



# MEMORANDUM

on the

## Right to Information Act of the State of Nepal

January 2008

### ARTICLE 19

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## SUMMARY OF RECOMMENDATIONS

### **On scope:**

- The Act should be amended to make it quite clear that it covers all three branches of government, as well as private bodies providing public services.
- All records should fall within the scope of the definition of ‘information’ regardless of whether they relate to ‘functions, proceedings or decisions of public importance’.
- Every person, regardless of nationality, residence or other status, should enjoy the right to information.

### **On exceptions:**

- A strong harm test – for example of placing a protected interest in ‘serious jeopardy’ – should apply to all exceptions.
- A public interest override, guaranteeing that information will be released where this is in the overall public interest, should be added to the Act.
- Consideration should be given to imposing an overall time limit beyond which exceptions no longer apply.
- The Act should not provide for a system for classifying information. Decisions on whether to disclose information should be made on a case-by-case basis rather than on classification status.

### **On requesting procedures:**

- More details should be added to the request procedure to ensure that it does not pose a barrier to requests or provide opportunities for obstructing access. Among other things, these should include provision for requests to be made orally, assistance to applicants to narrow their requests, a requirement for applicants to provide contact details with their requests, permission to refuse requests in certain clearly defined and limited circumstances (for example, where they are substantially similar to a recent request from the same person), provision for extended timelines for responding in exceptional circumstances, and transfer of requests where another public body holds the information.
- The fee structure should make it clear that applicants may only be charged the costs of duplicating and delivering the requested information. Furthermore, a central fee schedule should be published in advance, and consideration should be given in this schedule to providing a certain amount of information for free and to charging lower rates to public interest requesters.

### **On measures to promote openness:**

- Public bodies should be required to publish a description of any opportunities for public participation in their decision-making processes on a proactive basis.
- Consideration should be given to allocating a wider promotional role to the National Information Commission, including by publishing a code of practice on record management, a guide or code on minimum standards for proactive publication and a guide for the public on how to use the RTI Act, by providing training on implementation of the Act to civil servants and by conducting public awareness campaigns.

### **On complaints and appeals:**

- Heads of public bodies should be required to respond to complaints within a set timeframe and applicants should be able to complain about any material failure to process their requests for information in accordance with the Act. Applicants should be given longer – perhaps 21 days – to submit a complaint.
- In proceedings before the National Information Commission, both parties should have the right to make representations and the burden of proof should rest on the public body.
- The appointments process for the Commission should be revised. Consideration should be given either to making Parliament responsible for selecting the members or to including more civil society representatives on the appointments committee. The appointments process itself should be conducted in an open and participatory manner and members of the public should be given an opportunity to nominate candidates.
- Funding for the Commission should be shielded against political interference, instead of being provided directly by government.

**On protection of good-faith disclosures:**

- Whistleblowers should only be protected where their disclosures were made in good faith, in the belief that the information is substantially true. At the same time, whistleblower protection should apply broadly to all disclosures of information which reveal the existence of a serious threat to the public interest, such as a grave threat to public health, safety or the environment, and not just to the exposure of corruption and other irregularities.

## 1. INTRODUCTION

This Memorandum contains an analysis by ARTICLE 19, the Federation of Nepali Journalists and Freedom Forum of Nepal's Right to Information Act, 2064 (2007) (RTI Act), adopted in 2007 by the parliament of Nepal.

ARTICLE 19 is an international, non-governmental organisation based in London with a specific mandate to promote the rights of freedom of expression and to information. Through the provision of legal expertise and training, ARTICLE 19 has been involved in the adoption and implementation of right to information legislation in many countries around the world. We have also been actively involved in the development of the Nepali RTI Act in various ways, including through providing analyses of it in January 2004<sup>1</sup> and December 2006.<sup>2</sup>

The Federation of Nepali Journalists (FNJ) is the representative umbrella association of the media community in Nepal. Its 6000 members operate across the length and breadth of the country and belong to every sphere of the modern media - print, electronic and cyber. FNJ pioneered advocacy for Right to Information Act in Nepal since mid-nineties. It had also created and submitted a draft RTI bill to the government. FNJ organized series of talk programs and held discussions with parliamentarians and other press-related people and entities to create pressure on the government for the enactment and implementation of the Act.

Freedom Forum is not-for-profit, non-governmental organisation working for the cause of democracy and protection and promotion of human rights, press freedom and freedom of expression. The organisation was founded in February, 2005. Right to information is one of the basic themes of freedom forum since its establishment. It organized a 'National Campaign for Right to Information' along with the network called 'Citizens' Campaign for Right to Information'. Under the campaign national and regional workshops, consultative meetings with parliamentarians and grassroots advocacy were organized. Similarly, the Forum have had provided constructive inputs to the task force while formulating the Right to Information Act.

The three organisations warmly welcome the efforts of the Nepali authorities and civil society to adopt a right to information law. We are pleased to note that many of the problems identified in a previous analysis by ARTICLE 19<sup>3</sup> have been addressed in the final text of the Act. The right to information is a fundamental human right, crucial to the functioning of democracy and key to the implementation of other rights. It has been recognised as an integral part of the right to freedom of expression, which includes the right to “seek, receive and impart information”. Article 19 of the *Universal Declaration of Human Rights* (UDHR) states:

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

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<sup>1</sup> Available at: <http://www.article19.org/pdfs/analysis/nepal-information-act-jan-2004.pdf>.

<sup>2</sup> Available at: <http://www.article19.org/pdfs/analysis/nepal-foi-analysis.pdf>.

<sup>3</sup> In December 2006. See note 2.

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If information is denied to the public and journalists on a widespread basis, the exercise of free expression is severely limited. The enactment of the RTI Act is an important step in Nepal's democratisation process.

Our overall assessment of the Act is very positive. It establishes a presumptive right to information, subject to exceptions, it contains a broad definition of the public bodies covered and mandates the establishment of a National Information Commission. At the same time, the Act suffers from some weaknesses which we believe could be relatively easily remedied. The most serious is the regime of exceptions, which does not include a public interest override and which appears to promote the withholding of information simply on the basis that it has been classified. This Memorandum sets out our main outstanding concerns with the Act, as well as recommendations for its reform.

Our analysis of the Act 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)<sup>4</sup> and *A Model Freedom of Information Law* (ARTICLE 19 Model Law).<sup>5</sup> Both publications represent broad international consensus on best practice for right to information legislation. An overview of international standards on the right to information can be found in Section 3 of this Memorandum, after the substantive analysis of the RTI Act and our drafting recommendations, contained in Section 2.

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<sup>4</sup> (London: June 1999). Available at <http://www.article19.org/pdfs/standards/foi-the-right-to-know-russian.pdf>

<sup>5</sup> (London: July 2001). Available at <http://www.article19.org/pdfs/standards/foi-model-law-russian-.pdf>

## **2. ANALYSIS OF THE RIGHT TO INFORMATION ACT**

### **2.1. Scope**

A good starting point for a discussion of the RTI Act is its scope. One of the key international principles applicable to right to information legislation is the “principle of maximum disclosure”, which holds that all information held by all public bodies should presumptively be accessible to any person, and that this presumption may be overcome only in very limited circumstances. This implies that the scope of the access legislation should be broad. The ‘scope’ of a right to information law has three dimensions: (i) which bodies have an obligation to respond to requests for information; (ii) what type of material is included in the concept ‘information’; and (iii) who has the right to access information.

#### *2.1.1. Bodies obliged to provide access to information*

##### Overview

The RTI Act applies to ‘public agencies’, a term which is defined in Article 2(a). The definition covers constitutional and statutory bodies, agencies established by law to render services to the public and agencies operating under a government grant or owned or controlled by the government. It also covers political parties and organisations, and non-governmental organisations (NGOs) which operate with funds obtained directly or indirectly from the Nepali government, a foreign government or an international organisation. Pursuant to Article 2(a)(9), the government can bring further bodies under the ambit of the Act through a notification in the official gazette.

##### Analysis

Article 2(a) apparently seeks to ensure that all public bodies, whatever their nature, are covered by the RTI Act. This is important, since public bodies should be accountable to the public for how they perform their responsibilities.

An initial concern we have with Article 2(a) is that it is not expressly clear that the RTI Act applies to the legislative and judicial branches of government as well as to the executive. We understand the taskforce which drafted the RTI Act intended this to be the case, and envisaged that the legislature and judiciary would be included under Articles 2(a)(1) and (2), which cover “agencies under the Constitution” and “agencies established by an Act”. However, since the word ‘agency’ is not defined, we recommend explicitly confirming that all three branches of government are covered by the RTI Act, for example by adding the words “...whether executive, legislative or judicial” to Articles 2(a)(1) and (2).

Further attention should also be given to the extent to which the RTI Act applies to private legal and natural persons. Since the right to information is based on the idea that the State is established by the people to serve them, the organs of the State should be subject to a duty of accountability to the public. This reasoning does not apply to private persons, unless they have assumed part of the responsibilities of the State. Concretely, contemporary right to information laws generally apply to private bodies primarily in the following cases:

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1. *The body is owned or controlled by the State*, for example a State corporation established under civil law.
2. *The body carries out a statutory function*, for example a bar association or medical board established under civil law, but vested with the responsibility to ensure professional discipline by a law or regulation.
3. *The body performs a public function*, for example a private utility company providing water or electricity, or a company implementing a government contract to build roads or schools.
4. *The body is substantially financed by the State*, for example a privately-owned museum or archive which depends on public subsidies, or a charity implementing projects with government funds.

We believe that pursuant to Article 2(a), the RTI Act applies in situations 1, 2 and 4 described above. This is positive. We are concerned, however, that the Act will not always apply in situation 3, for example when a private company performs a public function but is neither under the control of the government nor receives income from it. Examples of this could include private schools or universities; it is important that the public can verify that the standard of education and curricula at these institutions meet the applicable legal requirements. We accordingly recommend amending Article 2(a)(4) to read: “private persons providing public services” (removing the “established by law” requirement).

The fact that political parties fall within the scope of the RTI Act is somewhat unusual, as is the fact that NGOs are covered even when not funded by the Nepali State. Although NGOs and political parties work for the public good or seek to influence public policy, they do not ordinarily perform explicitly public responsibilities (although their members may do so) and for this reason are usually not covered by RTI legislation, except in the four situations described above. At the same time, since their purpose is to advance the public interest, political parties and NGOs may have little reason to object to a duty to provide information to the public.

### 2.1.2. *The definition of ‘information’*

#### Overview

The definition of ‘information’ is found in Article 2(b):

[A]ny written document, material or information related to the functions, proceedings thereof or decision of public importance made or to be made by the public agencies.

Article 2(d) goes on to define what is meant by the term “written document”. This term includes any kind of scripted document and any audiovisual materials collected and updated through “any medium” and that can be printed or retrieved.

#### Analysis

Consistently with the principle of maximum disclosure, progressive right to information laws define information broadly as including any recorded information held by a public body, regardless of its form, source, date of creation, or official status, and whether or not it was created by the body that holds it.



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While the definition of information in the RTI Act is reasonably broad, we are concerned that the ‘public importance’ requirement is an unnecessary limitation of the right to information. This wording suggests that access to a document held by a public body can be refused on the mere grounds that it is not of public importance, and therefore does not fall within the definition of ‘information’. It is clear that this wording could be abused, and it also creates an extra task for Information Officers, who must assess every time whether or not a request relates to a matter of public importance, rather than simply disclosing the requested information unless an exception to the general rule of disclosure applies.

We are also concerned that a document is only considered to be subject to the Act if it relates to the ‘functions, proceedings or decisions’ of the public body. These are vague terms, which, like the ‘public importance’ requirement, could be abused. Moreover, public bodies may hold documents which relate to the functions of other bodies, rather than their own functions. Such documents should nevertheless be subject to disclosure, or else it would be easy to prevent disclosure of a document simply by sending it to another body.

Modern right to information laws generally apply to any record held by a public body, whatever its contents or purpose. It is true that a public body may hold documents which do not relate to a public function, such as a notebook or videocassette in the lost and found department of a hospital. However, access to such documents can in appropriate cases be refused under ordinary exceptions, such as the privacy exception.

The ARTICLE 19 Model Law provides the following broad definition of ‘records’:

### **Records**

7. (1) For purposes 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.

We recommend broadening the definition of ‘information’ and ‘written document’. At a minimum, the requirements that a document be of public importance and related to the functions, proceedings or decisions of the body should be removed.

### *2.1.3. Persons with the right to access information*

#### Overview

Article 3 of the Act provides that the right to information belongs to “every Nepali citizen” and, accordingly, every Nepali citizen shall have the access to information held in public agencies. This rule appears to be derived from Article 27 of the Interim Constitution of Nepal, which states:

Every citizen has the right to seek and receive information of a personal nature or relating to matters of public importance, provided that no one shall be required to provide information which has been declared secret by law.

#### Analysis

The fact that only Nepali citizens enjoy a right of access is a disappointing limitation on the scope of the RTI Act. Most right to information laws give *everyone* the right to request information, in line with Article 19 of the UDHR and Article 19 of the ICCPR,

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which both confer the right to seek and receive information on everyone, without discrimination on any grounds, including on the basis of nationality.<sup>6</sup> For example, Macedonia's recent *Law on Free Access to Information of Public Character*, which entered into force in September of 2006, states in Article 1:

Any national or foreign legal and natural entity shall be entitled to access information filed with government agencies.

Limiting the scope of the RTI Act to citizens has the effect of depriving some long-standing Nepali residents of the right of access, for example because they are refugees or stateless. This is particularly relevant in the Nepali context, where significant numbers of individuals fall within these categories.

There are few risks or costs associated with extending the right in this way, as evidenced by the experience of the many other countries which do this. In practice, only few non-citizens can be expected to make requests for information, so little burden will be imposed on public authorities. Moreover, permitting requests from non-citizens may provide indirect financial benefits, by making Nepal an easier place to do business for foreigners and hence a more attractive destination for investment.

We also note that the use of the word "citizen" in the Interim Constitution is not deciding. It is open to the legislature of Nepal to adopt a wider safeguard of the right to information than the minimum required by the Constitution.

### **Recommendations:**

- Article 2 should be amended to make it clear that all three branches of government are covered, for example by adding the words "...whether executive, legislative or judicial" to Articles 2(a)(1) and (2).
- Article 2 should be amended to ensure that private persons providing public services are covered by the RTI Act, regardless of whether they are established by law. This can be achieved by removing the words "established by law" from Article 2(a)(4).
- The definition of 'information' in Article 2(b) should be broadened. In particular, records should fall within the definition regardless of whether they relate to 'functions, proceedings or decisions of public importance'.
- Every person, regardless of nationality, residence or other status should enjoy the right to information. Article 3, as well as all other provisions limiting the right to "Nepali citizens", should be amended to this effect.

## 2.2. Exceptions

### Overview

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<sup>6</sup> Arguably, the rule of the ICCPR, to which Nepal is a party, should prevail over the RTI Act. Section 9.1 of Nepal Treaty Act, 1990 reads: "If any provision of the treaty of which His Majesty's Government or the Kingdom of Nepal is party, after such treaty is ratified, acceded or approved, is inconsistent with any law in force, such law to the extent of such inconsistency, shall be void and the provision of the treaty shall come into force as law of Nepal."

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The exceptions are found in Article 3(3). Five categories of interests are listed whose protection could justify a refusal to disclose information, such as national security and privacy. A public body may only invoke these exceptions if there is an “appropriate and adequate reason”.

Article 3(4) contains a severability clause, which applies when a request is made for a record which contains some information that can be released and other information to which an exception applies. Any information in the record which is not subject to the exception shall, to the extent it can be severed from the rest of the information, be disclosed.

Article 27 introduces a classification procedure. A committee consisting of senior civil servants is charged with classifying information as confidential for up to thirty years. Any person who disagrees with a decision to classify a document may apply to the committee for revision.

### Analysis

The exceptions regime in the RTI Act is one of its weakest points and it fails to strike a careful balance between the right of the public to know and the need to protect other important individual and social interests.

According to international standards (discussed further in Section 3 below), the right to information should be denied only if three conditions are met:

- 1) The information affects a legitimate interest protected by law.
- 2) Release of the information would cause actual harm to that interest.
- 3) This harm would be greater than the harm caused to the public interest by non-disclosure.

The second condition is often referred to as the ‘harm test’ and the third one as the ‘public interest override’. The operation of this three-part test can be illustrated through a simple example. During an election campaign, the media may wish to have access to the educational or criminal records of the leading candidates. This request affects a legitimate interest protected by law, namely the privacy of the candidates. Release of the information may in fact cause harm to that privacy, if its contents turn out to be embarrassing. However, the public interest override should be applied: the public’s right to know is more important in this instance than the candidates’ right to privacy. As the Indian Supreme Court remarked in a similar case, a voter may wish to “think over before making his choice of electing law-breakers as law-makers”.<sup>7</sup>

The RTI Act contains a list of legitimate interests and, to some extent, a harm test. The public interest override is however entirely absent. We are also concerned that the classification regime will lead to the unjustifiable withholding of information.

#### **2.2.1. Legitimate interests**

The legitimate interests listed in Articles 3(3)(a)-(e) of the Act are comparable to those found in other national laws, such as national security, public order, the investigation and

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<sup>7</sup> *Union of India (UOI) v. Association for Democratic Reforms and Anr. with People's Union for Civil Liberties (PUCL) and Anr. v. Union of India (UOI) and Anr.* (2002) 5 Supreme Court Cases 294 (Supreme Court of India), para. 46.

prosecution of crime, economic and trade interests, privacy, and security of life and body. We are wary of a certain degree of overlap between some of the legitimate interests. In particular, Article 3(3)(a) of the Act refers to “public peace”, while paragraph (d) refers to the need to safeguard the “harmonious relationship subsisted among various casts or communities”. It is hard to see what information held by a public body would, if made public, cause serious conflict among different groups and in any case such information would, in legitimate cases, also be covered by Article 3(3)(a). We are concerned about the possibility that paragraph (d) could be used in an illegitimate manner, for example to withhold information which discloses discriminatory practices or which highlights socio-economic divisions. Other countries, including many with serious ethnic and caste tensions, such as India, have not included an exception along these lines in their right to information laws.

### *2.2.2. The harm test*

Most of the exceptions in Article 3(3) are subject to a harm test; for example, paragraph (a) states that information can be withheld if it “seriously jeopardises” national security. We are concerned, however, that the strictness of the harm test varies from exception to exception and is rather lenient in some cases. Article 3(3)(b) provides that information which “directly affects” the investigation, inquiry and prosecution of crimes shall not be released, which appears to be a considerably lower standard than ‘serious jeopardy’.

### *2.2.3. The public interest override*

We are particularly concerned at the absence of a ‘public interest override’ in the RTI Act. Such an override is essential to ensure that exceptions are not allowed to trump the overall public interest and to ensure that minor concerns are not abused to refuse access to information. As it currently stands, the RTI Act would allow information to be withheld even if doing so is against the public interest.

It is also good practice to introduce an overall time limit beyond which exceptions expire. In the ARTICLE 19 Model Law, for example, exceptions to protect public interests, as opposed to private ones, expire after 30 years. This kind of practice, followed in many democracies, ensures that old archives become fully accessible to researchers once the information they contain can no longer cause serious harm to any current interest.

### *2.2.4. The classification scheme*

Finally, as noted above, the Act introduces a classification process for information in Article 27. Essentially, the Act establishes a committee tasked with determining, on a proactive basis, whether one of the exceptions found in Article 3(3) applies to documents. The committee can declare a document classified for a maximum of thirty years. An additional period of confidentiality may be added by the committee where this is deemed necessary having regard to the nature of the information.

While most, if not all, democratic governments organise the information they hold into different categories of classification on the basis of its sensitivity, the scheme proposed in Article 27 is inappropriate. Classification should be an administrative practice, designed to ensure proper internal management of information. For example, if a document is classified as sensitive it may only be handled by more senior civil servants. However, classification status should be irrelevant to the question whether a document is subject to disclosure under a right to information law. When a request for access to a document is received, this request should always be judged on the basis of the exceptions regime

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contained in the right to information law, which should reflect the three-part test discussed above. This is of importance, since the public interest in the disclosure of a file may vary over time. For example, the tax records of an ordinary person may legitimately be withheld, but if that person subsequently becomes a senior public official, the public interest in disclosure may prevail. Classification for 30 years would, under the RTI Act, prevent disclosure of these records, regardless of the subsequent public interest.

We accordingly recommend removing Article 27 from the Act. A separate law or civil service rule may regulate classification levels, to ensure appropriate management of files within public bodies. This should not, however, affect the question of disclosure under the RTI Act.

### **Recommendations:**

- The Act's regime of exceptions should be based on a three part test. Information should never be withheld, unless:
  - The information affects a legitimate interest protected by law;
  - Release of the information would cause actual harm to that interest;
  - This harm would be greater than the harm caused to the public interest by non-disclosure.
- Article 3(3)(d), which allows information to be withheld if its release would jeopardise the relationship between casts and communities, should be deleted. Genuine cases of a threat to public order can be dealt with under Article 3(3)(a).
- The harm test in Article 3(3)(b), which provides that information which "directly affects" the investigation, inquiry and prosecution of crimes shall not be released, should be made more strict, for example by requiring 'serious jeopardy'.
- All the exceptions contained in Article 3(3) should be made subject to a public interest override, guaranteeing that information will be released if doing so is in the overall public interest.
- Consideration should be given to setting an overall time limit beyond which exceptions no longer apply.
- The classification scheme of Article 27 should be removed from the RTI Act. Decisions on whether to disclose information should be based on a case-by-case balancing of interests rather than the classification status of the concerned documents.

## 2.3. Processing requests for information

### Overview

Articles 6-8 of the RTI Act deal with the procedures for requesting access to information.

Pursuant to Article 6, each public body must appoint an Information Officer who will be responsible for dealing with information requests. A Nepali citizen who wishes to obtain information must submit an application to the relevant Information Officer, "mentioning the reason" (Article 7(1)). The Information Officer is obliged to provide the information immediately or, if that is not reasonably possible, within fifteen days, providing notice to

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the applicant of the reasons for any delay (Article 7(3)). The Act also provides that where requested information relates to the security or life of any person, the Information Officer shall provide it within 24 hours of the request (Article 7(4)).

Article 7 also states that the Information Officer shall endeavour, as far as reasonably practicable, to provide information in the format requested by the applicant. If the information could be destroyed or damaged if provided in the specified format, the information will be communicated in another appropriate way, stating the reasons (Article 7(6)). In cases where the requested information is not held, the applicant shall be notified immediately (Article 7(8)).

At the time of requesting, the applicant is required to pay a fee, which must be based on the actual cost of providing the information (Article 8(2)). The applicant has the right to appeal against an unreasonable charge (Article 8(3)).

Finally, mention should also be made of Article 31, which states that a person who obtains information from a public body is prohibited from using it for a reason other than it was acquired for. Article 32(4) allows the imposition of a fine of up to NRS 25,000 (about US \$400) in cases of 'misuse' of information.

### Analysis

#### *2.3.1. The need to state a reason*

While the procedure for requesting access to information is generally well-designed, we are very concerned about the requirement in Article 7(1) for an applicant to 'mention the reason' for his or her request. This provision appears to contradict the basic idea of a right to information law, namely that information belongs to the public, rather than the government, and should be accessible to it unless the public body has a good reason to withhold the information. Indeed, many domestic RTI laws explicitly state that the applicant is not required to justify the request.<sup>8</sup> We recommend incorporating such a provision into the Nepalese RTI Act.

Connected with this, we strongly believe that Articles 31 and 32(4), which prohibit use of the information for other purposes than it was requested for, should be deleted.

#### *2.3.2. Manner of submitting a request*

The RTI Act does not specify any procedural requirements which a request must meet, except that the request should be submitted to the relevant Information Officer. This is a good thing, insofar as it means that requesters will not be subject to any unnecessary bureaucracy. It may however be helpful to clarify some basic questions, in particular whether the request can be made orally or must be made in writing, and what should be done if the request is unclear or disproportionately burdensome.

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<sup>8</sup> See, for example, Right to Information Act of India, Article 6(2); Federal Transparency and Access to Public Government Information Law of Mexico, Article 40; Freedom of the Press Act of Sweden, Chapter 2, Article 14(3); Promotion of Access to Information Act of South Africa, Article 11(3)(a); Act on the Openness of Administration of the Netherlands, Art. 3(3). See further Recommendation R(2002) of the Committee of Ministers of the Council of Europe, Principle V.

Written requests offer some obvious advantages over oral ones, such as being easier to store, replicate and forward to other departments, but a requirement to submit a written request makes the procedure difficult to use for those who are unable to write. It can also be an unnecessary formality if the request is a simple one which can be answered straight away. For these reasons, most modern right to information laws either allow requests to be filed orally, or state that if the requester is unable to submit a written request, the official who receives the request will reduce it to writing, providing a copy to the requester. Requests submitted through electronic communication means such as fax or e-mail are normally considered to have been made in writing.

A common problem which is not addressed by the RTI Act are requests which are unclear or which unreasonably interfere with the operations of the public body processing them. In such cases, the first step is to contact the requester as soon as possible and make an effort to discover what exactly he or she wants to know, narrowing the request accordingly. If this does not help, the request may legitimately be refused. Requests may also be refused immediately if the request is substantially identical to another recent request from the same person, or if it is clear the only purpose of the request is to waste the public body's time. The draft European Convention on Access to Official Documents, a draft treaty on the right to information, contains the following clause:

**Article 5 - Processing of requests for access to official documents**

1. The public authority shall help the applicant, as far as reasonably possible, to identify the requested official document.  
[...]
5. A request for access to an official document may be refused:
  - (i) if, despite the assistance from the public authority, the request remains too vague to allow the official document to be identified; or
  - (ii) if the request is manifestly unreasonable.<sup>9</sup>

Finally, for practical reasons, it may be useful to specify that the applicant should provide contact details when filing the request. This requirement should however not go further than is necessary to provide the information. Some countries explicitly guarantee the right to submit anonymous requests; in Sweden, the country with the oldest right to information regime, this right is even constitutionally guaranteed.<sup>10</sup>

**2.3.3. Time limits and the transfer of requests**

The duty to provide access to information as soon as possible, and in any case within 15 days, is a reasonable rule and in line with the practice of other democracies. In the case of unusually complicated requests, many countries do additionally allow the time-limit to be extended for one additional period of 15 days. In such cases, the public body is required to notify the requester of the delay in writing, stating the reasons for it. We believe the RTI Act would benefit from the introduction of a similar rule, principally because the 15-day deadline could be unrealistically tight in some cases. Overall respect for the Act is likely to suffer if civil servants feel it imposes impossible obligations on them.

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<sup>9</sup> Report of the sixteenth meeting of the Council of Europe Group of Specialists on Access to Official Documents, Strasbourg, 9 – 12 October 2007, DH-S-AC(2007)010, Appendix III.

<sup>10</sup> Freedom of the Press Act of Sweden (one of the basic laws which together make up the Swedish Constitution), Chapter 2, Article 14(3).

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If a request for information is submitted to a body which does not hold that information, the Act simply states that the Information Officer shall provide notification to the applicant. This is an appropriate response in cases where the requested information simply does not exist. However, if the information does exist but is held elsewhere, we believe the Information Officer should promptly refer either the request or the applicant to the body which will be able to provide the information in question, notifying the requester. In such cases, the time limit would begin to run from the moment the request is received by the second public body.

### 2.3.4. Fees

We welcome the principle that the costs of right to information shall be based on the “actual cost of providing information” (Article 8(3)). It is not clear, however, which costs may be factored into the calculation. Good practice suggests that only the costs of duplicating and sending the information to the requester should be charged, and not the costs of searching for the information or deciding whether to release it. For example, the draft European Convention on Access to Official Documents, mentioned above, provides:

#### **Article 7 - Charges for access to official documents**

1. Inspection of official documents on the premises of a public authority shall be free of charge. This does not prevent parties from laying down charges for services in this respect provided by archives and museums.
2. A fee may be charged to the applicant for a copy of the official document, which should be reasonable and not exceed the actual costs of reproduction and delivery of the document. Tariffs of charges shall be published.

This provision also suggests that central tariffs for access should be published beforehand. Stipulating this in the RTI Act would help prevent the charging of arbitrary fees and ensure that requesters are able to foresee what sort of charges they will face. It also avoids a patchwork of different fees being charged across the public sector.

A number of governments have realised that charging for requests itself generates costs and that it is not worthwhile to collect fees for small requests. Sometimes the first 50 pages or so are therefore provided for free. Furthermore, it is a good practice to charge no or lower fees in public interest cases, such as where the request is from an NGO, an MP, a university or the media and is intended to highlight an issue of public concern.

#### **Recommendations:**

- The Act should indicate whether requests for information must be made in writing or may also be made orally. In the former case, the public servant receiving the request should assist illiterate or disabled applicants to reduce their request to writing.
- If a request is too unclear or too burdensome to process, the public authority should be under an obligation to provide assistance to help clarify or narrow the request.
- Public authorities should be permitted to refuse requests which are substantially similar to a recent request from the same person, which are clearly intended to waste the public authority’s time, or which remain unclear or unduly burdensome despite assistance having been offered to the applicant.
- Consideration should be given to requiring applicants to provide a contact address or number.



- Consideration should be given to allowing the time-limit for responding to a complicated request to be extended for one additional 15 day period. The applicant should be notified of the delay and the reasons for it in writing.
- When a public body receives a request for information held by another public body, it should be under an obligation to refer either the request or the applicant to the body which does hold the information by a set deadline.
- Article 8 should state clearly that only the costs of duplication and delivering the requested information can be charged to the applicant. A central fee structure should be published in advance.
- Consideration should be given to providing a certain amount of information, for example the first 50 pages, for free, and to charging lower rates to public interest requesters, such as the media, NGOs, MPs and universities.

## 2.4. Measures to promote openness

### Overview

Article 4 places an obligation on every public body to “respect and protect” citizens’ right to information. In the first place, public bodies are required to “classify and update information and make them public, publish and broadcast” (Article 4(2)(a)). Article 5(3) sets out a list of categories of information which must be made available on a proactive basis, such as the structure and nature of the body, the duties, responsibilities and powers of the body, decision-making processes, a description of functions performed and so on. The information may be disseminated in any national language and through different media (Article 4(3)), and should be updated every three months (Article 5(4)).

In addition to publishing information proactively, public bodies have a general duty to ensure that access to information is “simple and easy”, to conduct their functions openly and to provide appropriate training and orientation to staff (Article 4(2)(b)-(d)).

### Analysis

Most contemporary right to information laws impose a proactive obligation on public bodies to make certain key categories of information public even in the absence of a request, a practice sometimes referred to as routine disclosure. Routine disclosure is a key element of a right to information regime, as many people will find it difficult or uncomfortable to file a request for information with a public body. In order to involve these people in the activities of their government, and to enable them to benefit from the information public bodies hold, as much information as possible should be published proactively. Proactive publication also means that individuals do not have to resort to the request process to get information, which can actually reduce the burden on public bodies, particularly given how simple it is to make information available over the Internet.

The provisions in the RTI Act regarding routine disclosure are suitably wide and include most of the key sorts of information that public bodies are required to disclose routinely under other right to information laws. One category of information which we believe would improve the list in Article 5(3) is a description of the mechanisms or procedures which members of the public can use to participate in the public body’s decision-making

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procedures. An important purpose of a right to information regime is to involve people more in their own government, thereby strengthening democracy, but in order to do so, people must understand the opportunities that exist for public consultation.

Experience in many countries shows that the poor organisation of public bodies' records is one of the biggest obstacles to an effective right to information regime, as well as to the functioning of public bodies in general. Improving record management practices should therefore be an important goal of any right to information law. A central official body – perhaps the National Information Commission – should be given the responsibility of collecting information on good practices from different public bodies and, on the basis of this, issuing a code of practice on record management which explains how to organise, update, dispose and transfer records.

Article 19 of the RTI Act sets out a helpful list of promotional activities to be undertaken by the Commission. The Commission could also undertake a number of other promotional roles. Even if records are well organised, the duty to publish information may be a burden to comply with for smaller public bodies. The National Information Commission could reduce this burden by offering assistance to public bodies, through the publication of a guide on minimum standards and best practices regarding the duty to publish, as well as by responding to *ad hoc* questions from public bodies.

The National Information Commission could also contribute to making access to information “simple and easy” for people by publishing a guide to the RTI Act. Such a guide, which is provided for in the right to information laws of many countries, should set out in a clear and understandable way how an individual can file a request for information, how the request is supposed to be processed and responded to, and how to appeal against any failure to observe these rules.

The Commission could organise training activities for Information Officers and heads of public agencies on how to implement the Act, and conduct public awareness campaigns through a variety of means (radio, newspapers, television, Internet and so on). The Act's effectiveness will be greatly reduced if the wider public remains ignorant of its existence.

### **Recommendations:**

- Every public body should be required to publish a description of the mechanisms or procedures available to members of the public to participate in decision-making procedures.
- Consideration should be given to requiring the National Information Commission (or some other official body) to publish the following:
  - A code of practice on record management, based on the best practices of different public bodies.
  - A guide on minimum standards and best practices regarding the duty of public authorities to publish information proactively.
  - A guide on how to use the RTI Act for ordinary people.
- The Commission should be required to provide training on the implementation of the RTI Act to civil servants and to conduct public awareness campaigns about the Act.

## 2.5. Appeals

### Overview

Articles 9 and 10 deal with appeals against refusals to provide access to information, as well as other failures to comply with the RTI Act. Initially, applicants have seven days from the moment the information is denied, in whole or in part, to complain to the head of the public body concerned. The head may decide to release the information or confirm the earlier decision, within an unspecified timeframe (Article 9).

If the requester disagrees with the head, he or she may file an appeal with the National Information Commission within 35 days. The Commission may then summon the concerned head or Information Officer and take their statement, as well as hearing witnesses, reviewing evidence and inspecting any document held by a public body. The Commission shall reach a decision within sixty days (Article 10). This decision can be appealed to the Appellate Court within 35 days (Article 34).

Articles 32 and 33 provide for compensation and other remedies where the Commission finds that the head of a public body or an Information Officer improperly processed a request. The Commission may write to the concerned body seeking 'departmental punishment' or decide to impose a fine on the person concerned of up to NRs 25,000 (about US\$400). Delays in providing information shall be punished with a fine of NRs 200 per day, while failure to implement the Commission's decision may result in a further fine of NRs 10,000. Furthermore, an individual who has sustained losses as a result of improper processing of a request may appeal to the Commission for compensation within three months. Following investigation, the Commission may award a "reasonable amount" of compensation to the applicant.

Articles 11-18 deal with the establishment and composition of the Commission. The Commission is composed of a Chief Information Commissioner and two other Information Commissioners, who are appointed by the Government at the recommendation of a committee. The committee consists of the Minister for Information and Communication, the President of the Federation of Nepalese Journalists and the Speaker of Parliament, with the latter acting as chair (Article 11(1)-(4)).

Candidates for membership in the Commission must be Nepali citizens who hold a bachelor's degree and have at least 15 years of experience in a relevant field (Article 12). Persons who have been convicted by a court of a crime involving 'moral degradation' are ineligible, as are those who are employees of a government or public institution or hold a political position (Article 13). In making its nominations, the committee is further required to follow "inclusive principles" as much as possible, and ensure that the Commission includes at least one female member (Article 11(4) and (5)).

The term of office for members of the Commission is five years, non-renewable, although an Information Commissioner can be reappointed as Chief Information Commissioner (Article 14). The post of a Commission member may become vacant upon completion of the term, death, resignation, attainment of the age of 65 or conviction of a crime involving moral degradation (Article 15). A member may be removed by a vote of two-thirds of the parliamentary committee concerned with information and communications, if it finds the member unfit to hold office due to incompetence, misconduct or failure to perform the

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duties of a member honestly. The member concerned has the right to present their case to the committee (Article 16). The level of remuneration of members is not set in the Act; Article 17 merely states that it shall be “as prescribed”.

Article 19 sets out the functions, duties and powers of the Commission. These include observing and studying records and documents of public importance held in public agencies, ordering public agencies to make information public, prescribing timeframes to provide information, and so on. The Commission’s budget is provided by government (Article 23). An annual report of the Commission’s activities must be published and laid before Parliament every year (Article 25).

### Analysis

#### *2.5.1. The complaints procedure*

As discussed above, the RTI Act requires an applicant to seek reconsideration from the head of the public authority before appealing a failure to provide the requested information. A similar rule is found in several countries. This has a number of benefits. It may help to avoid unnecessary appeals to the Commission. At the same time, it can also serve as a device for public bodies to deliberately delay access to information. In order to reduce such abuse to a minimum, we recommend adding a deadline within which the head must take his decision.

An applicant is entitled to complain to the head in a number of different situations, namely where an Information Officer “does not provide information, denies providing information, partially provides information, provides wrong information or does not provide information by denying the applicant as a stakeholder” (Article 9(1)). These are positive rules, but we believe there are other circumstances in which a complaint should be permitted, such as where the information is not provided in the requested form, not provided promptly without a good reason, in violation of Article 7(2) or 7(5), or the fee charged is excessive (currently, as discussed in Section 2.3.4 above, a requester may appeal an excessive fee to the Commission, but not to the head of the public authority). These could be specifically listed as additional grounds for a complaint or the Act could be amended to state simply that an applicant may complain against any material failure to process a request in accordance with the Act.

Finally, the 7-day deadline for filing a complaint seems excessively tight; many requesters will in practice file their complaint within a short period, particularly if the information is needed urgently, but there is no good reason why a complaint should not be accepted after 14 or 21 days.

#### *2.5.2. The appeals procedure and remedies*

If the complaint to the head does not yield a satisfactory result, the requester may file an appeal with the National Information Commission. We assume the grounds on which such an appeal may be filed are the same as those for a complaint.

While the RTI Act sets out some powers of the Commission, including compelling witnesses and inspecting documents held by public authorities, it offers little detail on the procedure to be followed when hearing an appeal. Article 10(5) states simply that the procedure “shall be as prescribed.” To a large extent, the adoption of procedural rules by the Commission itself is appropriate. However, there are two important matters which we

believe should be set out in the RTI Act itself; the right of both parties to make representations in appeals before the Commission, and the burden of proof. Given the presumption of openness, the burden of proof should always lie on the public body.

We welcome the power of the Commission to impose a fine in cases where a request for information has been dealt with improperly, as well as the possibility of awarding compensation to an applicant who has sustained damages as a result of such improper processing.

### *2.5.3. The National Information Commission*

The establishment of the National Information Commission is a highly commendable step and will help ensure effective protection of the right to information in Nepal. Experience in countries around the world shows that independent information commissions are an essential compliment to courts in offering effective protection for the right to know. They can develop specific expertise on access to information. They can also process appeals cases more quickly and less expensively than courts, so that they are more accessible to ordinary people. Furthermore, information commissions are able to undertake a range of activities to help improve awareness and implementation of the right to information legislation.

For an information commission to enjoy public confidence, it is important that it is truly independent from the government whose actions it is supposed to oversee. In this regard, we have a number of concerns about the appointments procedure and composition of the Nepali National Information Commission.

There is only one civil society representative on the nominating committee, alongside two officials, who may represent the same political party. While it is positive that there is at least some civil society representation, in the form of the President of the Nepalese Federation of Journalists, this is not sufficient to ensure independent decision-making. A related concern is that the appointments process is, somewhat ironically, lacking in transparency, since there is no opportunity for public participation. This could be corrected by giving members of the public an opportunity to nominate candidates or to comment on a shortlist of candidates.

The RTI Act should also provide stronger safeguards for the Commission's financial independence. Rather than relying on an essentially discretionary grant from the government, which could be used as a means to apply pressure, the Commission should draw up its own budget, which should be approved by Parliament. The Act should also set the salaries of Commission members at a reasonable level, perhaps linked to existing civil service or judicial salaries, to avoid any possibility of this being used to influence the Commission's decision-making.

Finally, while the criteria for eligibility to serve on the Commission are well-designed, we believe that the rules of incompatibility found in Article 13 should continue to apply after appointment, for the entire duration of the member's term. It should be possible to remove a member of the Commission who, for example, takes up parallel employment as a civil servant or is elected to a political position. Another ground for removal which is currently absent from the Act but which should be added is incapacitation – if a member is no longer able to perform his/her duties due to prolonged illness, removal should be possible according to the ordinary procedure.

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### **Recommendations:**

- A timeframe should be added to Article 9, within which the head of a public authority must respond to a complaint.
- Applicants should be able to challenge any material failure to process their request in accordance with the Act. In addition to the circumstances listed in Article 9, a complaint or appeal should be possible against a failure to provide the information in the requested form, a failure to provide it promptly without a good reason or the charging of an excessive fee.
- The 7 day deadline for filing a complaint in Article 9(1) should be increased to at least 21 days.
- The RTI Act should specify that when the National Information Commission hears a case, both parties shall have an opportunity to make representations, and the burden of proof shall rest on the public body to justify any refusal to disclose information.
- Consideration should be given to making Parliament responsible for selecting the members of the Commission, by a two-thirds vote of its members, or to significantly broadening the scope of the nominations committee to include more civil society representatives.
- The appointments process should be conducted in an open and participatory manner and members of the public should be given an opportunity to nominate candidates.
- The Commission should draw up its own budget, which should be approved by Parliament. Commission members' salaries should be shielded from political interference.
- The rules of incompatibility found in Article 13 should continue to members of the Commission after their appointment. Inability to perform the functions of a member due to illness should be added as a ground for removal under Article 16.

## 2.6. Protection of good-faith disclosures

### Overview

The Act contains two types of safeguards for disclosures made in good faith. First, Article 36 provides that no case shall be filed and no punishment imposed on a head or Information Officer for disseminating information in good faith. In other words, a civil servant will not be held liable for disclosing information which should have been withheld on the basis of the exceptions in Article 3, if the mistake was an honest one.

Second, Article 29 provides protection for whistleblowers. It affirms the responsibility of employees within public agencies to provide information proactively on any ongoing or probable “corruption or irregularities” or any deed constituting an offence under prevailing laws. Pursuant to paragraph 3, it is forbidden to cause harm to or punish a whistleblower and paragraph 4 guarantees the right of whistleblowers to complain to the Commission and demand compensation in cases where they are nevertheless penalised.

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### Analysis

We strongly support these two safeguards. The guarantee that civil servants will not be prosecuted for disclosing information in good faith will help ensure that requests are processed in a balanced way, rather than excessively venturing on the safe side.

The protection of whistleblowers is an important part of any effective right to information regime, and can help tackle a culture of secrecy. We do believe that Article 29 could be improved upon in two ways. First, whistleblower protection should only apply to disclosures made in good faith in the belief that the information is substantially true; there can be situations in which a civil servant makes a disclosure for improper purposes, such as to deliberately discredit someone else. Second, whistleblower protection should apply not only to disclosures which reveal corruption or irregularities, but generally in any situation which presents a serious threat to the public interest, including threats to public health, safety or the environment.

### **Recommendations:**

- The whistleblower protection of Article 29 should be limited to disclosures of information made in good faith, in the belief that the information is substantially true.
- Whistleblower protection should apply to disclosures of information which reveal the existence of a serious threat to the public interest, such as a grave threat to public health, safety or the environment, in addition to corruption and other irregularities.

### 3. RELEVANT INTERNATIONAL STANDARDS

The right to access information has long been recognised as an extremely important human right, for its key role both in a democratic society and in the realisation of a number of other fundamental human rights. The United Nations, at the very first meeting of the General Assembly, adopted a Resolution on the free circulation of information in its broadest sense, stating:

Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the UN is consecrated.<sup>11</sup>

That the right to information is an aspect of freedom of expression has repeatedly been confirmed by United Nations bodies. The UN Special Rapporteur on Freedom of Opinion and Expression declared in 1998 that:

[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....<sup>12</sup>

Article 19 of the *Universal Declaration of Human Rights*<sup>13</sup> defines the right to freedom of expression as the right to “seek, receive and impart information”. Similar guarantees of freedom of expression can be found in the *International Covenant on Civil and Political Rights*,<sup>14</sup> the principal UN human rights treaty, again under Article 19, as well as in the three regional human rights treaties, the *European Convention on Human Rights*,<sup>15</sup> the *African Charter on Human and Peoples’ Rights*<sup>16</sup> and the *American Convention on Human Rights* (ACHR).<sup>17</sup>

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 agency, 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 agency 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

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<sup>11</sup> Resolution 59(1), 14 December 1946.

<sup>12</sup> 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.

<sup>13</sup> UN General Assembly Resolution 217A(III), 10 December 1948.

<sup>14</sup> UN General Assembly Resolution 2200A(XXI), 16 December 1966, in force 23 March 1976.

<sup>15</sup> Adopted 4 November 1950, E.T.S. No. 5, entered into force 3 September 1953.

<sup>16</sup> Adopted at Nairobi, Kenya, 26 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986.

<sup>17</sup> 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.



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which may justify non-disclosure should be provided in the law and exceptions should be narrowly drawn so as to avoid including material which does not harm the legitimate interest;

- All public bodies should be required to establish open, accessible internal systems for ensuring the public's right to receive information; the law should provide for strict time limits for the processing of requests for information and require that any refusals be accompanied by substantive written reasons for the refusal(s);
- The cost of gaining access to information held by public bodies should not be so high as to deter potential applicants and negate the intent of the law itself;
- The law should establish a presumption that all meetings of governing bodies are open to the public;
- The law should require that other legislation be interpreted, as far as possible, in a manner consistent with its provisions; the regime for exceptions provided for in the freedom of information law should be comprehensive and other laws should not be permitted to extend it;
- 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 agency.<sup>18</sup>

His views were welcomed by the UN Commission on Human Rights.<sup>19</sup>

In December 2004, the three special mandates on freedom of expression – the UN Special Rapporteur on Freedom of Opinion and Expression, the Representative on Freedom of the Media of the Organisation for Security and Cooperation in Europe and the Special Rapporteur on Freedom of Expression of the Organisation of American States – issued a Joint Declaration which included the following statement:

The right to access information held by public authorities is a fundamental human right which should be given effect at the national level through comprehensive legislation (for example Freedom of Information Acts) based on the principle of maximum disclosure, establishing a presumption that all information is accessible subject only to a narrow system of exceptions.<sup>20</sup>

The right to information has also been explicitly recognised in all three regional systems for the protection of human rights. Within Europe, the Committee of Ministers of the Council of Europe adopted a Recommendation on Access to Official Documents in 2002.<sup>21</sup> 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.

The Council of Europe's Group of Specialists on Access to Official Documents is currently developing a binding treaty in the area of right to information.

Within the Inter-American system, the Inter-American Commission on Human Rights approved the *Inter-American Declaration of Principles on Freedom of Expression* in

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<sup>18</sup> 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.

<sup>19</sup> Resolution 2000/38, 20 April 2000, para. 2.

<sup>20</sup> See <http://www.cidh.org/Relatoria/showarticle.asp?artID=319&IID=1>.

<sup>21</sup> Recommendation No. R(2002)2, adopted 21 February 2002.

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October 2000.<sup>22</sup> The Principles unequivocally recognise right to 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:

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.

In an important decision on 19 September 2006, the Inter-American Court of Human Rights confirmed that a right to access publicly-held information is included in the right to freedom of expression under the ACHR:

77. In respect of the facts of the present case, the Court considers that article 13 of the Convention, in guaranteeing expressly the rights to “seek” and “receive” “information”, protects the right of every person to request access to the information under the control of the State, with the exceptions recognised under the regime of restrictions in the Convention. Consequently, the said article encompasses the right of individuals to receive the said information and the positive obligation of the State to provide it, in such form that the person can have access in order to know the information or receive a motivated answer when for a reason recognised by the Convention, the State may limit the access to it in the particular case.<sup>23</sup>

In 2003, the African Commission on Human and Peoples’ Rights adopted a *Declaration of Principles on Freedom of Expression in Africa*,<sup>24</sup> Principle IV of which states, in part:

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.

The growing international consensus that there is a fundamental right to access officially held information is further reflected in the rapid growth in the number of such laws worldwide over the past ten years. States which have recently adopted right to information legislation 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 access laws some time ago, such as Sweden, the United States, Finland, the Netherlands, Australia and Canada, bringing the total number of States with right to information laws to more than 70. 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.

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<sup>22</sup> 108<sup>th</sup> Regular Session, 19 October 2000.

<sup>23</sup> *Claude Reyes and Others v. Chile*, 19 September 2006, Series C No. 151, para. 77 (Inter-American Court of Human Rights). Unofficial translation from the Spanish judgement.

<sup>24</sup> Adopted at the 32nd Session, 17-23 October 2002.