NOTE

on the

Right to Access Information Bill, 2008 Sierra Leone

ARTICLE 19

May 2009

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

This Note provides an analysis of the draft Right to Access Information Bill, 2008 (draft Bill) which was prepared in a collaborative approach by civil society organisations in Sierra Leone, working with the authorities and, in particular, the Attorney General's office. This Note assesses the draft Bill against international standards on freedom of expression and the right to information. ARTICLE 19 very much welcomes moves to adopt a right to information law in Sierra Leone. Such legislation is central to moves to bolster democracy in the country, as well as to wider issues of good governance, controlling corruption and building participation.

The draft Bill is, for the most part, a very progressive piece of legislation which draws on better international and comparative practice. Strong points include the clear definition of the right and wide scope of application, the progressive approach to proactive publication using publication schemes, generally strong procedural rules, the establishment of an independent Information Commissioner and accessible appeals system, and a good complement of promotional measures. At the same time, the draft Bill could still be further improved and suggestions for this are outlined below. Many of these are minor and technical in nature, if not unimportant. The one area where more attention is needed in the draft Bill is in relation to the regime of exceptions.

This Note is based on international law and best practice in the field of the right to information, as summarised in two ARTICLE 19 publications: *The Public's Right to Know: Principles on Freedom of Information Legislation* (ARTICLE 19 Principles)[1] and *A Model Freedom of Information Law* (ARTICLE 19 Model Law).[2] Both publications represent broad international consensus on best practice regarding right to information legislation.

The analysis is organised around the five key features of a good right to information law, namely a strong guarantee of the right, good provisions on proactive disclosure, strong procedural rules for making requests for information, a tight regime of exceptions, and the right to appeal any failures to an independent oversight body. It also touches on other features for a successful right to information system, including good promotional measures.

1. Guarantee of the Right

For the most part, the draft Bill contains strong guarantees of the right to access information held by public authorities, including a clear statement of the basic right, along with wide definitions of information and public authorities. The definition of public authorities is, however, incomplete, with the first item under this definition (section 1(a)) being missing. It is assumed that this is intended to refer to bodies established by the Constitution.

Recommendation:

- Bodies established by the Constitution should be added to the definition of public authorities in section 1 of the draft Bill.

2. Proactive Publication

The draft Bill adopts the approach of the right to information law of the United Kingdom when it comes to proactive publication. Instead of providing a list of information which must, at a minimum, be published, this approach requires public authorities to adopt publication schemes, or to commit to a model publication scheme published by the Information Commission, outlining the information they will make available on a proactive basis. This has the distinct advantages of allowing proactive publication commitments to be adapted to the particular information held by different public authorities, and allowing for the levering up of these commitments over time, as public authorities gain capacity in this area.

This is an excellent approach which ARTICLE 19 has often recommended for right to information legislation. At the same time, it has some drawbacks in terms of placing an onus on public authorities, which may already suffer from resource constraints, to produce a publication scheme. The experience of the UK has been that the quality of publication schemes varies considerably, and the Information Commissioner in that country has not been able to devote sufficient attention to this issue to ensure that minimum standards are always met. This will probably prove to be an even greater challenge in Sierra Leone.

[1] (London: June 1999). Available at http://www.article19.org/pdfs/standards/foi-the-right-to-know-russian.pdf.
[2] (London: July 2001). Available at http://www.article19.org/pdfs/standards/foi-model-law-russian-.pdf.

An alternative to a pure publication scheme approach would be to stipulate in the law a minimum set of proactive publication obligations, and then to require public authorities to adopt publication schemes outlining how they will go beyond these minimum standards. This would be a sort of combination of the list approach adopted in most right to information laws, and the innovative publication scheme approach adopted in the United Kingdom.

Recommendation:

- Consideration should be give to adding a list of minimum proactive publication obligations for public authorities to the law, so that publication schemes could indicate how public authorities would go beyond this in their proactive publication efforts.

3. Procedural Rules

Effective procedural rules are central to the success of right to information legislation. Although they do not often attract a lot of attention, given their rather mundane nature, procedural rules can make or break openness regimes. For the most part, the draft Bill incorporates clear and strong procedural rules, which should ensure that the processing of requests for information proceeds smoothly.

Section 6 provides for requesters to specify the form in which they would like to access information – be it by obtaining a copy, inspecting the record or receiving a transcript of the record – in line with better practice in this area. However, the definition of 'access to information' in section 1 also stipulates various forms for accessing information, which are both broader – inasmuch as they include taking samples of material – and narrower – inasmuch as they only envisage certified copies – than the list provided in section 6. This duplication and inconsistency may give rise to confusion in the application of the law.

Section 4(4) authorises the Minister to adopt regulations on fees, providing, among other things, for no fees to be payable in prescribed cases. It would be preferable for the list of conditions in which no fees are payable to be set out directly in the law (examples might include impecunious requesters and requests in the public interest).

Section 5 sets an overall time limit of 20 days for complying with a request for information. As currently worded, however, it suggests that public authorities might be permitted to provide information only 20 days after the required fee had been paid, whereas provision of information should take place forthwith once the fee has been paid.

Recommendations:

- Consideration should be given to providing only one list of forms of accessing information, ideally based on a combination of all forms of access stipulated in sections 1 and 6.
- Consideration should also be given to indicating the conditions in which no fee is payable in the primary legislation, rather than leaving this to the discretion of a minister.
- Section 5 should be amended to make it clear that access to information must be provided immediately once any required fee has been paid.

4. Exceptions

The regime of exceptions is the one aspect of the draft Bill which requires substantial reconsideration. This is not surprising, given the importance of the exceptions, as well as the challenges involved in ensuring that they conform to international standards.

One simple but recurring issue is the formulation of the exception relating to the duty of public authorities to confirm or deny that they hold records. As currently stated, the duty does not arise if the information falls within the scope of the exception, whereas this exception should only be engaged when the confirmation or denial would itself give rise to the risk of harm established in the exception, a much narrower rule.

There are also problems with the substance of many of the exceptions. Section 7, for example, exempts information which is rendered secret by another law. Although this is the approach taken in a number of countries, better practice right to information laws override secrecy rules. If pre-existing secrecy laws are allowed to trump the right to information, this will seriously undermine the goal of opening up the public sector. Section 7, however, is not limited to other laws but also provides for 'any social obligation' to override the duty to disclose. This is a unique and seriously problematical rule that is not found in other right to information laws. Among other things, this rule is open to massive abuse given that 'social obligations' is an inherently flexible notion which is not defined.

Article 9 provides that information is exempt if a request is vexatious or repeated. While these may be grounds to refuse to answer a request, they should not render the information exempt, which is quite a different matter. Similarly, it should be clear that the idea of a repeated request means a request from the same person. Repeated requests, but from different people, merit responses from public authorities.

Section 11 exempts information which a public authority holds with a view to publication. It does not, however, place any limit on the timeframe for such publication. This rule could, as a result, be abused to delay the release of information.

Section 12 provides for the 'Minister responsible for national security' to sign a certificate to the effect that the release of certain information would pose a threat to national security and such a certificate shall be conclusive evidence of that fact. Such certificates may be general in nature and may have prospective effect. It is presumed that this is based on the UK Freedom of Information Act 2000, which employs almost identical wording.

It may be noted, first, that there may well be more than one minister who could reasonably claim to be responsible for national security, keeping in mind the very broad definition which governments sometimes employ in relation to this notion. Second, this is a very broad power, which essentially gives the minister the power to exclude whole categories of information, present and future, from disclosure. It is almost inevitable that such a power would be subject to abuse. Although this is the approach taken in the UK, more progressive right to information laws do not allocate such powers effectively to veto disclosure to ministers.

Section 13 provides for an additional exception, alongside protection of national security, in favour of defence capacity. It is not clear why this exception is necessary, since defence must

surely relation to national security. Once again, this appears to follow the example of the United Kingdom where the law, unlike other right to information laws, also contains this double protection.

Section 14 exempts information as needed to maintain relations with other States or international organisations, in accordance with accepted practice. But it also goes beyond this, protecting "the interests of Sierra Leone abroad" as well as the "promotion or protection" of these interests. This is far too broad and subject to flexible interpretation. It is also not something which is found in progressive right to information laws.

Section 15 exempts information to protect the "administration of Sierra Leone". Once again, this is an overbroad and excessively flexible exception which is not found in progressive right to information laws.

Section 18 exempts a number of wide categories of information relating to court processes, including any document filed with a court in a particular case and any document given to a person conducting an inquiry. This does not identify a specific interest – such as the authority or impartiality of the courts or justice generally – and it is not harm based.

Section 19 exempts information relating to the examination by a public authority of the economy, and the efficiency and effectiveness of the use of resources by other public authorities. Once again, this is overbroad and subject to variable interpretation. Some right to information laws exempt information the disclosure of which would prejudice a testing or audit function, which is a narrower and more appropriate approach.

Section 20 exempts information the disclosure of which would prejudice the privileges of Parliament and a certificate to this effect signed by the Speaker shall be conclusive evidence of such a risk. This is not an exception found in progressive right to information laws and it is not clear what purpose it serves. The use of certificates issued by the Speaker is also, as with any such certificates, open to abuse.

Section 21 exempts all information relating to the formulation or development of government policy, ministerial communications and advice by law officers. As with the section 18 exception, this does not identify a specific interest – such as the free and frank provision of advice or the ability of the government to formulate policy effectively – and it is not harm based.

The regime of exceptions is also missing a few important exceptions and rules. There does not, for example, appear to be any exception in favour of either privacy (personal information) or the investigation, prevention and prosecution of crime. Finally, the draft Bill fails to provide for a public interest override, whereby information will still be disclosed even if this would pose a risk of harm to a protected interest, where this is in the overall public interest. A good example of a simple public interest override is section 8(2) of the Indian Right to Information Law, 2005, which provides:

> Notwithstanding anything in the Official Secrets Act, 1923 nor any of the exemptions permissible in accordance with sub-section (1), a public authority may allow access to information, if public interest in disclosure outweighs the harm to the protected interests.

Recommendations:

- Public authorities should only be allowed to refuse to confirm or deny whether they hold information where this would, of itself, pose a risk of harm to a legitimate interest.
- The right to information law should override secrecy laws to the extent of any inconsistency. At a minimum, the exception in favour of social obligations in section 7 should be removed.
- The rule on vexatious and repeated requests should justify a refusal to answer a request, but not render the relevant information exempt, and the idea of a repeated request should be limited to requests from the same person.
- Some form of time limit should be introduced into section 11, relating to information which is due to be published.
- The power of the minister under section 12 to issue certificates to the effect that information is sensitive to national security should be removed.
- Consideration should be given to removing section 13, which relates to defence, given that national security is already protected by section 12.
- The section 14 protection for the interests of Sierra Leone abroad should be removed.
- The section 15 protection for the administration of Sierra Leone should be removed.
- The exception in section 18 in favour of court documents should be revised to refer to a particular interest and to require a risk of harm to that interest.
- The section 19 exception in favour of examinations of the economy or the use of resources by public authorities should be limited to protecting audit functions.
- The rule in section 20 in favour of the privileges of Parliament should be removed.
- The exception in section 21 in favour of the formulation of policy should be revised to refer to a particular interest and to require a risk of harm to that interest.
- Exceptions in favour of privacy and the investigation, prevention and prosecution of crime should be added to the law.
- The law should include a public interest override along the lines noted above.

5. Appeals

As with other parts of the draft Bill, the rules regarding appeals are generally progressive and effective. Section 32(2)(a) provides that no one shall be appointed Information Commissioner if he or she is an employee of a political party or holds an elected position in government. It might be useful to stipulate that this prohibition applies to anyone who has held such a position within the last five years.

The Information Commissioner is, pursuant to section 45(1), given wide powers to require public authorities to take action to remedy any failures to comply with the right to information law. These powers might be extended further, for example to include such things as requiring public authorities to appoint information officers, undertake training, report on implementation measures and so on.

Recommendations:

- Consideration should be given to providing that the rule against appointing individuals with strong political affiliations as Information Commissioner apply to

anyone who has held the stipulated posts during the past five years.
- Consideration should be given to extending the remedial powers of the Information Commissioner.

6. Other Issues

Section 33(e) of the draft Bill calls on the Information Commissioner to refer evidence of criminal offences to the appropriate public authority. He or she should also have the power to refer such evidence directly to the prosecutor, in case the problems go to the top of the public authority, or are rife within it.

Section 47 describes a number of offences under the Act, such as denying or obstructing access or interfering with the work of the Information Commissioner. Conviction for these offences can lead to a fine of up to one million Leones (approximately USD315). The same fine is applicable, under section 48, to anyone who refuses to accept an application for information, although this seems less serious than many of the section 47 offences. Section 48 also envisages fines of 300,000 Leones (approximately USD95) for each day that a person fails to provide information without reasonable excuse. It may be noted that in just four days, this would exceed the maximum offence under section 47, even though some of those offences, such as destroying a record with intent to deny access, might be permanent in nature.

Recommendations:
- The Information Commissioner should have the power to refer evidence of criminal offences to the prosecutor, as well as to the public authority concerned.
- The fines for the offences in sections 47 and 48 should be reconsidered to ensure that they are internally proportionate.

Key Recommendations

Independence:

- Consideration should be give to adding a list of minimum proactive publication obligations for public authorities to the law, to supplement the publication schemes.
- Consideration should also be given to indicating the conditions in which no fee is payable in the primary legislation, rather than leaving this to the discretion of a minister.
- Section 5 should be amended to make it clear that access to information must be provided immediately once any required fee has been paid.
- The right to information law should override secrecy laws to the extent of any inconsistency. At a minimum, the exception in favour of social obligations in section 7 should be removed.
- The power of the minister to issue certificates regarding information claimed to be sensitive on national security grounds should be removed.
- The exceptions in favour of defence, the interests of Sierra Leone abroad, the administration of Sierra Leone and the privileges of Parliament should be removed.
- The exceptions in favour of court documents and formulation of policy should be revised to refer to a particular interest and to require a risk of harm to that interest.
- Exceptions in favour of privacy and the investigation, prevention and prosecution of crime should be added to the law.
- The law should include a public interest override.
- Consideration should be given to extending the remedial powers of the Information Commissioner.
- The fines for obstructing access should be reconsidered to ensure that they are internally proportionate.

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. These publications are available on the ARTICLE 19 website: http://www.article19.org/publications/law/standard-setting.html.

On the basis of these publications and ARTICLE 19's overall legal expertise, the Law Programme's operates the Media Law Analysis Unit which publishes around 50 legal analyses each year, commenting on legislative proposals as well as existing laws that affect the right to freedom of expression. The Unit was established in 1998 as a means of supporting positive legal reform efforts worldwide, and our legal analyses frequently lead to substantial improvements in proposed or existing domestic legislation. All of our analyses are available online at http://www.article19.org/publications/law/legal-analyses.html.

If you would like to discuss this Note further, or if you have a matter you would like to bring to the attention of the ARTICLE 19 Law Programme, you can contact us at the address listed on the front cover or by e-mail to law@article19.org