



MEMORANDUM

on

Mozambique's draft Bill on Access to Sources of Information

ARTICLE 19 Global Campaign for Free Expression

February 2004

I. Introduction

This Memorandum analyses the draft Bill on Access to Sources of Information (the draft Bill), as received by ARTICLE 19 in February 2004. Our comments are based on an unofficial English translation of the draft Law, received by ARTICLE 19 in February 2004.¹ The draft Bill has been drafted by a coalition of NGOs and, in the absence of any 'official' government initiatives in this field, is intended to be put forward as a private bill in Parliament in the near future. It was forwarded to ARTICLE 19 with a request to make suggestions and recommendations with regard to areas in which it might be improved upon.

We welcome the NGO initiative that has produced this draft Bill. The right to have access to information is a fundamental right protected by Article 19 of the *Universal Declaration of Human Rights* as well as Article 9 of the *African Charter on Human and Peoples' Rights*. Not only is it a basic human right in itself, its implementation in practice is also key to the fulfilment of other rights and the functioning of democracy in a wider sense. Additionally, an effective freedom of information regime improves government transparency and can contribute significantly to improving the efficiency of government organisations. Experience has taught that wide civil society involvement is key to the success of access to information legislation – from the initial drafting stages to its

¹ ARTICLE 19 takes no responsibility for the accuracy of the translation or for comments based on mistaken or misleading translation.

eventual implementation. It is a positive sign, therefore, that Mozambican civil society has taken the initiative to draft this Bill and we hope that they will succeed in getting official support for it.

The draft Bill aims to operationalise the right to access to information that is enshrined in the Constitution of Mozambique. It aims to include within its scope not only public bodies, but also private bodies that hold information that may be of public interest, thus enabling the widest possible access to information. However, we believe that it can be improved upon in a number of respects and that more detail is needed. Many of the definitions are not clear, which in practice is likely to lead to difficulty in interpretation. There is no clear regime of exceptions, which will also lead to problems in practice, and the implementation and supervision regime is lacking in independence. Finally, the draft Bill omits to provide protection for ‘whistleblowers’, individuals who release in good faith information they believe to be of public interest, and there is no requirement for public bodies to publish certain kinds of information proactively, even in the absence of a request.

In order to facilitate further discussion around the draft Bill, this Memorandum analyses it against international standards on freedom of expression and information. Section II of this Memorandum outlines these standards, particularly as developed under the *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights*, and as illustrated and expounded in two key ARTICLE 19 publications, *The Public’s Right to Know: Principles on Freedom of Information Legislation* (the ARTICLE 19 Principles)² and *A Model Freedom of Information Law* (the ARTICLE 19 Model Law).³ The ARTICLE 19 Principles have been endorsed by, among others, the UN Special Rapporteur on Freedom of Opinion and Expression.⁴ Section III examines the draft Bill in detail against these standards.

II. International and Constitutional Obligations

II.1 The Guarantee of Freedom of Expression

The *Universal Declaration of Human Rights* (UDHR)⁵ is generally considered to be the flagship statement of international human rights. Some provisions of the UDHR – including Article 19, guaranteeing not only the right to freedom of expression but also the right to information – are binding on all States as a matter of customary international law. Article 19 protects freedom of expression as follows:

Everyone has the right to freedom of 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....[emphasis added]

² London: June 1999.

³ London: July 2001.

⁴ See Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/2000/63, 18 January 2000, para. 43.

⁵ UN General Assembly Resolution 217A(III), 10 December 1948.

The *International Covenant on Civil and Political Rights* (ICCPR),⁶ which Mozambique acceded to in October 1993, guarantees the right to information in similar terms, providing:

Everyone shall have the right to freedom of expression: this right shall include freedom to *seek, receive* and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print.... [emphasis added]

By ratifying the ICCPR, States Parties agree to refrain from interfering with the rights protected therein, including the right to freedom of expression. However, the ICCPR also places an obligation on States Parties to take positive steps to ensure that rights, including freedom of expression and information, are respected. Pursuant to Article 2 of the ICCPR, States must “adopt such legislative or other measures as may be necessary to give effect to the rights recognized by the Covenant.” This means that States must create an environment in which a diverse, vigorous and independent media can flourish, and provide effective guarantees for freedom of information, thereby satisfying the public’s right to know.

Article 9 of the *African Charter on Human and People’s Rights*,⁷ ratified by Mozambique in February 1989, also guarantees for freedom of expression. This key right is also guaranteed in the other two regional human rights treaties, the *American Convention on Human Rights*⁸ and the *European Convention on Human Rights*.⁹

II.2 Freedom of Information

In the earlier international human rights instruments, freedom of information was not set out separately but included as part of the fundamental right to freedom of expression. Freedom of expression, as noted above, includes the right to seek, receive and impart information and freedom of information, including the right to access information held by public authorities, is clearly a core element of this right. There is little doubt as to the importance of freedom of information. The United Nations General Assembly, at its very first session in 1946, adopted Resolution 59(I), which states:

Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the UN is consecrated.¹⁰

The right to freedom of information as an aspect of freedom of expression has repeatedly been recognised by the UN. The UN Special Rapporteur on Freedom of Opinion and Expression has provided extensive commentary on this right in his Annual Reports to the UN Commission on Human Rights. In 1997, he stated: “The Special Rapporteur, therefore, underscores once again that the tendency of many Governments to withhold

⁶ Adopted and opened for signature, ratification and accession by UN General Assembly Resolution 2200A (XXI), 16 December 1966, entered into force 3 January 1976.

⁷ Adopted at Nairobi, Kenya, 26 June 1981, entered into force 21 October 1986.

⁸ Adopted at San José, Costa Rica, 22 November 1969, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force 18 July 1978.

⁹ Adopted 4 November 1950, E.T.S. No. 5, entered into force 3 September 1953

¹⁰ Adopted 14 December 1946.

information from the people at large ... is to be strongly checked.”¹¹ His commentary on this subject was 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.”¹² In his 1998 Annual Report, the Special Rapporteur declared 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....”¹³

In 2000, the Special Rapporteur provided extensive commentary on the content of the right to information as follows:

- 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

¹¹ 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.

¹² Resolution 1997/27, 11 April 1997, para. 12(d).

¹³ 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, para. 14.

the freedom of information law should be comprehensive and other laws should not be permitted to extend it;

- 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

Once again, his views were welcomed by the Commission on Human Rights.¹⁵

In November 1999, the three special mandates on freedom of expression – the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression – came together for the first time in November 1999 under the auspices of ARTICLE 19. 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.¹⁶

The right to freedom of information has also been explicitly recognised in all three regional systems for the protection of human rights. Within Africa, the *Declaration of Principles on Freedom of Expression in Africa*, adopted by the African Commission on Human and Peoples' Rights in 2002,¹⁷ addresses the right to access to information in Part IV:

Freedom of Information

1. Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law.
2. The right to information shall be guaranteed by law in accordance with the following principles:
 - everyone has the right to access information held by public bodies;
 - everyone has the right to access information held by private bodies which is necessary for the exercise or protection of any right;
 - any refusal to disclose information shall be subject to appeal to an independent body and/or the courts;
 - public bodies shall be required, even in the absence of a request, actively to publish important information of significant public interest;
 - no one shall be subject to any sanction for releasing in good faith information on wrongdoing, or that which would disclose a serious threat to health, safety or the environment save where the imposition of sanctions serves a legitimate interest and is necessary in a democratic society; and

¹⁴ Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/2000/63, 18 January 2000, para. 44.

¹⁵ Resolution 2000/38, 20 April 2000, para. 2.

¹⁶ 26 November 1999.

¹⁷ 32nd Session, 17-23 October 2002.

- secrecy laws shall be amended as necessary to comply with freedom of information principles.
- 3. Everyone has the right to access and update or otherwise correct their personal information, whether it is held by public or by private bodies.

Within the Inter-American system, the Inter-American Commission on Human Rights approved the Inter-American Declaration of Principles on Freedom of Expression in October 2000.¹⁸ The Principles unequivocally recognise freedom of information, including the right to access information held by the State, as both an aspect of freedom of expression and a fundamental right on its own:

- 3. Every person has the right to access information about himself or herself or his/her assets expeditiously and not onerously, whether it be contained in databases or public or private registries, and if necessary to update it, correct it and/or amend it.
- 4. Access to information held by the state is a fundamental right of every individual. States have obligations to guarantee the full exercise of this right. This principle allows only exceptional limitations that must be previously established by law in case of a real and imminent danger that threatens national security in democratic societies.

Within Europe, the Committee of Ministers of the Council of Europe adopted a Recommendation on Access to Official Documents in 2002.¹⁹ Principle III provides generally:

Member states should guarantee the right of everyone to have access, on request, to official documents held by public authorities. This principle should apply without discrimination on any ground, including that of national origin.

National freedom of information laws have been adopted in record numbers over the past ten years in a number of countries, some of which include India, Israel, Jamaica, Japan, Mexico, Pakistan, Peru, South Africa, South Korea, Thailand, Trinidad and Tobago, and the United Kingdom, as well as most of East and Central Europe. These countries join a number of other countries which enacted such laws some time ago, such as Sweden, the United States, Finland, the Netherlands, Australia and Canada, bringing the total number of States with freedom of information laws to over 50. A growing number of inter-governmental bodies, such as the European Union, the UNDP and the World Bank, have also adopted policies on the right to information. With the adoption of a strong Law on Access to Sources of Information, Mozambique will join a long list of nations which have already taken this important step towards guaranteeing freedom of information.

II.3 Constitutional Guarantees

The Constitution of Mozambique, finally, guarantees the right to information in Article 74:

- 1. All citizens shall have the right to freedom of expression and to freedom of the press as well as the right to information.
- ...

¹⁸ 108th Regular Session, 19 October 2000.

¹⁹ Recommendation No. R(2002)2, adopted 21 February 2002.

3. Freedom of the press shall include in particular ... access to sources of information.

II.4 Restrictions on freedom of information

While international law recognises that the right to information is not absolute, it is well established that any restriction on this right must meet a strict three-part test. This test requires that any restriction must be (1) provided by law, (2) for the purpose of safeguarding a clearly defined legitimate interest, and (3) necessary to secure the interest.

Critical to an understanding of this test is the meaning of “necessary”. At a minimum, a restriction on access to information is “necessary” for securing a legitimate interest only if (1) disclosure of the information sought would cause substantial harm to the interest (in short, if the disclosure satisfies the harm test), and (2) the harm to the interest caused by disclosure is greater than the public interest in disclosure.²⁰ Building on this test, the Council of Europe Recommendation mentioned above elaborates in some detail the permissible exceptions to the right to freedom of information. It states, under Principle IV:

Possible limitations to access to official documents

1. Member states may limit the right of access to official documents. Limitations should be set down precisely in law, be necessary in a democratic society and be proportionate to the aim of protecting:
 - i. national security, defence and international relations;
 - ii. public safety;
 - iii. the prevention, investigation and prosecution of criminal activities;
 - iv. privacy and other legitimate private interests;
 - v. commercial and other economic interests, be they private or public;
 - vi. the equality of parties concerning court proceedings;
 - vii. nature;
 - viii. inspection, control and supervision by public authorities;
 - ix. the economic, monetary and exchange rate policies of the state;
 - x. the confidentiality of deliberations within or between public authorities during the internal preparation of a matter.
2. Access to a document may be refused if the disclosure of the information contained in the official document would or would be likely to harm any of the interests mentioned in paragraph 1, unless there is an overriding public interest in disclosure.²¹

III. Analysis of the draft Bill

The draft Bill aims to implement a general right of access to “official sources of information” as well as a right of access to information held by private bodies, “whenever the public good may be at stake”.²² In principle, the draft Bill provides that this information should be accessible to all, with the exception of materials whose publication

²⁰ See ARTICLE 19 Principles, Principle 4.

²¹ Note 19.

²² Article 2.

is prohibited by law, such as official secrets legislation, matters that are under consideration by a court or matters “that involve the intimacy of private life.”²³ Access requests should be handled by the official in charge of the institution concerned or someone delegated by him or her, and processed within ten days. Refusals can be appealed to the Supreme Mass Media Council and from there to the Administrative Tribunal.

III.1 Scope of the Draft Bill

Article 2 of the draft Bill states: “Official sources of information are the object of this present law ... Private sources shall be equivalent to official ones whenever the public good may be at stake.” Article 3 provides that sources may be “documental or oral, and, whatever their nature, capable of responding satisfactorily to the desired request ... Written sources may consist of any authentic document ... Anonymous texts are not covered by this present law.” Article 5 provides that the draft Bill will apply to “[t]he bodies and institutions of the Public Administration, public companies, and private entities, whenever the public good is at stake...”

The rationale of the draft Bill, as made clear in the preamble, is to provide for implementation in practice of the constitutional right to information. In order for this aim to be achieved, we believe it is essential that the Bill should be drafted in clear and unambiguous terms, and that its scope should be wide. As presently drafted, the Bill fails to meet these standards.

Although we assume that it is intended that the Bill should apply to all information held by public bodies, the draft Bill fails to make this clear. The Bill variously mentions “sources of information” (Article 1), “official sources of information” (Articles 2 and 4), and “bodies and institutions of the Public Administration [and] public companies”. Article 3(3) puzzlingly excludes “anonymous texts” from the scope of the draft Bill, while Article 3(2) states that “written sources may consist of any authentic document.” This confusion of terms does not aid the interpretation of the draft Bill. The draft Bill should state, in unambiguous terms, that it applies to all ‘information’ held by ‘public bodies’. Both terms should be defined broadly, probably in a separate section on definitions. The ARTICLE 19 Principles, as endorsed by the UN Special Rapporteur on Freedom of Expression state:

‘Information’ includes all records held by a public body, regardless of the form in which the information is stored (document, tape, electronic recording and so on), its source (whether it was produced by the public body or some other body) and the date of production. The legislation should also apply to records which have been classified, subjecting them to the same test as all other records.

...

[T]he definition of ‘public body’ should focus on the type of service provided rather than on formal designations. To this end, it 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 bodies or quangos (quasi non-governmental organisations), judicial bodies, and

²³ Article 5.

private bodies which carry out public functions (such as maintaining roads or operating rail lines). Private bodies themselves 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.

There are two key problems with the definition of information covered by the draft Bill. First, it appears to include only oral and documentary information, to the exclusion of information stored in other formats, such as electronically or on a video. There is no reason to restrict the scope of a freedom of information law in this way.

Second, the apparent exclusion from the draft Bill of “anonymous texts” in Article 3 should be removed. It is unclear what anonymous texts might be held by a public body, but there is, in any case, no warrant for this exclusion, over and beyond the regime of exceptions. It may be noted that other freedom of information laws do not include such exclusions.

Although we welcome the inclusion within the scope of the draft Bill of “private sources”, we are concerned that their obligations are limited to cases when “the public good is at stake” (which we take to correspond with the ‘public interest’ test proposed in the ARTICLE 19 Principles). International standards suggest that the right to access privately held information should extend to cases where the information requested is necessary in order for the applicant to exercise his or her rights. The African Declaration states:

[E]veryone has the right to access information held by private bodies which is necessary for the exercise or protection of any right.

This principle has been implemented in South African access to information legislation, for example.²⁴ It is not clear whether or not the draft Bill goes this far.

Recommendation:

- The draft Bill should apply to all ‘information’ held by ‘public bodies’. Both terms should be defined broadly along the lines suggested above.
- It should be made clear that the draft Bill grants a right of access to information held by private parties where this is necessary for the exercise or protection of a right as well as where access would be in the public interest.

III.2 Regime of Exceptions

The draft Bill fails to include a specific regime of exceptions, preferring instead to exclude from the scope of the Bill certain categories of information. Under Article 5, requests for access to information that concern “matters the publication of which is forbidden by other legal diplomas, such as those that involve state secrets, those that are sub judice, and those that involve the intimacy of private life” will fall outside the scope of the draft Bill and will therefore be refused. Furthermore, Article 10 of the draft Bill

²⁴ Promotion of Access to Information Act, 2000, section 50.

states: “The interpretation of the present law shall be harmonised with that of other legislation in force concerning access to official sources of information.”

These provisions are not in keeping with international standards in this area. As noted in Section II, above, international law recognises that access to information is not an absolute right: it may, in certain cases, be restricted. However, such cases must be judged on an individual basis and access requests may be refused only if disclosure would cause serious harm to a legitimate interest and there is no overriding public interest that would justify disclosure.

Instead, the draft Bill excludes whole categories of information, without providing for a harm test. For example, the rule of *sub judice* does not provide a link to any specific harm. By contrast, the ARTICLE 19 Model Law provides:

29. 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: –

...

(c) the administration of justice;

The draft Bill should also strive to ensure that any exceptions are appropriately narrowly drafted. While an exception in favour of privacy is warranted, at the same time this should not be so broad as to seriously undermine the right of access. The Model Law, for example, provides for an exception to the personal information exception where, “the individual is or was an official of a public body and the information relates to his or her function as a public official”.²⁵

It would appear that the draft Bill effectively incorporates secrecy provisions in other laws. While we have no information regarding precisely what these laws are, we are concerned that some of them – for example, official secrets laws – operate to promote secrecy rather than transparency and openness, and may even contradict sections of the draft Bill. This will counteract the stated aim of the Bill, to implement the constitutional right to access to information. A freedom of information law should include a complete set of clear and narrowly drafted exceptions, which should then not be permitted to be extended by other laws.

Finally, it should also be made clear that where the public interest in disclosure outweighs the risk of harm to a protected interest, disclosure should take precedence. This so-called public interest override is set out in the Model Law as follows:

Notwithstanding any provision in this Part, 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.²⁶

Recommendations:

²⁵ Note 3, section 25(2)(d).

²⁶ Note 3, section 22.

- The draft Bill should not contain broad class exemptions but should, instead, provide a comprehensive list of clear and narrow exceptions to the right of access, which are applicable only where disclosure would pose a risk of serious harm to a protected interest.
- The draft Bill should explicitly override any secrecy or other laws that could be construed as providing for the withholding of information properly disclosed pursuant to the provisions of the draft Bill.
- A public interest override along the lines noted above should be added to the draft Bill.

III.3 Access Procedure

The procedure to apply for access to information held by a public body is set out in Articles 7-9 of the draft Bill. These provide:

Article 7 (Request for information)

1. The petitioner who wishes to gain access to any information shall specify his/her request, properly identifying him/herself.
2. The information shall be given to the petitioner or to whoever he/she indicates.

Article 8 (Access)

Access to the documents held by the entities mentioned in article 5 includes:

- a) Consultation free of charge, on the respective premises;
- b) Obtaining a copy, or reproduction by any technical means, of the document desired, through payment of a fee;
- c) Other forms that confirm the existence of the document or information desired.

Article 9 (Reply)

1. The reply to the request shall be given within 10 days.

We welcome this simple and straightforward procedure. In particular, the ten-day time-limit is a crucial ingredient in the regime, serving to ensure that practical access requests will not be buried in red-tape. However, we are concerned that as currently drafted, the procedure lacks the kind of detail needed to operationalise the regime. For example, the draft Bill should require that the petitioner indicates, with some precision, the kind of information sought. Upon receipt of such a request, the draft Bill should then place the burden on the body concerned to either produce the material or, if it cannot identify the material sought, request the petitioner to supply further detail. The public body to which a request has been directed should also be under an obligation to redirect the request to another institution, if it does not hold the requested information but knows which body does. The draft Bill should also clarify that access requests may be made in different formats, for example in person, by turning up at the department concerned and asking for material, in writing or via email. The person requesting access should be allowed to indicate his or her preference with regard to the means by which s/he would like to receive the information. It would also be preferable if the draft Bill provided for assistance to be provided to requesters where necessary, including because of disability or inability to write.

Importantly, the draft Bill does not elaborate on the fees that may be charged for access. Article 8 merely states that access on the spot shall be provided for free, while ‘a fee’ may be charged for reproduction. We recommend that consideration be given to providing for a central, binding fee schedule for all public bodies covered. The central supervisory authority should set the fees, in consultation with all stakeholders, including civil society organisations. Otherwise, there is the possibility of inconsistency in the level of fees being charged, as well as of some departments charging excessive fees. Furthermore, consideration should be given to providing for lower fees or free access for certain types of requests, particularly requests in the public interest. The whole idea of a freedom of information law is to ensure access to information and this can be seriously undermined by an excessive fee structure.

Recommendations:

- The draft Bill should set out in some detail the exact obligations of the public body once an access request has been lodged, along the lines suggested above, including to provide assistance to requesters as necessary.
- The draft Bill should specify the various different ways in which a request can be lodged (in person, in writing, via email etc.). The requester should be allowed to state a preference regarding the form in which information should be communicated.
- Consideration should be given to providing for a centralised fee schedule along the lines suggested above.

III.4 Appeals and Oversight

Refusals of a request for information may be appealed first to the Supreme Mass Media Council and from there to the Administrative Tribunal.²⁷

Ideally, there should be three levels of appeal, first an internal appeal to a higher authority within the body which has refused access, second to an independent administrative body and then finally to the courts. We note that the draft Bill does not provide for an internal appeal.

While we welcome the provision for an appeal to the Supreme Mass Media Council as an administrative level of appeal, at the same time we have some concerns about this. In particular, we are concerned that the Council lacks the independence required to fulfil its functions as an appeals body. We note, in this regard, that two of the nine members, including the chair, are appointed by the President. Second, access to information is a right that belongs to all, not just the media. The Supreme Mass Media Council is a body that, until now, has functioned as a press watchdog; we are concerned that it lacks the kind of expertise as well as the resources required to oversee the implementation of the draft Bill.

We also welcome the avenue of judicial appeal to the Administrative Tribunal but we stress that this should be a full merits review of the original refusal.²⁸

²⁷ Article 9(2)-(6).

The draft Bill does not address the specific issue of oversight, failing to provide for specific activities that should take place to ensure that the Bill will be implemented in practice, such as the training of civil servants. Although the draft Bill does not establish or appoint a specific body to oversee the implementation of the draft Bill, it may be assumed that the existing Supreme Mass Media Council will have some *ex officio* powers in this regard. Article 9 of the draft Bill provides that it hears appeals, while Article 105 of the Constitution states that “[t]he right to information ... shall be guaranteed by the Supreme Mass Media Council.”

ARTICLE 19 is concerned that this institutional arrangement is not sufficient to ensure the draft Bill’s actual implementation. In our experience, the establishment of an effective and powerful independent supervisory body to oversee the implementation of freedom of information legislation is key to the success of such legislation. The supervisory body should enjoy complete operational and administrative autonomy from any other person or entity, including the government or any government agencies, and be appointed in a democratic and transparent process. It should have the power to monitor and report on the implementation of the Bill by all public bodies, as well as to organise training activities for public officials.²⁹

The draft Bill should therefore be far more specific with regard to the powers and duties of the supervisory body. As mentioned above, it should be required to organise training for public bodies. It should also have specific powers of enforcement – the draft Bill should specify that its decisions are binding – as well as the power to make recommendations for reform of public bodies, to promote transparency and openness. It should also have a power to raise awareness among the public. In order to carry out these functions, it should be sufficiently staffed and funded, and enjoy full independence along the lines suggested above.

Recommendations:

- The draft Bill should provide for an internal appeal.
- The provision for appeal to the Supreme Mass Media Council should be reconsidered in favour of an appeal to a specialised, independent body.
- It should be clear that the appeal to the Administrative Tribunal is a full appeal on the merits.
- The draft Bill should specifically allocate a range of oversight and implementation powers to an independent administrative body, as outlined above. Consideration should be given either to establishing a specific body for this purpose or to taking measures to strengthen the independence of the Supreme Mass Media Council.

III.5 Duty to Publish

The draft Bill does not impose an obligation on public bodies to publish certain key categories of information proactively, in the absence of a specific request, and there is no

²⁸ See Article 45 of the ARTICLE 19 Model Law.

²⁹ ARTICLE 19’s Model Law, in Part V, provides one example of how such a body could be set up.

requirement for public bodies to promote a culture of openness and transparency within their organisations. Principles 2 and 3 of the ARTICLE 19 Principles, endorsed by the UN Special Rapporteur on Freedom of Expression, deal with these important issues. They state:

PRINCIPLE 2. OBLIGATION TO PUBLISH

Freedom of information implies not only that public bodies accede to requests for information but also that they publish and disseminate widely documents of significant public interest, subject only to reasonable limits based on resources and capacity. Which information should be published will depend on the public body concerned. The law should establish both a general obligation to publish and key categories of information that must be published.

Public bodies should, as a minimum, be under an obligation to publish the following categories of information:

- operational information about how the public body functions, including costs, objectives, audited accounts, standards, achievements and so on, particularly where the body provides direct services to the public;
- information on any requests, complaints or other direct actions which members of the public may take in relation to the public body;
- guidance on processes by which members of the public may provide input into major policy or legislative proposals;
- the types of information which the body holds and the form in which this information is held; and
- the content of any decision or policy affecting the public, along with reasons for the decision and background material of importance in framing the decision.

PRINCIPLE 3. PROMOTION OF OPEN GOVERNMENT

Informing the public of their rights and promoting a culture of openness within government are essential if the goals of freedom of information legislation are to be realised. Indeed, experience in various countries shows that a recalcitrant civil service can undermine even the most progressive legislation. Promotional activities are, therefore, an essential component of a freedom of information regime. This is an area where the particular activities will vary from country to country, depending on factors such as the way the civil service is organised, key constraints to the free disclosure of information, literacy levels and the degree of awareness of the general public. The law should require that adequate resources and attention are devoted to the question of promoting the goals of the legislation.

As a minimum, the law should make provision for public education and the dissemination of information regarding the right to access information, the scope of information which is available and the manner in which such rights may be exercised. In countries where newspaper distribution or literacy levels are low, the broadcast media are a particularly important vehicle for such dissemination and education. Creative alternatives, such as town meetings or mobile film units, should be explored. Ideally, such activities should be undertaken both by individual public bodies and a specially designated and adequately funded official body – either the one which reviews requests for information, or another body established specifically for this purpose.

The law should provide for a number of mechanisms to address the problem of a culture of secrecy within government. These should include a requirement that public bodies provide freedom of information training for their employees. Such training should address the importance and scope of freedom of information, procedural

mechanisms for accessing information, how to maintain and access records efficiently, the scope of whistleblower protection, and what sort of information a body is required to publish.

The official body responsible for public education should also play a role in promoting openness within government. Initiatives might include incentives for public bodies that perform well, campaigns to address secrecy problems and communications campaigns encouraging bodies that are improving and criticising those which remain excessively secret. Another possibility is the production of an annual report to Parliament and/or Parliamentary bodies on remaining problems and achievements, which might also include measures taken to improve public access to information, any remaining constraints to the free flow of information which have been identified and measures to be taken in the year ahead.

Public bodies should be encouraged to adopt internal codes on access and openness.

Article 6 clarifies that the official in charge of the body concerned bears ultimate responsibility for the (non)release of information. In our experience, it is preferable if a specific person or department within the public body is appointed to coordinate all FOI-related efforts and to respond to requests for access. That person or department should also bear responsibility for the publication of the range of materials suggested above, as well as to undertake measures to promote openness, in consultation with the independent oversight body (discussed in Section III.4).

Recommendations:

- The draft Bill should require public bodies to publish certain key categories of information proactively, as outlined above, as well as to undertake measures to promote open government.
- The draft Bill should require that public bodies appoint or establish a specific person or department with full responsibility for all FOI-related measures.

III.6 Protection for Whistleblowers

The draft Bill fails to provide protection against legal or employment-related sanctions for ‘whistleblowers’: persons who release information on wrongdoing, or information that could disclose a serious threat to health, safety or the environment. Provided that the person acts in good faith and in the reasonable belief that the information is in fact true, ARTICLE 19 recommends that such persons be given such protection.³⁰ Whistleblowers can play an important part in fulfilling the public’s right to know, particularly in a country where freedom of information laws are a recent introduction and a culture of secrecy still pervades many public bodies.

The same protection should apply to those who, again reasonably and in good faith, disclose information under the law pursuant to a request, even if they have in fact made a mistake and disclosed exempt information. Such protection is key to changing the culture of secrecy that pervades many public bodies and to giving civil servants the confidence to apply the access law in a fulsome manner.

³⁰ See section 47 of the ARTICLE 19 Model Law for such a provision. Such provisions exist in the freedom of information laws of a number of jurisdictions.

Recommendation:

- The draft Bill should provide protection for whistleblowers and those who disclose information pursuant to a request, as long as they acted reasonably and in good faith.

III.7 Maintaining Records

We note that the draft Bill contains no provision imposing on government agencies – and perhaps even private bodies – the obligation to appropriately maintain their records. Such an obligation, along with the provision for the creation of a Code of Practice relating to the keeping, management and disposal of records, is an important part of a freedom of information regime.³¹

Recommendation:

- The draft Bill should include a provision requiring government agencies and private bodies to maintain their records in good condition so as to facilitate the right to information. It should also provide for the creation of a central Code of Practice detailing the relevant procedures in this regard.

³¹ See section 20 of the ARTICLE 19 Model Law for an example of a provision relating to the maintenance of records.