping systems, the types and forms of information it holds, the categories of information it publishes and the procedure to be followed in making a request for information;
(e) a description of the powers and duties of its senior officers, and the procedure it follows in making decisions;
(f) any regulations, policies, rules, guides or manuals regarding the discharge by that body of its functions;
(g) the content of all decisions and/or policies it has adopted which affect the public, along with the reasons for them, any authoritative interpretations of them, and any important background material; and
(h) any mechanisms or procedures by which members of the public may make representations or otherwise influence the formulation of policy or the exercise of powers by that body.

Guidance on Duty to Publish
The Information Commissioner shall: –
(a) publish a guide on minimum standards and best practices regarding the duty of public bodies to publish; and
(b) upon request, provide advice to a public body regarding the duty to publish.

3.6.2 Maintenance of Records

Article 14 of the draft Law outlines the obligations for the maintenance of records. We recommend amending the existing provisions of Article 14 with a requirement on the Information Commissioner to draw up a Code of Practice relating to the keeping, management and disposal of records, as well as the transfer of records to the relevant archiving body, and to ensure correction of personal information:

Maintenance of Records
(1) Every public body is under an obligation to maintain its records in a manner which facilitates the right to information, as provided for in this Law, and in accordance with the Code of Practice stipulated in sub-section (3).

(2) Every public body shall ensure that adequate procedures are in place for the correction of personal information.

(3) The Information Commissioner shall, after appropriate consultation with interested parties, issue and from time to time update a Code of Practice relating to the keeping, management and disposal of records, as well as the transfer of records to the [insert relevant archiving body, such as the Public Archives].

We also recommend an express provision for the training of department officials to promote the proper administration of the information disclosure regime:

Training of officials
Every department shall ensure the provision of appropriate training for its officials on the right to information and the effective implementation of this Law.

Recommendations
- Insert two new subsections for Article 4 as outlined above;

- Amend Article 14 as outlined above; and
- Insert express provision relating to the training of department officials.

3.7 The Information Commissioner and the Information Council

3.7.1 Process of Appointment

The independence of the Information Council from political influence is critical to the effectiveness of the access to information scheme. As currently drafted, Article 3(A) provides that six members, with expertise and specialization in information and documents affairs or legal affairs, are to be appointed by the Council of Ministers for a period of three years. This period can be renewed upon the recommendation of the Minister for Culture, who also names the Chairman of the Council.

Ideally, there should be a public consultation process for the nomination of the members of the Information Council and a shortlist of candidates should be published. It is preferable that no members of the Council, including the Information Commissioner, hold an elected or appointed position in central or local government. Whether the Director General of the National Library Department is sufficiently protected from government influence should be considered further. It may be that he or she is sufficiently protected and is in the most appropriate position to administer the access to information regime.

We also note that the proposed three year term of office is both too short to ensure the effective administration of the Information Council and that it may undermine the independence of the Information Council. We propose a term of seven years instead.

If it is considered that an alternative Information Commissioner is most appropriate for the access to information regime, we propose the following drafting for his or her appointment. This provision should also apply for the appointment of each of the members of the Information Council in any case. Accordingly, we recommend this drafting replace Article 3(A):

> **Appointment of members of Information Council including the Information Commissioner**
>
> (1) The members of the Information Council, including the Information Commissioner, shall be appointed by the Minister of Culture after nomination by a two-thirds majority vote of the Council of Ministers, and after a process in accordance with the following principles: –
>
> (a) participation by the public in the nomination process;
> (b) transparency and openness; and
> (c) the publication of a shortlist of candidates.
>
> (2) No-one may be appointed a member of the Information Council or the Information Commissioner if he or she: –
> (a) holds an official office in, or is an employee of a political party, or holds an elected or appointed position in central or local government; or

(b) has been convicted, after due process in accordance with internationally accepted legal principles, of a violent crime and/or a crime of dishonesty or theft, for which he or she has not been pardoned.

(3) Each member of the Information Council and the Information Commissioner shall hold office for a term of seven years, and may be re-appointed to serve a maximum of two terms, but may be removed by the Minister of Culture upon a recommendation passed by a two-thirds majority vote of the Council of Ministers.

3.7.2 Powers and Functions

Both the Information Commissioner and the Information Council should be granted more express powers in order to properly implement the access to information regime.

In relation to the Information Commissioner, we are concerned that the role as currently drafted is too ***perfunctory***. The Commissioner's role appears to be too limited, restricted mainly to administrative matters. We recommend that the Information Commissioner is assigned responsibility for the promotional and monitoring tasks which are currently within the mandate of the Information Council (Articles 16(5) and (6)). We also recommend expanding the scope of the activities which the Information Commissioner is responsible for in the following manner:

General Activities

(1) In addition to any other powers and responsibilities provided for in this Law, the Information Commissioner may: –

(a) monitor and report on the compliance by public bodies with their obligations under this Law;
(b) make recommendations for reform both of a general nature and directed at specific public bodies;
(c) co-operate with or undertake training activities for public officials on the right to information and the effective implementation of this Law;
(d) with the approval of the Information Council, refer to the appropriate authorities cases which reasonably disclose evidence of criminal offences under this Law; and
(e) publicise the requirements of this Law and the rights of individuals under it.

Reports

(1) The Information Commissioner shall, within three months after the termination of each financial year, lay before the Council of Ministers an annual report on compliance by public bodies with this Law, the activities of the Information Commissioner and the Information Council and audited accounts during that financial year. This report will first be approved by a resolution of the Information Council.

(2) The Information Commissioner may from time to time lay before the Council of Ministers such other reports as it deems appropriate, which have been approved by the Information Council.

This would mean that a more clear division of responsibility between the Information Comissioner and the Information Council, and would allow the Information Council to focus on its tribunal-like functions in making determinations on complaints. In relation to the Information Council, its powers of investigation when considering a complaint from an

applicant should be expressly stated. The enforcement mechanism for any ruling of the Information Council should also be expressly stated. We recommend the following drafting:

> **Complaint Decision**
> (1) The Information Council shall decide an application as soon as is reasonably possible, and in any case within 30 days, after giving both the applicant and the relevant public or private body an opportunity to provide their views in writing.
>
> (2) In any application, the burden of proof shall be on the public or private body to show that it acted in accordance with its obligations under this Law and related subordinate legislation.
>
> (3) In its decision pursuant to sub-section (1), the Information Council may: –
> (a) reject the application;
> (b) require the public or private body to take such steps as may be necessary to bring it into compliance with its obligations under this Law;
> (c) require the public body to compensate the complainant for any loss or other detriment suffered; and/or
> (d) in cases of egregious or wilful failures to comply with an obligation under this Law, impose a fine on the public body.
>
> (4) The Information Council shall serve notice of his or her decision, including any rights of appeal, on both the complainant and the public or private body.
>
> **Information Council's Powers to Investigate**
>
> (1) In making its determination, the Information Council shall have the power to conduct a full investigation, including by issuing orders requiring the production of evidence and compelling witnesses to testify.
>
> (2) The Information Council may, during an investigation pursuant to sub-section (1), examine any record to which this Law applies, and no such record may be withheld from the Information Council on any grounds.
>
> **Binding Nature of Information Council's Decisions and Orders**
>
> Upon expiry of the 30-day period for appeals pursuant to the Law, the Information Council may certify in writing to the court any failure to comply with a decision or order pursuant to the Law, and the court shall consider such failure under the rules relating to contempt of court.
>
> **Direct Implementation of the Decision**
> (1) The Information Council may, after giving a public body an opportunity to provide their views in writing, decide that a public body has failed to comply with an obligation under this Law.
>
> (2) In its decision pursuant to sub-section (1), the Information Council may require the public body to take such steps as may be necessary to bring it into compliance with its obligations under this Law, including by: –
> (a) appointing an information officer;
> (b) publishing certain information and/or categories of information;

(c) making certain changes to its practices in relation to the keeping, management and destruction of records, and/or the transfer of records to the [insert relevant archiving body, such as the Public Archives];
(d) enhancing the provision of training on the right to information for its officials;
(e) providing him or her with an annual report, in compliance with section 21; and/or
(f) in cases of egregious or wilful failures to comply with an obligation under this Law, paying a fine.

(3) The Information Council shall serve notice of its decision, including any rights of appeal, on the public body.

Recommendations

- Replace Article 3(A) with the proposal outlined above; and
- Insert the provisions relating to the powers and functions of the Information Council and the Information Commissioner outlined above.

3.8 Protection for Whistleblowers

A provision which is missing from the draft Law is protection for 'whistleblowers' – individuals who release information on wrongdoing connected with public bodies. Protection of whistleblowers is critical to an effective access to information regime. The free flow of such information must be encouraged through an express provision in the draft Law.

Whistleblowers should benefit from protection as long as they acted in good faith and in the reasonable belief that the information was substantially true and disclosed evidence of wrongdoing. Such protection should apply even where disclosure would otherwise be in breach of a legal or employment requirement. Such is the importance of protecting whistleblowers.

We propose the insertion of the following provision to achieve this protection:

(1) No one may be subject to any legal, administrative or employment-related sanction, regardless of any breach of a legal or employment obligation, for releasing information on wrongdoing, or that which would disclose a serious threat to health, safety or the environment, as long as they acted in good faith and in the reasonable belief that the information was substantially true and disclosed evidence of wrongdoing or a serious threat to health, safety or the environment.

(2) For purposes of sub-section (1), wrongdoing includes the commission of a criminal offence, failure to comply with a legal obligation, a miscarriage of justice, corruption or dishonesty, or serious maladministration regarding a public body.

Recommendation

- Insert the proposed provision relating to the protection of whistleblowers into the draft Law.