ARTICLE 19

Tunisia: Draft Organic Law on the Right of Access to Information

September 2013

Legal analysis

Executive summary

In September 2013, ARTICLE 19 analysed the Draft Organic Law on the right to access to information that is currently undergoing a process of public consultations.

ARTICLE 19 welcomes the efforts of the Tunisian Government to protect the right to information through an Act of Parliament, which affords greater legal protection than an existing Decree on this subject (Decree No. 2011 - 41 of 26 May 2011, Decree).

It is positive that the Draft Law retains many positive features of the Decree. In particular:

- the right of access to information is granted to everyone;
- the procedure for requesting information is generally satisfactory;
- public authorities have a positive obligation to publish key categories of information of significant public interest; and
- access to information is in principle free of charge subject to, but not exceeding, any costs incurred by the public body in supplying the requested information.

We also note with satisfaction that several of our recommendations regarding the Decree have been taken into account. In particular, the scope of the Draft Law is no longer limited to the disclosure of 'administrative documents' but protects the right of access to 'information'. The Draft Law further establishes an independent public authority - the Commission of Access to Information - to oversee the implementation of the law and examine appeals against refusals by public authorities to disclose requested documents in the first instance.

At the same time, some of the weaknesses identified in relation to the Decree have not been remedied. In particular, the Draft Law needs to improve the regime of exceptions for the refusal of requests for information, and should include a clear public interest override provisions. The provisions on the Information Commission should be brought fully in line with international standards and best practices. We also advise that the Draft Law should include provisions on protection of whistleblowers.

The legal analysis suggests further ways in which the current legal framework could be improved in order to fully comply with international standards on freedom of expression and freedom of information.

Key Recommendations:

1. The definition of 'administrative records' and 'information' should be replaced with a definition of 'record' as follows: "For the purpose of this Act, a record 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."
2. Articles 25 to 31 of the Draft Law should be replaced by a single provision clearly laying down the three-part test which requires that public authorities may not withhold information unless they can show that: (i) the information concerns a legitimate aim listed in the law; (ii) disclosure threatens to cause substantial harm to that aim; and (iii) the harm to the aim is greater than the public interest in having the information. Such a provision could be drafted along the lines of best practices in this area.
3. The Draft Law should include a provision laying down time limits beyond which the exemptions from disclosure would no longer apply.
4. The independence of the Commission of Access to Information should be fully guaranteed. In particular, the Draft Law should explicitly provide that the Commission enjoys operational

and administrative autonomy from any other person or entity, including the government and any of its agencies, except as specifically provided for by law. In this regard, there should be no government representative sitting on the Commission's Council. The Commissioners (members of the Council) should be selected by the Parliament with a two-third majority of the votes cast. The President should have only a formal power to appoint the selected candidates. Furthermore, the Commission's budget should be allocated by Parliament and the Commission should only be required to submit its annual report to Parliament.

5. The type of sanctions that may be imposed on the officials who fail to comply with the law should be clearly identified.
6. The Draft Law should contain a provision exempting from civil, administrative, or criminal action, all officials – not just information officers - who disclose administrative documents in good faith in the exercise or performance of their duties or powers.
7. Whistleblowers should be strongly protected under the Draft Law or in a separate law in line with best practice in this area.
8. Adequate resources should be allocated for the training of information officers on all aspects of this Law and relevant international standards in this area.
9. Public bodies should be required to put their records in order in no more than six months.

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About the Article 19 Law Programme

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

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

All of our analyses are available online at http://www.article19.org/resources.php/legal/.

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Introduction

In this legal analysis, ARTICLE 19 examines the compatibility of the Draft Organic Law on the right of access to information (the Draft Law)[1] with relevant international standards on the right to information (RTI)[2] and, more broadly, its likely impact on the rule of law in Tunisia. Our assessment also takes into account relevant comparative best practices on RTI.[3]

ARTICLE 19 has longstanding experience of analysing RTI legislation across the world and deep knowledge of the Tunisian legislative framework in relation to media and free speech matters. In particular, we provided comments on the Draft Decree no. 2011-41 on Access to Administrative Documents,[4] which was adopted by the Tunisian Interim Government on 26 May 2013. Furthermore, ARTICLE 19 has published two influential standard-setting documents on the right to access information: *The Public's Right to Know: Principles on Freedom of Information Legislation*[5] (the ARTICLE 19 Principles) and *A Model Law on Access to Information* (Model Law), which encapsulate international best practices in this area.[6]

At the outset, ARTICLE 19 welcomes the efforts of the Tunisian Government to protect RTI through an Act of Parliament, which affords greater legal protection than the Decree no. 2011-41 regarding access to the administrative documents held or produced by public authorities (the Decree). The Draft Law contains many of the positive aspects of the Decree. In particular:

- the right of access to information is granted to everyone (Article 1);
- public authorities have a positive obligation to publish key categories of information of significant public interest (Chapter 2, Articles 5 to 7);
- public authorities are required to assist individuals and legal entities seeking access to information and facilitate such access (Article 13); and
- access to information is in principle free of charge subject to, but not exceeding, any costs incurred by the public body in supplying the requested information (Article 14).

[1] This analysis is based an unofficial translation which was transmitted to ARTICLE 19 in September 2013. ARTICLE 19 takes no responsibility for the accuracy of the translation or for comments made on the basis of any inaccuracies in the translation.
[2] The Lima Principles http://www.cidh.org/Relatoria/showarticle.asp?artID=158&IID=1; the Declaration of SOCIUS Peru http://www.britishcouncil.org/az/socius_peru_declaration.pdf; the Johannesburg Principles on National Security Freedom of Expression and Access to Information http://www.article19.org/pdfs/standards/joburgprinciples.pdf; Ten Principles on the Right to Know http://portal.unesco.org/ci/en/ev.php-URL_ID=29655&URL_DO=DO_PRINTPAGE&URL_SECTION=201.html; the Declaration of Chapultepec http://www.declaraciondechapultepec.org/english/declaration_chapultepec.htm; and the Atlanta Declaration and Plan of Action for the Advancement of the Right of Access to Information http://www.cartercenter.org/news/pr/ati_declaration.html; ARTICLE 19, *The Public's Right to Know: Principles on Freedom of Information Legislation* ("ARTICLE 19 FOI Principles") (London: June 1999); ARTICLE 19, *A Model Freedom of Information Law* ("ARTICLE 19 Model FOI Law") (London: July 2001).
[3] See ARTICLE 19, *Global Right to Information Index* http://www.article19.org/pdfs/press/rti-index.pdf (released 21 September 2010).
[4] See, ARTICLE 19, Comment On the Decree on Access to the Administrative Documents of Public Authorities of Tunisia, July 2011; available at http://www.article19.org/data/files/pdfs/analysis/tunisia-comment-on-the-decree-on-access-to-the-administrative-documents-of-p.pdf
[5] ARTICLE 19, The Public's Right to Know: Principles on Freedom of Information Legislation, London, June 1999; available at http://www.article19.org/data/files/pdfs/standards/righttoknow.pdf.
[6] ARTICLE 19, A Model Freedom of Information Law, London, July 2001; available at http://www.article19.org/data/files/pdfs/standards/modelfoilaw.pdf.

We also note with satisfaction that several of our recommendations regarding the Decree have been taken into account. In particular, the scope of the Draft Law is no longer limited to the disclosure of 'administrative documents' but encompasses the right of access to 'information'. Chapter VII of the Draft Law establishes an independent public authority - the Commission of Access to Information - to oversee the implementation of the law and examine appeals against refusals by public authorities to disclose requested documents. Furthermore, individuals wishing to make a request for information are no longer required to state the reason for their request.

At the same time, some of the weaknesses identified in relation to the Decree have not been remedied and there are many provisions that do not meet international standards on freedom of expression and freedom of information. The legal analysis examines these issues in greater detail and suggests further ways in which the Draft Law could be improved in order to fully comply with international standards.

ARTICLE 19 hopes that the drafters of this important piece of legislation will incorporate these comments into the final version of the Draft Law and we stand ready to assist further in this process. We also urge all stakeholders in Tunisia to promote broader public understanding of right to information legislation in the country.

Analysis of the Draft Law

Positive aspects

ARTICLE 19 generally welcome the Draft Law as an improvement for the protection of RTI and the effective participation of the Tunisian people in the transition process towards a meaningful democracy in Tunisia. In particular, we highlight the following positive aspects of the Draft Law:

- The Title of the Draft Law makes it clear that the legislation is intended to protect the *right* of access to information rather than merely guaranteeing 'access to administrative documents' as was the case previously.
- Article 1 of the Draft Law has clearly defined objectives, including strengthening the principles of transparency and accountability in the public sector.
- The Draft Law is relatively comprehensive and includes many of the key elements of a modern freedom of information legislation;
- The right of access to information is granted to everyone and is not limited to citizens;
- Public bodies have a positive obligation to publish key categories of information of significant public interest;
- The procedure for requesting information is generally satisfactory;
- The Draft Law creates a presumption that all records held or produced by public authorities are subject to disclosure and that this presumption may be overcome only in very limited circumstances laid down in the Draft Law;
- The Draft Law provides that requests for information are dealt with by specifically designated information officers within each public authority;
- Public authorities are required to update information held by them on a quarterly basis;
- Public authorities are required to assist individuals seeking access to information;
- The process for getting access to information is kept within reasonable time limits;
- If the request for access to information has a direct influence on the private life or liberty of the person requesting disclosure of the document, the public authority must respond immediately, and in any case, within a period not exceeding two working days;
- Individuals or legal entities can appeal against a refusal to disclose the requested information before the Commission of Access to Information and failing that, before the courts;
- Any public official who fails to comply with the provisions of the Draft Law is liable to administrative action;
- Access to information is in principle free of charge subject to, but not exceeding, any costs incurred by the public body in supplying the requested information;
- Implementation of the law is overseen by an independent public authority, the Commission of Access to Information.

Matters of concern

Notwithstanding the abovementioned positive aspects, the Draft Law presents a number of weaknesses. These need to be addressed urgently in order to bright the Draft Law in compliance with international legal standards.

Scope

Information covered

ARTICLE 19 is especially pleased that the scope of the Draft Law covers access to 'information' rather than just 'documents' as was the case under the Decree. At the same time, we consider that

the definitions of 'administrative records' and 'information' in Article 3 of the Draft Law could be further improved. In particular:

- Both 'administrative records' and 'information' are defined by reference to 'documents'. In our view, this is unnecessary and unduly limiting.
- Since the Draft Law is intended to guarantee the right of access to 'information', it would be more consistent to define 'records' by reference to 'information' rather than 'documents'.
- The definition of 'administrative records' could be drafted more broadly to cover 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*.[7] We note, for example, that under the Liberian Freedom of Information Act 2010, public record means a record, manual book, regulation, or other documents produced or received by, being used by, possessed by or under the control of a public authority, whether in written form or recorded or stored in electronic form or in any other device.[8]

In order to clarify these issues, we recommend that both the definition of 'administrative records' and 'information' is replaced by a single definition of 'records.' This definition could be informed by the definition of records in ARTICLE 19 Model Law:

> **Records**
> 7. (1) For purposes of this Act, a record includes any recorded information, regardless of its form, source, date of creation, of official status, whether or not it was created by the body that holders it and whether or nor it is classified.
>
> (2) For purposes of this Act, a public or private body holders a record if: -
> (a) the public or private body holds the record, other than on behalf of another person; or
> (b) another person holds the record, on behalf of the public or private body.[9]

Bodies covered

ARTICLE 19 is equally pleased that many of its recommendations in relation to the bodies covered under the Decree have been taken into account in the Draft Law. In particular, the definition of 'public body' now encompasses both the judicial and legislative branches of government. Private bodies exercising a public function have also been included.

Nonetheless, we believe that the definition of 'public body' could be further improved by making reference to specific criteria such as the level of public funding rather than listing different types of public bodies. We propose the following definition:

> **Public and Private Bodies**
> 6.(1) For purposes of this Act, a 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 substantially financed by funds provided by Government or the State; or
> e) carrying out a statutory or public function, provided that the bodies indicated in sub-section (1)(e) are public bodies only to the extent of their statutory or public functions.
> (2) The Minister may by order designate as a public body any body that carries out a public function.

[7] See Section 7 of ARTICLE 19's Model Freedom of Information Law is available at http://www.article19.org/pdfs/standards/modelfoilaw.pdf
[8] Section 1.3.12 of the Liberian Freedom of Information Act 2010.
[9] ARTICLE 19 Model Law, *op.cit.* Section 7.

(3) For purposes of this Act, a private body includes any body, excluding a public body, that: –

a) Carries on any trade, business or profession, but only in that capacity; or
b) has legal personality.[10]

Recommendations:

- The definition of 'administrative records' and 'information' should be replaced by a single definition of 'records' in line with Section 7 of ARTICLE 19 Model Law. In particular, 'records' should be defined by reference to 'information' rather than 'documents'.
- The definition of 'public bodies' could be further improved by making reference to specific criteria such as the level of public funding.

Exceptions to the Principle of Disclosure

The regime of exceptions to the principle of disclosure is contained in Articles 25 to 31 of the Draft Law. In our view, this is one of the weakest aspects of the Draft Law:

- ***Wrong test:*** Our main concern relates to Article 26 of the Draft law which provides that public bodies may withhold information which "*could be harmful*" to the following interests: the confidentiality of deliberations; national defence; foreign policy; the State security and safety of persons; the Government's monetary, economic and financial policy; the administration of justice; the detection and prevention of crime; the fundamental rights and freedom of individuals; public and private commercial and financial interests; the conduct of monitoring missions and their results; the secrecy relating to the identities of the persons who have provided the public body with information in order to report cases of embezzlement and corruption.

  Although the test for withholding information constitutes an improvement compared to the equivalent provision of the Decree - which allowed information to be withheld if it was 'likely to undermine' vaguely defined interests – it is, in our view, still too weak. The proposed regime fails to meet international standards that establish a strict three-part test of restrictions. According to this test, a refusal to disclose information is not justified unless the public authority can show the following:

  1. The information relates to a legitimate aim listed in the law;
  2. The disclosure threatens to cause *substantial* harm to that aim;
  3. The harm to the aim must be greater than the public interest in having the information.

  Contrary to those requirements, Article 26 of the Draft Law provides that information may be withheld if it "*could be harmful*" to the interests listed under that provision. Instead, the legislation should provide that information may be withheld if it threatens to cause *substantial* harm to those interests.

- ***Unclear exceptions:*** some of the exceptions to the principle of disclosure under Article 26 are too broadly drafted. The "conduct of monitoring missions and their results", for example, is unclear and does not constitute a permitted exception to the disclosure principle under international law. Similarly, the 'confidentiality of deliberations' is too vague and could be replaced by "the effectiveness and integrity in government decision-making processes".

[10] *Ibid.*, Section 6.

- ***Unjustified absolute non-disclosure to protect certain interests:*** Article 25 provides for further restrictions on the disclosure of information for the protection of a number of private interests, including the protection of personal data, intellectual property rights and interests which are protected by a court order. Under Article 25, non-disclosure is not subject to the three-part test. In the case of personal data, Article 29 further provides that access is not permitted without prior consent of the person concerned.

  However, there is no reason in principle why the protection of those interests – which are generally recognised under international law as legitimate aims which may justify non-disclosure - should not be subject to the same three-part test as the other interests listed under Article 26. Indeed, we suggest that all the legitimate aims which may justify non-disclosure should be included in the same provision.

  Similarly, we note that 'unfinished' and 'preparatory' documents in decision-making processes are entirely excluded from the scope of the right of access to information under Article 27 of the Draft Law. In our view, this is an unnecessary restriction that fails to comply with international standards in this area. As noted above, information relating to policy-making and the operations of public bodies may legitimately be withheld. However, this must be done in accordance with the three-part test outlined above. There is no reason in principle why preparatory documents should be entirely removed from public scrutiny. This is also inconsistent with the stated objective of the Draft Law to 'improve decision-making processes through the promotion of public participation in the making of public policies'. In our view, this provision should be deleted. At the same time, Article 26 should be amended as suggested above to: (i) include 'the effectiveness and integrity in government decision-making processes' as a possible exception to disclosure; but (ii) making clear that information may be withheld only if it threatens to cause *substantial* harm to the interests exhaustively listed in that provision.

- ***Lack of public domain provision*:** While we appreciate that Article 30 of the Draft Law provides that information withheld in accordance with Articles 25 and 26 may still be accessed in accordance with the conditions laid down in the Law on National Archives, this does not remedy the shortfalls outlined above. In this regard, we note with concern that Chapter IV of the Draft Law fails to include a provision clearly stating that a body may not refuse to communicate information where that information is already publicly available.

- ***Lack of overriding public interest provision:*** We are also concerned that an overriding public interest provision (part three of the test) is missing from the Draft Law. This is only partially mitigated by Article 31 of the Draft Law which provides that the exceptions mentioned under Article 26 do not apply to information whose disclosure is 'necessary to expose or to investigate serious violations of human rights and war crimes' and in circumstances where the public interest outweighs the protected interest in various areas, including matters of public health, the environment and corruption.

  In our opinion, the legislation should instead include a broadly drafted public interest override provision, such as the one contained in the Council of Europe Convention on Access to Official Documents[11] which reads as follows:

  Article 3 – Possible limitations to access to official documents

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

[11] The COE Convention was adopted by the Committee of Ministers on 27 November 2008 and is available here: https://wcd.coe.int/wcd/ViewDoc.jsp?id=1377737&Site=CM

a. national security, defence and international relations;
b. public safety;
c. the prevention, investigation and prosecution of criminal activities;
d. disciplinary investigations;
e. inspection, control and supervision by public authorities;
f. privacy and other legitimate private interests;
g. commercial and other economic interests;
h. the economic, monetary and exchange rate policies of the state;
i. the equality of parties in court proceedings and the effective administration of Justice;
j. environment; or
k. the deliberations within or between public authorities concerning the examination of a matter. …

2. Access to information contained in an official document may be refused if its disclosure would or would be likely to harm any of the interests mentioned in paragraph 1, unless there is an overriding public interest in disclosure.
3. The Parties shall consider setting time limits beyond which the limitations mentioned in paragraph 1 would no longer apply.

Alternatively, the drafters of Tunisia Freedom of Information law are respectfully invited to consider Part IV of ARTICLE 19 Model Law and Part III of the African Union Model Law for Access to Information in Africa,[12] both of which lay down a more detailed regime of exceptions to the principle of disclosure in line with international standards on RTI.

Finally, we recommend that the legislation should include a provision laying down time limits beyond which the exemptions from disclosure would no longer apply. In this regard, it may be noted that the UK recently held an extensive consultation on this issue and is currently adopting legislation to reduce the time period to 20 years[13].

Recommendations:

- Chapter IV of the Draft Law, concerning exceptions to the right of access to information, should be entirely reviewed.
- Articles 25 to 31 of the Draft Law should be replaced by a single provision clearly laying down the three-part test which requires public authorities may not withhold information unless they can show that: (i) the information concerns a legitimate aim listed in the law; (ii) disclosure threatens to cause *substantial* harm to that aim; (iii) the harm to the aim is greater than the public interest in having the information. Such a provision could be drafted along the lines of best practices in this area.
- The legislation should include a provision laying down time limits beyond which the exemptions from disclosure would no longer apply.

The Commission of Access to Information

ARTICLE 19 welcomes the creation of a Commission of Access to Information (the Commission), which is in line with our earlier recommendation to establish an independent public authority to deal with freedom of information. However, ARTICLE 19 has a number of concerns with the following aspects of the Draft Law.

[12] See Sections 23 to 39 of the Model Law for Access to Information in Africa developed by the African Commission on Human and Peoples' Rights, available at: http://www.achpr.org/files/news/2013/04/d84/model_law.pdf

[13] Review of the 30 Year Rule, January 2009. http://www2.nationalarchives.gov.uk/30yrr/30-year-rule-report.pdf, Ministry of Justice, Opening up public bodies to public scrutiny, 7 January 2011: http://www.justice.gov.uk/news/newsrelease070111a.htm

Independence of the commission
Article 38 states that "the Commission has legal personality and financial autonomy. Its budget is attached by order to the budget of the Presidency of the Government." However, the Draft Law fails to specifically guarantee the independence of the Commission from the state and public bodies. Moreover:

- The Commission's budget is attached by order to the budget of the Presidency of the Government and is, among other resources, made up of state subsidies (Articles 38 and 48);
- A government representative, appointed by the Presidency, sits on the Council of the Commission (Article 42) (see further below);
- the Commission's annual report is submitted both to the Presidency and Parliament (Article 40);

In those circumstances, it is hard not to conclude that the Commission remains firmly under government's influence. If not remedied, this would, in our view, fundamentally undermine the operation of the Commission and the overall purpose of the Draft Law. We would therefore recommend that these particular aspects of the abovementioned provisions be revised. Instead, the Commission's budget should be allocated by Parliament. Similarly, the Commission should only be required to submit its annual report to Parliament.

Recommendations:

- The Draft Law should explicitly provide that the Commission enjoys operational and administrative autonomy from any other person or entity, including the government and any of its agencies, except as specifically provided for by law.
- The Commission's budget should be allocated by Parliament.
- The Commission should only be required to submit its annual report to Parliament.

Appointment of the Commission's Council
The Council of the Commission is made up of 8 members who are appointed by various bodies, including the First President of the Administrative Court, First President of the Court of Cassation, the Bar Association, the President of the National Authority for the Protection of Personal Data, the President of the High Authority for Audiovisual Communication and the Head of Government. There are also two members who are representatives of "organizations working in the field of access to information, following a call for candidates". However, the process of their appointment is not specified.

ARTICLE 19 welcomes the fact that the Draft Law seeks to ensure that the members of the Council come from various fields and expertise. However, we note that the independence of the Commission Council is not adequately protected from political influence through politically involved appointees. We note especially:

- We are concerned that the members of the Commission can be governmental representatives which defeats the idea of the independence of the Commission.

- With the exception of two representatives of organizations working on RTI (whose appointment is not clarified), the public does not participate in the nomination process. Public participation is a guarantee that candidates are selected on the basis of their professional and personal qualities as opposed to their political affiliation. It would be also advisable if the Draft Law stimulated public participation because it promotes public awareness of the new regime.

- In terms of the selection and appointnment of the candidates, ARTICLE 19's Principles specifically state:

> Appointments should be made by representative bodies, such as an all party parliamentary committee, and the process should be open and allow for public input, for example regarding nominations. Individuals appointed to such a body should be required to meet strict standards of professionalism, independence and competence, and be subject to strict conflict of interest rules.[14]

These standards should be taken to consideration in the final version of the Draft Law.

Recommendations:

- There should be no government representative on the Council of the Commission.
- The Commissioners (members of the Council) should be selected by the Parliament with a two-third majority of the votes cast.
- The President should have only a formal power to appoint the selected candidates

Removal of the members of the Commission

Article 47 of the Draft Law states that members can be removed from their post before the end of their mandate by decree upon the proposal of the President of the Commission, on the basis of a majority vote of the members and after hearing the member concerned. The reasons for the termination are further specified.

ARTICLE 19 is concerned however that the Draft Law fails to provide for the possibility of an appeal against the decision. Also, it is not clear why the removal is being decided solely by other members of the Commission without the inclusion of an independent body.

Recommendations:

- The Draft Law should empower the National Assembly to appoint a tribunal to hear petitions for cases of removal of a member of the Commission.

Proactive Transparency and Information Officers

Articles 5 to 8 of the Draft law deal with the obligation on public authorities to publish key information in a number of areas. We welcome these provisions as a generally very positive step towards greater government transparency.

We note, however, that Article 5 of the Draft Law could be improved by requiring public bodies to use clear and comprehensible language when providing key information. Alongside this requirement, adequate resources should be allocated for the training of officials designated as information officers within their respective public authority on all aspects of the right to information, including proactive transparency, disclosure of information upon request and the effective implementation of the legislation on access to information. In particular, it is vital that information officers are trained so that they understand that access to information should not be confined to information published on the public authority's website (i.e. proactive transparency) but also includes disclosure of information not previously published upon request.

Recommendation:

- Allocate resources for the training of information officers on all aspects of the right of access to information, including both proactive transparency but also disclosure of information upon request.

[14] ARTICLE 19 Principles, Principle 5.

Protections and Sanctions

ARTICLE 19 notes that Article 26 of the Draft Law offers very limited protection to whistleblowers by providing that the identity of those who reveal corruption and embezzlement should not be disclosed in response to a freedom of information request. However, this provision is far from sufficient.

Protection of whistleblowers

ARTICLE 19 regrets that the Draft Law entirely fails to provide adequate protection to whistleblowers. In this respect, we would draw attention to Kenya's Draft Freedom of Information Law which provides adequate protection to whistleblowers in the following way:[15]

- Persons making disclosure of information obtained in confidence in the course of their activities are protected: these persons shall not be penalized in relation to any employment, profession, voluntary work, contract, membership in an organization or any holding of an office as a result of making a disclosure of information if the disclosure is of public interest.
- Disclosure which is made to the police or appropriate public authority should be deemed to be made in the public interest. The information for which the protection is given should relate to violations of the law, including human rights, mismanagement of funds, conflict of interest, corruption, abuse of public office and dangers of public health, safety and the environment.
- The protection provided includes protection against dismissal, discrimination, reprisal or other forms of adverse treatment or denial of appointment, promotion or advantage that otherwise would have been provided.
- Person shall make a disclosure where he or she has reasonable belief in the veracity of the information. Section 47(6) provides that in the proceedings for an offence for contravention of any statutory prohibition or restriction on the disclosure of information, it shall be a defence to show that, in the circumstances, the disclosure was in the public interest and that the accused person had, before making the disclosure, complied with the provisions of of the Bill.

In the alternative, we would respectfully urge the Tunisian Parliament to adopt an additional law on whistleblowing as best practice similar to what has been adopted in the UK, Ghana and South Africa.[16]

Protection of information managers

ARTICLE 19 welcomes the exemption from civil, administrative and criminal liability granted to access to information managers for acts performed in good faith in the exercise of their functions under Article 37. However, we believe that this exemption should be made available more broadly to *anyone* for anything done in good faith in the exercise of their functions and powers under the Draft Law. In our view, it would be more appropriate for a broad 'good faith disclosures' exemption provision to be included in Chapter 9 on Offences and Penalties.

Administrative sanctions

Furthermore, while we appreciate that Article 53 of the Draft Law seeks to impose administrative sanctions on civil servants for failure to comply with their obligations under the Draft Law, including by obstructing access to information, we are concerned that the sanctions are not sufficiently clearly set out in the Draft Law.

[15] See ARTICLE 19's legal analysis of Kenya's Draft Freedom of Information Law 2012, available at: http://www.article19.org/data/files/medialibrary/2940/12-01-31-ANAL-kenya.pdf

[16] See for example, Ghana's Whistleblower Act 2006, available at: http://www.parliament.gh/assets/file/Acts/Whitsleblwer%20Act%20720.pdf

In particular, the Draft Law fails to specify what 'second administrative penalties' amount to. Nor does the Draft Law make any reference to any specific legislation where such sanctions would be clearly identified, such as the Administrative Code. Moreover, the Draft refers to the possibility of further civil & criminal penalties without defining the acts for which public officers might be held liable or the sanctions that may be applicable.

Recommendations:

- The Draft Law should strongly protect whistleblowers; alternatively, the Tunisian Parliament should adopt a separate law to protect whistleblowers in line with best practice in this area.
- The Draft Law should include a broad 'good faith disclosures' provision under Chapter 9 on Offences and Penalties. If such a provision is adopted, Article 37 of the Draft Law would become redundant and could be struck out.
- Any criminal or regulatory offences and corresponding penalties should be clearly set out in the Draft Law.

Classification of Public Documents and Time Frame for Implementation

ARTICLE 19 notes that under Article 51 of the Draft Law, public bodies are required to establish a system of classification of documents within a period of two years. Whilst we believe that this is in principle a good initiative, especially as the Draft Law provides that this would be in order to facilitate the right of access to information, we emphasise that this provision could also be misused in order to withhold important information from public scrutiny. In the absence of a strong culture of transparency and democratic accountability, ARTICLE 19 reiterates its earlier recommendation that the principle of maximum disclosure of information should be clearly protected in the Draft Law. Moreover, for the reasons explained further below in relation to Article 55, we believe that the two-year implementation period set out in Article 51 is unduly long.

Article 55 of the Draft Law provides for a two-year period for public bodies to *complete* the organisation of their administrative records. A similar requirement can be found in Article 51 cited above. Given that the Decree no. 2011-41 was adopted two years ago, ARTICLE 19 considers that Tunisian public authorities have already had ample time to put their administrative records in order. In our view, the two-year period suggested in Articles 51 and 55 is far too long and should be reduced to no more than six months. Furthermore, and in any event, this should not prevent public authorities from responding to freedom of information requests as soon as the Law comes into force.

Recommendations:

- Public authorities should be required to organise and/or classify their administrative records within 6 months of the Law coming into force;
- The Law should make it clear that this should not prevent public authorities from responding to freedom of information requests as soon as the law comes into force.

Appendix – Draft Organic Law on the Right of Access to Information

Draft Organic Law N°. ..... on the right to access to information

Chapter I:
General Provisions

Article 1: This law enshrines the right of any person or legal person to access to information held by public bodies and aiming at achieving the following objectives:

- The strengthening of the principles of transparency and accountability in the public sector;
- The improvement of the quality of public services and strengthening of the confidence of citizens in public institutions;
- The improvement of decision making process through the promotion of public participation in the making of public policies;
- The improvement of the methods of organization, classification and management of documents produced or received by public bodies.

Article 2: Access to information is regarded as a principle that has no limits except those exceptions provided for by this law.

Article 3: For the purposes of this law, the following terms have the meanings they are assigned hereunder

- Public bodies:
  - The central and regional state administrations, the local communities and the public institutions and enterprises;
  - The regulatory authorities;
  - The private persons entrusted with a public service mission;
  - The legislative authorities;
  - The judicial authorities.
- Administrative records: documents produced or received by public bodies within the frame of their public service mission whatever the date, form or the medium of such documents.
- Information: any content that can be found in the documents produced or received by public bodies.
- Personal data: mean any information relating to a natural person already identified or that may be identified, directly or indirectly in line with the provisions of Article 4 of the Organic Law n ° 2004-63 dated July 27, 2004 on the protection of personal data.
- Third parties: any natural or legal person other than public bodies and the applicant for access to information.

Article 4: Subject to compliance with Articles 25 and 26 of this Law, the deposit in the National Archives of communicable documents in accordance with the provisions of this Law does not preclude the right to access to such documents at all times.

Chapter II:
Access to information on the initiative of the public body

Article 5: Subject to exceptions provided for by this Law, every public body is required to publish and periodically update the following information:

- The main functions it is assigned, its organizational chart, the address of its main office and secondary offices, as well as the list of the names of its heads of structures and their contact information;

- The decisions and policies that concern the public and are related to the activity of the organization;
- The procedures used in the decision-making process in connection with the services provided;
- The list of names of access to information managers, including the data provided for in the second paragraph of Article 35 of this Law;
- The legal texts ruling over the activity of the body such as circulars and general notes;
- The list of services provided by the public body, the supporting documents required for obtaining these service and their delivery deadlines;
- Information on the programs of the concerned public body, its achievements and the results of public tenders relating thereto ;
- The list of documents available in electronic version or in hard copy related to services provided by the public body;
- A guide to assist the users, listing the information specified in paragraph 6 of Article 36 of this Law.

Article 6: In addition to the information referred to in Article 5 of this Law, any specialized public body that operates in the economic, financial, social, or statistics fields, and that produces in the process of its activity information related to these areas, must periodically publish:

- Statistics , economic and social information, including the results of disaggregated statistical surveys;
- Any information concerning the public finances, including macroeconomic data, information on public debt, national accounts, State assets and liabilities, forecasts and data on public expenditure and management of public finances, and budget detailed information at the central , regional and local levels;
- All available information on social programs and services, particularly in the field of employment, education, training, social security and health insurance.

Article 7: The information referred to in Articles 5 and 6 of this Law shall be published on the relevant public body website, and be updated at least once every three months, indicating every time the date of last update.

In addition to the above information, the website must include:

- A brief description of the access to information policy;
- The legal framework for access to information;
- All reports produced by the public body pertaining to the enforcement of this law, including quarterly and annual reports required under paragraphs 7 and 8 of Article 36 of this Law;
- Application forms for access to information and appeal to higher administrative authority, in addition to the department in charge of their receipt;

Article 8: Public bodies that are subject to the provisions of this Law shall publish all those information which have been subject to repetitive requests in line with Chapter III of this Law.

Chapter III:
Access to information at the request of the interested party
Section 1:
The procedures for requesting access to information

Article 9: Subject to the exceptions provided for by this Law, any natural person or legal entity may submit a written request for access to information that shall mandatorily mention the details referred to in Article 10 of this Law request.

The filing of the request is made either directly to the relevant public body against the mandatory issuance of an acknowledgement receipt or by registered letter with acknowledgment of receipt, or by any means of communication available.

Article 10: Any request for access to information must include the name and address of the applicant in the case of a natural person, and when applicable the name and head office of the legal person, in addition to full details pertaining to requested information and the interested body

Article 11: The applicant is not required to state in his request for access to information the reasons of his application, or to justify it by any particular interest.

Article 12: When filing his request, the applicant may specify the modalities for access to information that may take one of the following forms:

- On-site consultation of the information;
- Obtaining a hard copy of the information;
- Obtaining an electronic version of the information, when possible;
- Obtaining an audio or video version when possible.

Article 13: If the request for access does not contain the minimum information set out in Article 10 of this Law, the access to information manager referred to in Chapter VI of this Law shall notify the applicant accordingly within a period not exceeding five days.
In case the applicant is unable to specify for any reason whatsoever all the required details including, his inability to accurately identify the requested document or information, the access to information manager shall provide the applicant with guidance and advice to ensure the request meets the above conditions.

Section 2:
Charged fees

Article 14: Subject to special provisions in force, every person has the right to access to information free of charge.
However, if the provision of information involves costs, the charged fees should not exceed the actual costs incurred by the relevant public body for the supply and delivery of information.
The information will be provided only after submission of the proof of payment of relevant fees.

Article 15: The amount and method of payment of due fees and the cases of exemption are fixed, when applicable, by order of the Minister of Finance.

Section 3:
The response to the request for access to information

Article 16: The public body must respond to any request for access to information at the earliest possible, provided that the response period does not exceed fifteen days from the date of receipt of the request.

During the response period, and in cases where access to information is possible, the applicant must be informed of how to access information and possibly of the charged fees, in addition to the place where requested information can be consulted;

In case of refusal of the request, the decision shall state the reasons of such a refusal and state the terms and procedures of appeal, in addition to the competent bodies.

Article 17: In cases where the request for access to information could affect the person's life or liberty, the public body must respond urgently in a period not exceeding two working days following the filing of the request, and ensure its response be motivated in accordance with Article 16 of this law.

Article 18: In cases where the requested information is held by a public body other than the body to whom the application was filed, the latter must respond to the request within five working days from the date of receipt of the application, and make sure the applicant be informed of its incompetence or the transfer of his request to the relevant public body.

Article 19: The deadline provided for in Article 16 of this Law may be extended for another fortnight, when the request concerns multiple documents, or when their delivery requires the consultation of third parties, and the applicant must be notified accordingly.

Article 20: If the request concerns information that has already been published, the public body must inform the applicant accordingly and provide him with information on the place where distribution took place.

Article 21: In cases where the public body is unable to provide the requested information in the required form, it must inform the applicant of the other means of access available in a period not exceeding five days.

Article 22: The public body is not required to respond more than once to the same applicant in case he keeps requesting the same information repetitively without reasonable grounds.

Article 23: The public body shall provide the applicant with all the necessary data, whenever it is proved that the information provided following his request were inaccurate or incomplete.

Article 24: If the public body fails to reply within the time limits provided for in Articles 16, 17, 18 and 19 of this Law, this shall be deemed to constitute an implied decision of rejection and entitles the applicant to appeal in accordance with appeal legal procedures provided for in Chapter V of this Law.

Chapter IV:
Exceptions to the right of access to information

Article 25: The public body may refuse access to information protected by the laws on the protection of personal data, and the laws on the protection of literary and artistic property, or by judicial decision.

Article 26: The public body may refuse access to information when it could be harmful to:

- The confidentiality of deliberations;
- The national defense;
- The foreign policy;
- The State security or safety of persons;
- The Government monetary, economic and financial policy;
- The conduct of procedures before the courts;
- The detection and prevention of crime;
- The fundamental rights and freedoms of individuals;
- The public and private commercial and financial interests;
- The conduct of monitoring missions and their results;
- The secrecy relating to the identities of the persons who have provided the public body with information in order to report cases of embezzlement and corruption.

Article 27: The right to access to information does not apply to unfinished documents and to preparatory documents of a decision that is still under finalization.

Article 28: in cases where part of the document is subject to the exceptions provided for in Articles 25 and 26 of this Law, this part should be hidden, if possible, and the rest of the information must be communicated to the applicant.

Article 29: Access to personal data or to data specific to third parties is not permitted without the prior written consent of the person concerned.

Article 30: The information excluded from the right to access in accordance with the provisions of Articles 25 and 26 of this Law shall remain available in accordance with time and conditions set forth by the legislation on National Archives.

Article 31: The exceptions provided for in Article 26 of this Law shall not apply:
- To information which disclosure is necessary in order to expose or to investigate serious violations of human rights or war crimes or to prosecute their perpetrators ;
- When the general public interest outweighs the interest in protecting, due to a serious threat to the health, safety or environment as a result of a criminal act, corruption or mismanagement.

Chapter V:
Appeals against decisions of the public body

Article 32: The applicant to access to information may, within fifteen days of the refusal, appeal to the head of the body concerned who must reply within ten days following the date of filing the appeal to higher administrative authority.

In case of refusal of the request for access or denial of the appeal by the head of the public body concerned, the applicant may appeal to the Commission of Access to Information referred to in Chapter VII of this Law within a period not exceeding fifteen days from the date of refusal.

The Commission shall decide on the appeal within a period not exceeding sixty days from the receipt of the request and its decisions are binding.

The applicant may appeal against the decision of the Commission to the Administrative Court within thirty days from the date of the Commission decision.

Article 33: Appeal against decisions of refusal of access before the Administrative Court is subject to the prior seizure of the Commission of Access to Information referred to in Chapter VII of this Law.

Article 34: The Administrative Court takes decision on the appeal referred to in Article 17 of this Law within five days from the date of submission of the request.

Chapter VI:
The access to information manager

Article 35: Public bodies subject to the provisions of this Law and by virtue of orders of their heads shall appoint access to information managers and their deputies.

This order must include the names, grades, classes, functions, phone numbers, and business e-mail addresses of the access to information managers and their deputies.

The public body must notify this appointment order to the Commission of Access to Information provided for in Chapter VII of this Law, within fifteen days and to inform the public through its website.

Article 36: The access to information manager is in charge of:

1. The receipt of requests for access to information and ensure they are processed;
2. The assistance of the applicant especially in cases where he suffers from a physical disability or impairment or when he is unable to read and write ;
3. The coordination between the public body to which he is attached and the Commission of Access to Information referred to in Chapter VII of this Law;
4. The design under the supervision of the top executive of the public body, of an action plan for the implementation of the right to access to information, including clear objectives and a time schedule setting the steps , the time and the role assigned to each stakeholder ;
5. The preparation of a simplified guide of procedures for access to information applicants to ensure their rights are respected in line with this Law, stating the procedures for applications and deadlines for their review and response, as well as appeals relating thereto. This guide is available to the public and published mandatorily on a specific tab on the website of the public body concerned.
6. The preparation of quarterly reports on the progress of the procedures adopted for the implementation of the provisions of this law, within ten days following each quarter, and their submission to the Commission of Access to Information provided for in Chapter VII of this law.
7. The preparation in the first month of the subsequent year of an annual report on the activities relating to the access to information and its submission to the Commission of Access to Information provided for in Chapter VII of this law.
8. Monitoring and updating of the action plan under the supervision of the top executive of the public body.

Article 37: The access to information manager assumes no administrative, civil and criminal liability for acts performed in good faith in the exercise of his functions.

Chapter VII:
The Commission of Access to Information

Article 38: An independent public authority named "Commission of Access to Information", is created, with registered office located in Tunis.

The Commission has legal personality and financial autonomy. Its budget is attached by order to the budget of the Presidency of the Government.

Article 39: The Commission is responsible for ensuring compliance with the rules concerning the right to access to information and the use of public information in accordance with the legislation in force. It is responsible for:

- Rule on appeals against decisions of refusal to requests for access to information and reuse of public information produced by public bodies governed by this Law;
- Ensure the compliance with the obligation of proactive publication of information provided for in Chapter II of this Law;
- Fulfill an advisory mission on how to access information and reuse them;
- Provide the necessary amendments to laws and regulations governing access to and reuse of public information;
- Advise and provide opinion on draft laws and regulations pertaining to the access and reuse of information, which must be mandatorily transmitted to the Commission;
- Contribute to the various actions relating to the access and reuse of information.

Article 40: Prepare an annual report to be submitted to the Head of Government and parliament, and published on the official website of the Commission.

Article 41: The Commission shall exercise its functions in full independence and neutrality.

Article 42: The Council of the Commission is made up of eight members, namely:
- A judge of the Administrative Court availing of a professional experience of at least 15 years, to be appointed by the first President of the Administrative Court; President
- A court judge availing of a professional experience of at least 10 years, appointed by the First President of the Court of Cassation; Vice -President
- A lawyer availing of a professional experience of at least 10 years, appointed by the Bar Association, following a call for candidates; Member
- Two representatives of organizations working in the field of access to information , following a call for candidates; Members
- A representative of the National Authority for the Protection of Personal Data, appointed the President of Authority; Member
- A representative of the Independent High Authority for Audiovisual Communication appointed by the President of the Authority; Member
- A representative of the Presidency of the Government, appointed by the Head of Government; Member

The Chairman of the Commission may invite to its meetings any person whose presence is deemed useful. The invitee shall have advisory opinion.

Article 43: The members of the Commission referred to in Article 42 of this Law shall be appointed by decree for a period of three years, renewable once.

Article 44: The candidate for Commission membership must meet the following requirements:
- Being a Tunisian national;
- Not having been convicted of criminal offenses , with the exception of those who benefited from the amnesty under the general amnesty Decree -Law No. 2011-01 dated February 9, 2011;
- Being at least 35 years old, at the time of submitting his application.
- Having experience and expertise in areas related to access to information.
- Not having held senior positions in the government or a political party during the two years prior to submitting his application.

Article 45: The members of the Commission continue the exercise of their prior functions, with the exception of the President and Vice-President who shall serve their functions within the Commission on a full-time basis.

Article 46: Members are forbidden to participate in the deliberations of the Commission in the following cases:
- When they are concerned individually by the subject of the meeting;
- When the subject of the meeting concerns their ascendants or their descendants to the third degree;
- When they have been directly or indirectly involved in making the decision of refusal of access to information, which is the subject of the meeting;
- If they were in charge of a mission in the public body during the last three years prior to the holding of the meeting.

Article 47: It is possible to terminate the appointment of the members of the Commission before the end of their mandate by decree upon the proposal of the President of the Commission, on the basis of a majority vote of the members and after hearing the member concerned. This termination decision is taken in the following cases:
- Serious infringements to professional obligations or absence without a legitimate reason during three successive meetings.

- Participation in the deliberations of the Commission in one of the cases mentioned in Article 46 of this Law;
- The disclosure of information or documents obtained during the performance of their duties within the Commission;

Article 48: The revenue of the Commission shall be composed of:
- Subsidies paid by the State;
- Revenue from services and activities of the Commission;
- Donations granted to the Commission in accordance with the laws and regulations;
- Other income attributed to the Commission by law or regulation.

Article 49: The members of the Commission are subject to the provisions of the General Regulations on the State Personnel, local public communities and public establishments of an administrative nature.

Article 50: The organization and operation modalities of the Commission of Access to Information shall be determined by decree.

Chapter VIII:
The classification of public documents

Article 51: The public bodies subject to this Law shall, within a period not exceeding two years after the enactment of this Law, establish a system of grading and classification of the administrative documents they hold in order to facilitate the right to access to information.

Article52: The public bodies subject to this organic law are required to provide suitable places for the storage and preservation of the documents and information media they hold.

Chapter IX:
Offences and penalties

Article 53: Any public officer is liable for second degree administrative penalties for the following deeds:
- Destroy, truncate or alter information in an illegal manner;
- Hide information;
- Order or cause a person to commit the deeds referred to in the preceding two paragraphs.

The application of administrative penalties provided for in the first paragraph of this Article shall not prevent the possibility of invoking the civil and criminal liability of the public officer.

Chapter X:
Final Provisions

Article 54: Public bodies subject to the provisions of this Law shall have an official website, within six months of the enactment of this Law.

Article 55: Public bodies subject to the provisions of this Law shall complete the organization of their administrative records within a maximum period of two years from the date of entry into force of this Law.

Article 56: Public bodies subject to the provisions of this Law shall publish and disseminate the guide provided for in paragraph 6 of Article 36 within a period of six months from the date of entry into force of this Law.

Article 57: The Commission of Access to Information provided for in Chapter VII of this Law starts the effective exercise of its functions within a maximum period of one year from the date of entry into force of this law.

Article 58: This organic Law repeals Decree-Law No. 2011-41 dated May 26 2011 regarding public access to administrative documents held by public bodies as amended and supplemented by Decree No. 2012-54 dated June 11, 2011 .