MEMORANDUM

on

Nepal's Right to Information Bill - 2063 (2006)

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Commissioned and endorsed by the United Nations Educational, Scientific and Cultural Organization (UNESCO)

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

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SUMMARY OF RECOMMENDATIONS

Scope:
- Information should be defined broadly to cover all information held by a public body, regardless of whether access to it is deemed to be in the public interest and regardless of whether or not it is deemed to relate to the activities of the public body.

Routine Disclosure:
- The provisions on routine disclosure should be reviewed to make sure they are clear and precise, and that they place an obligation on public bodies to widely disseminate the information covered.
- Consideration should be given to including a system of publication schemes to allow for progressive increases in the scope of information being made available on a routine basis.

Processing of Requests:
- Public bodies should be required to provide full but not true information.
- The provisions on fees should be substantially reworked to limit fees to the cost of duplication and dissemination of information, to provide for a central fee structure and to provide for free requests in certain public interest cases.

Exceptions:
- The right to information law should provide for severability, a public interest override and overall time limits on secrecy.
- Mere classification of a document should not be allowed to override the right to information and the right to information law should override secrecy laws to the extent of any inconsistency, not the other way around.
- Duplicative exceptions should be removed from the law and all of the exceptions should be harm-based.
- Exceptions which do not protect legitimate interests should be removed from the law.

Appeals:
- The right to information law should provide for an independent administrative appeal, in addition to the internal appeal to the chief executive and the external appeal to the courts.

Punishments and Protections:
- Penalties should be imposed on anyone who wilfully acts to prevent the disclosure of information in breach of the right to information law.
- All public officers should enjoy protection for good faith acts taken pursuant to the right to information law.

Omissions:
- The law should task a central body should with raising public awareness of their right to access information and with publishing a guide on how to do this; provision should also be made for training for public officials and annual reporting on implementation by each public body.
- The law should put in place a good record management system.
- The law should provide protection for whistleblowers as long as they acted reasonably and in good faith.

1. INTRODUCTION

This Memorandum provides an analysis of Nepal's Right to Information Bill – 2063 (2006) ("draft Law") in terms of its compliance with international standards.[1] ARTICLE 19's analysis and comments are made within the framework of international standards governing freedom of expression and information, with particular reference to Nepal's treaty obligations under the *International Covenant on Civil and Political Rights* (ICCPR).

In September 2006, ARTICLE 19 participated in an International Press Freedom and Freedom of Expression Mission to Nepal. One of the key demands of that Mission, reflecting priorities identified by local partners, was that Nepal should adopt a progressive right to information law, giving effect to the right of everyone to access information held by public bodies. The Mission met with key Nepalese leaders, including the Speaker of the House, the Prime Minister, the leaders of the largest parties and the Maoists, as well as a wide range of civil society actors. Without exception those we met recognised the importance of the right to information and every single leader indicated their strong support for giving it legal effect in Nepal.

This draft Law, which we understand has been prepared by the Nepalese authorities, is a central first step in this process and we strongly endorse this activity. It has a number of very progressive features and the potential to provide the framework for a very progressive right to information in Nepal. It defines public bodies broadly and sets out clearly the right of citizens to access information held by those public bodies. It includes a number of good process guarantees, including an obligation on public bodies to provide information relating to the defence of human life within 24 hours. It provides for an internal appeal to the chief executive officer and from him or her to the courts.

At the same time, the draft Law could still be further improved. The most serious problem is the substantially overbroad regime of exceptions, which includes a number of class exceptions (exceptions which do not require harm) and which provides for other laws, and even administrative classification, to override the right of access. The provisions on proactive publication need to be clarified. There are also a number of omissions. A key one is the failure of the law to provide for an administrative appeal in addition to any appeal to the courts. The draft Law also fails to provide for promotional measures, a record management system or protection for whistleblowers.

ARTICLE 19 seeks to make a constructive contribution to the promotion and protection of freedom of expression and access to information in Nepal and the purpose of this Memorandum is provide civil society and the authorities in Nepal with additional drafting recommendations to further the draft Law's compliance with the applicable international standards. It draws on the ARTICLE 19 publications, *The Public's Right to Know: Principles on Freedom of Information Legislation*,[2] which provides an elaboration of international

[1] The draft Law is in Nepali and we have used an English translation provided to us by our partners. This translation can be accessed at http://www.article19.org/pdfs/laws/Nepal.FOI.Sep06.doc. ARTICLE 19 takes no responsibility for the accuracy of the translation or for comments based on mistaken or misleading translation.
[2] (London: ARTICLE 19, 1999). Available at: http://www.article19.org/pdfs/standards/righttoknow.pdf. These Principles are the result of a study of international law and best practice on the right to information and have been endorsed by, amongst others, the UN Special Rapporteur on Freedom of Opinion and Expression in his report to the 2000 session of the United Nations Commission on Human Rights (UN Doc. E/CN.4/2000/63,

standards, along with best national practice, and *A Model Freedom of Information Law*,[3] which translates the Principles into concrete legal form.

2. INTERNATIONAL STANDARDS

2.1. The importance of access to information

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

In the earlier international human rights instruments, the right to information was not set out separately but included as part of the fundamental right to freedom of expression, which includes the right to seek, receive and impart information. Article 19 of the *Universal Declaration on Human Rights* (UDHR), adopted as a United Nations General Assembly resolution in 1948,[4] states:

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

While the UDHR is not directly binding on States, parts of it, including Article 19, are widely regarded as having acquired legal force as customary international law.[5] Article 19 of the *International Covenant on Civil and Political Rights* (ICCPR), a formally binding legal treaty ratified by some 160 States,[6] ensures the right to freedom of expression and information in terms similar to the UDHR.

These provisions are increasingly seen as imposing an obligation on States to enact right to information laws. The United Nations Special Rapporteur on Freedom of Opinion and Expression,[7] for example, has repeatedly called on all States to adopt and implement right to information legislation.[8] In 1995, the UN Special Rapporteur stated:

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annex II), and referred to by the Commission in its 2000 resolution on freedom of expression (Resolution 2000/38). They were also endorsed by the Special Rapporteur on Freedom of Expression of the Organization of American States (OAS). See the 1999 Report, Volume III of the Report of the Inter-American Commission on Human Rights to the OAS.

[3] (London: ARTICLE 19, 2001). Available at: http://www.article19.org/pdfs/standards/modelfoilaw.pdf.

[4] UN General Assembly Resolution 217A (III), adopted 10 December 1948.

[5] For judicial opinions on human rights guarantees in customary international law, see *Barcelona Traction, Light and Power Company Limited Case* (Belgium v. Spain) (Second Phase), ICJ Rep. 1970 3 (International Court of Justice); *Namibia Opinion*, ICJ Rep. 1971 16, Separate Opinion, Judge Ammoun (International Court of Justice); *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980) (US Circuit Court of Appeals, 2nd Circuit). For an academic critique, see M.S. McDougal, H.D. Lasswell and L.C. Chen, *Human Rights and World Public Order*, (Yale University Press: 1980), pp. 273-74, 325-27. See also United Nations General Assembly Resolution 59 (1), 1946.

[6] UN General Assembly Resolution 2200A (XXI), adopted 16 December 1966, in force 23 March 1976. The figure for ratifications is as of November 2006. Nepal acceded to the ICCPR in May 1991.

[7] The Office of the Special Rapporteur on of Opinion and Expression was established by the UN Commission on Human Rights, the most authoritative UN human rights body, in 1993: Resolution 1993/45, 5 March 1993.

[8] See, for example, the Concluding Observations of the Human Rights Committee in relation to Trinidad and

> The Special Rapporteur, therefore, underscores once again that the tendency of many Governments to withhold information from the people at large … is to be strongly checked.[9]

His comments were welcomed by the UN Commission on Human Rights, which called on the Special Rapporteur to "develop further his commentary on the right to seek and receive information and to expand on his observations and recommendations arising from communications".[10] In his 1998 Annual Report, the Special Rapporteur reaffirmed that the right to 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…."[11]

The UN Special Rapporteur was joined in his call for legal recognition of the right to information by his regional counterparts – 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 – in a Joint Declaration issued in November 1999. The three reiterated their call in December 2004, stating:

> 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.[12]

The right to information has also been explicitly recognised in all three regional systems for the protection of human rights. 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.[13] The Principles unequivocally recognise a 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.

In a very recent decision, the Inter-American Court of Human Rights has held that Article 13 of the *American Convention on Human Rights*,[14] which guarantees freedom of expression, specifically includes a right to access information held by public bodies.[15]

Tobago, UN Doc. No. CCPR/CO/70/TTO/Add.1, 15 January 2001. 14. The comments of the UN Special Rapporteur on freedom of Opinion and Expression are discussed at length below.

[9] 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.

[10] Resolution 1997/27, 11 April 1997. 12(d).

[11] Report of the Special Rapporteur, 28 January 1998, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/1998/40. 14.

[12] 6 December 2004. Available at: http://www.cidh.org/Relatoria/showarticle.asp?artID=319&lID=1.

[13] 108th Regular Session, 19 October 2000.

[14] Adopted at San José, Costa Rica, 22 November 1969, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123,

The African Commission on Human and Peoples' Rights recently adopted a *Declaration of Principles on Freedom of Expression in Africa*,[16] 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.
> 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
>   - secrecy laws shall be amended as necessary to comply with freedom of information principles.

Within Europe, the Committee of Ministers of the Council of Europe adopted a Recommendation on Access to Official Documents in 2002.[17] 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 rest of the Recommendation goes on to elaborate in some detail the principles which should apply to this right. The Council of Europe is presently engaged in preparing a binding treaty on the right to information.[18]

The Commonwealth has also recognised the fundamental importance of the right to information and taken a number of significant steps to elaborate on the content of that right.[19]

Implementation of the right to access to information is also a key requirement imposed on States parties to the UN Convention against Corruption. Nepal signed this Convention on 10 December 2003, although it has not so far ratified it.[20] Article 13 of the Convention requires that States should "[ensure] that the public has effective access to information".

National right to information laws have been adopted in record numbers over the past ten years, in countries 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 nations join a number of other countries which

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entered into force 18 July 1978.
[15] *Caso Claude Reyes and Others v. Chile*, 19 September 2006.
[16] Adopted at the 32nd Session, 17-23 October 2002.
[17] Recommendation No. R(2002)2, adopted 21 February 2002.
[18] The Group of Specialists on Access to Official Documents is responsible for this work.
[19] See the *Communiqué*, Meeting of Commonwealth Law Ministers (Port of Spain: 10 May 1999).
[20] See http://www.unodc.org/unodc/crime_signatures_corruption.html.

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 right to information laws to nearly 70. A growing number of inter-governmental bodies, such as the European Union, the UNDP, the World Bank and the Asian Development Bank, have also adopted policies on the right to information. With the adoption of a strong right to information law, Nepal would join a long list of nations which have already taken this important step towards guaranteeing this fundamental right.

2.2. The content of the right to information

A survey of international law and best practice shows that, to be effective, right to information legislation should be based on a number of general principles. Most important is the principle of maximum disclosure: any information held by a public body should in principle be openly accessible, in recognition of the fact that public bodies hold information not for themselves but for the public good. Furthermore, access to information may be refused only in narrowly defined circumstances, when necessary to protect a legitimate interest. Finally, access procedures should be simple and easily accessible, and persons who are refused access should have a means of challenging the refusal before an independent body.[21]

In his 2000 Annual Report to the UN Human Rights Commission, the UN Special Rapporteur endorsed ARTICLE 19's overview of the state of international law on the right to information as set out in the ARTICLE 19 Principles and called on Governments to revise their domestic laws to give effect to this right. He particularly directed States' attention to nine areas of importance:

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

[21] See the ARTICLE 19 Principles, note 2.

- 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 body.[22]

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

2.3. Limits to the right to information

One of the key issues in a right to information law is defining when a public body can refuse to disclose information. Under international law, restrictions on the right to information must meet the requirements stipulated in Article 19(3) of the ICCPR:

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

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

1. The information concerns a legitimate protected interest listed in the law;
2. Disclosure threatens substantial harm to that interest; and
3. The harm to the protected interest is greater than the public interest in having the information.[23]

The same approach is reflected in Principle IV of the Council of Europe Recommendation on this issue, which states:

> **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;

[22] *Ibid*., para. 44.
[23] See ARTICLE 19's *The Public's Right to Know*, note 21, at Principle 4.

> 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.[24]

This incorporates a clear list of legitimate protected interests, and permits information to be withheld only where disclosure would harm the interest and where this harm is greater than the public interest in disclosure.

1. Legitimate Protected Interest

Right to information laws should contain an *exhaustive* list of all legitimate interests which might justify a refusal to disclose information. This list should be limited to matters such as law enforcement, the protection of personal information, national security, commercial and other confidentiality, public or individual safety, and protecting the effectiveness and integrity of government decision-making processes.[25]

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

2. Substantial Harm

Even if information falls within the scope of a legitimate aim listed in the legislation, it is only where disclosure of the information would cause substantial harm to that legitimate aim that such disclosure may be refused. It is not enough for the information simply to fall within the scope of a listed legitimate interest. This would create a class exception that would seriously undermine the free flow of information to the public. This would be unjustified since public authorities can have no legitimate reason to withhold information the disclosure of which would not cause harm. Instead, the public body must demonstrate that the disclosure of the information would cause substantial harm to the protected interest.

3. Harm outweighs public interest benefit in disclosure

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

[24] Note 17.
[25] *Ibid.*

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

3. ANALYSIS OF THE DRAFT LAW

3.1. Scope of the draft Law

Three aspects of scope are important in a right to information law: who has the right to request information; the type of information covered; and the bodies covered by the obligation to disclose. It is clear from section 3, which is the key provision granting a right to demand and receive information from public bodies, that only Nepali citizens benefit from this right. This is supported by section 4, which requires public bodies to provide information only to citizens, as well as the preamble, which also refers to citizens.

Progressive right to information laws give *everyone* the right to request information, in line with Article 19 of the ICCPR, which confers the right to freedom of expression and information on everyone. This is consistent with the overall aim of the law, which is transparent government. Non-citizens may well play a role in promoting accountable, good government, for example by exposing corruption in the procurement of arms from abroad. Furthermore, limiting the scope to citizens has the effect of depriving some long-standing Nepali residents from the right of access, for example because they are refugees or stateless. This is particularly relevant in the Nepali context, where large numbers of individuals fall within these categories. On the other hand, 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.

Information is defined in section 2(B) as "any publicly important notice related with activities constituted by public institution". Section 3, which sets out the right of access, limits the right to access information on any matter of public importance and section 4, setting out the corresponding obligation of public bodies to provide information upon request, is similarly limited to information on matters of public importance. A document, on the other hand, is defined broadly as any means of recording information.

Consistently with the principle of maximum disclosure, progressive right to information laws define information broadly as including any 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. Legitimate interests are protected by the regime of exceptions and there is no need to limit the scope of the right of access by restricting it to public interest information. Furthermore, this requires public bodies to go into an otherwise unnecessary assessment of whether or not the information requested relates to a matter of public interest. There is no need for this and the fact that someone wants the information, as evidenced by the request, should be enough. It is not for public bodies to impose their understanding of a matter of public interest on requesters.

Similarly, there is no need to limit the right to information on activities of the public body. Normally, one would assume that all of the information such bodies hold has something to do with their activities. If not, however, it may well be in the public interest for someone to discover that. Regardless, there is, as with the question of public interest information, no need to impose an additional layer of decision-making and an additional possibility for misinterpretation which limits the scope of access. The right should simply apply to any information held by a public body.

Public bodies are defined broadly in section 2(A) of the draft Law as including all levels and branches of government, constitutional or statutory bodies, institutions operating under a government grant or owned by government, and non-governmental organisations (NGOs) constituted under prevailing laws.

This is a commendably broad definition. Consideration could be given to adding bodies which perform public functions. Modern governments privatise a wide range of services, even if they are clearly public in nature. Such privatisation should not, of itself, take the activity outside of the scope of a right to information law. Furthermore, if it did, this would be an additional, and clearly illegitimate, motivation for governments to privatise.

Consideration should also be given to removing NGOs from the scope of the definition, unless they are otherwise covered, for example because they are funded by the State. From among the many right to information laws around the world, only South Africa has included private bodies, and then only to the extent necessary for the exercise or protection of a right. The draft Law singles out NGOs for special treatment. If the right does extend to private bodies, there would appear to be little reason to restrict it to NGOs. However, in this case it might be wise to follow the South African example and impose an obligation on private bodies only where the information is needed for the exercise or protection of some other right.

Recommendations:

- Everyone should have the right to demand and receive information under the right to information law.
- Information should be defined broadly to cover all information held by a public body, regardless of whether access to it is deemed to be in the public interest and regardless of whether or not it is deemed to relate to the activities of the public body.
- Consideration should be given to extending the definition of a public body to include private bodies undertaking a public function.
- Consideration should be given either to removing NGOs from the scope of the law or to extending it to all private bodies. In the latter case, consideration should further be given to limiting the obligation to cases where the information is required for the exercise or protection of a right.

3.2. Routine disclosure

Most 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, sometimes referred to as automatic or routine disclosure. The provisions in the draft Law on routine disclosure are not entirely clear, perhaps due to translation. Section 4(2) provides that public bodies must keep certain categories of information up-to-date 'by listing and annexing it'. Pursuant to

section 5, the chief executive of each public body must provide the updated information required under section 4(2) to the information officer and, pursuant to section 6, public bodies shall 'manage Information Officer' to disseminate public information within one month of the coming into force of that section.

It is possible that the intention here is that public bodies are required to maintain the section 4(2) categories of information in an up-to-date form, to provide this information to the information officer and for that individual to provide it to the public in a proactive manner. If so, this should be clarified (at least to the extent that it is not fully clear in the Nepali original) and it should be specified that dissemination shall be broad. Otherwise, these provisions need to be amended to provide for a proper system of routine disclosure.

The specific list of information covered in section 4(2) is suitably wide, including most of the key sorts of information that public bodies should routinely disclose. Consideration should be given to adding to this a guide describing the main types of information held by the public body, with a view to facilitating requests by members of the public.

In the United Kingdom, rather than provide a list of documents which must be disclosed on a routine basis, the law requires each public body to adopt a publication scheme, setting out the documents it proposes to make available. This scheme must be approved by the Information Commissioner, who may attach a time limit to his or her approval. This serves two important objectives. First, it allows routine publication to be adapted to the particular information held by each public body. For example, bodies dealing with environmental matters have a special obligation to disclose certain information. Second, it allows for the scope of disclosure to be increased over time, as the body gains capacity in this area. This allows full advantage to be taken of new technologies, which essentially allow for unlimited routine disclosure of information.

Recommendations:

- The provisions which appear to be on routine disclosure should be reviewed to make sure they are clear and precise, and that they place an obligation on public bodies to widely disseminate the information covered.
- Consideration should be given to adding a new item to the list in section 4(2), namely a guide describing the main types of information held by the public body.
- Consideration should be given to including a system of publication schemes, along the lines of that in place in the United Kingdom, to allow for progressive increases in the scope of information being made available on a routine basis over time.

3.3. Processing of requests

The draft Law sets out detailed rules regarding the processing of requests for information. Many of these provisions are very positive. For example, information relating to the defence of a human life must be provided within 24 hours and requests must normally be satisfied in the form desired by the requester. At the same time, further improvements could be made. Pursuant to section 9(1), the Information Officer is required to provide 'full and true' information. Full information should always be provided but it is not clear what is meant here by true information. To the extent that public bodies happen to hold information that is

inaccurate, this should still be provided. Indeed, the very fact that they hold wrong information is itself a matter of public interest.

Pursuant to section 9(3), the Information Officer may transfer a request to another body if the information sought is 'related to' that other body. Transfer of requests causes delay, can be confusing for requesters and can result in mistakes, such as requests getting lost or put aside. Where the body receiving the request holds the information, it should be required to provide it, although it may wish to consult with other public bodies if the information relates more closely to their work. It should only be possible to transfer a request where the public body does not actually hold the information sought.

Where a requester has been refused information, he or she may make a complaint to the chief executive within seven days. This provision could be improved in two ways. A complaint should be available not only where information is not provided but also for other failures to comply with the law, for example by charging excessive fees or failing to provide adequate notice of a refusal. Also, the time limit of 7 days is too short. The requester might, for example, be travelling or be too busy to deal with the matter within that time frame.

Section 10 provides simply that requesters shall pay the 'fee determined based upon cost at the related institution'. This is problematical for a few reasons. First, it fails to provide any guidance as to what may be charged. Good practice suggests that only the costs of duplicating and sending the information to the requester should be charged. The cost of searching for information, for example, depends on the state in which the public body keeps its records and the requester should not be penalised simply because records are kept in poor order. Second, it allows for a patchwork of fees across the civil service. It would be far preferable for fees to be set centrally for all public bodies. Third, better practice in many countries is to provide a certain amount of information for free. This imposes only a minimal burden on public bodies and greatly facilitates the making of smaller requests. Fourth, it fails to take into account certain public interest cases, such as where a requester cannot afford to pay for the information or where the information is sought for a public interest reason, for example, an NGO researching the environmental effect of a development project. The law should make provision, in such cases, for lower fees or for information to be provided for free.

Finally, section 7(3) provides that the information officer shall provide information on public importance to individuals whose objective is informing the general public through the media. It is not clear how this obligation differs from the general obligation of public bodies to provide information to everyone. Apart from the differential fees for public interest requests, noted above, and which would normally cover the media, most right to information laws do not have special rules governing the provision of information to the media. The risk with such a provision is that it may be seen as an excuse for not providing information to non-media workers.

Recommendations:

- Public bodies should be required to provide full but not true information.
- Public bodies should be able to transfer requests only when they do not hold the information sought. Where they information relates to another public body, they have the option of consulting with that body before releasing the information.
- The time limit for lodging a complaint with the chief executive should be expanded beyond 7 days and the grounds for the complaint extended beyond just

a refusal to provide information to the other matters noted above.

- Section 10, providing for fees, should be substantially reworked to limit fees to the cost of duplication and dissemination of information, to provide for a central fee structure and to provide for free requests in certain public interest cases. Consideration should also be given to providing for a certain amount of information to be provided for free.
- Consideration should be given to removing section 7(3), setting out special rules for providing information to media requesters, from the law.

3.4. The regime of exceptions

The regime of exceptions is set out in section 11 of the draft Law. At the outset, it may be noted that it lacks three key elements of a progressive regime of exceptions. First, it does not contain a severability clause, whereby if only part of a document is covered by an exception, the rest of the document should still be provided where it is possible to redact or remove the exempt information. Second, it does not contain a public interest override, along the lines noted above, under 2.3 Limits to the Right to Information. As noted there, such an override is essential to ensure that exceptions are not allowed to trump the overall public interest and to ensure that minor grounds are not abused to refuse access to information. Third, the draft Law lacks an overall time limit beyond which exceptions presumptively expire. In the ARTICLE 19 Model Law, for example, exceptions to protect public interests, as opposed to private ones, expire after 30 years. Otherwise, time limited concerns like internal deliberation processes may lead to endless secrecy.

Apart from these three structural problems, the regime of exceptions is also seriously overbroad. A key problem is section 11(e), which renders exempt, among other things, information which the government has decided to keep confidential (presumably by classifying it) or which is required to be kept confidential under another law. If the government can decide what is to be disclosed and what is to be kept secret, then there is very little purpose in having a right to information law and this certainly cannot be described as a right to information, since it applies only at the discretion of the authorities. Classification, in particular, is an administrative practice and it makes no sense to put this above the law. Rather, the law should set out clearly the exceptions and any classified document should be reviewed to see whether classification is justified on the basis of those exceptions.

As regards other laws, the better practice is to provide, in case of conflict, for the right to information law to override secrecy laws, rather than the other way around, as is the case in the draft Law. In most countries, secrecy laws were adopted many years ago and do not respect the standards for disclosure of documents set out above. In particular, they do not set out clear and narrow grounds for secrecy, allow for secrecy only where disclosure would cause harm to a legitimate interest or provide for a public interest override. This is the case in Nepal, for example with the Secrecy of Document Act, 1982. To allow such laws to override the right to information law seriously undermines the access regime.

The draft Law also appears to include a number of overlapping or repetitive exceptions. For example, both sections 7(a) and (e) protect foreign relations, both sections 7(d) and (g) refer to investigation of crimes, sections 7(f) and (h) both protect business confidentiality, sections 7(i) and (j) both cover matters that have not been finalised, and sections 7(l) and (n) both

protect personal information. These are confusing and may lead to inappropriate or differential application of the law.

A number of the exceptions do not include a harm test and are thus class exceptions. These include: (d) and (g) on information relating to investigation of crime; (e) on information provided confidentially by other institutions or governments; (i) and (j) on information relating to matters not finally decided; and (m) on matters publicised through broadcasting. The need for harm-based exceptions has been noted above, under 2.3 Limits to the Right to Information. In each case, it is possible to frame these as harm-based exceptions. For example, (d) and (g) could be limited to information the disclosure of which would prejudice the investigation of a crime. As regards matters not finally decided, there are a number of specific interests to be protected, including: the effective formulation or development of government policy; the success of a policy, by avoiding premature disclosure of that policy; the free and frank provision of advice or exchange of views inside government; and the effectiveness of a testing or auditing procedure. Rather than simply providing that all non-final documents are exempt, these interests should be spelt out.

A number of the exceptions do not protect interests which other countries consider legitimate grounds for secrecy. For example, it is hard to see what information held by government would, if made public, cause conflict among different ethnic groups (section 7(c)) and, although this is a worthy public goal, other countries, including many with serious ethnic tensions, such as India, have not included an exception along these lines in their right to information laws. Furthermore, there is already an exception for peace and order, should the tension result in violence.

The problems with sections 7(i) and (j), on matters not finally decided, have already been noted. As phrased, this would include a vast array of perfectly uncontroversial information. Instead, as recommended, these provisions should identify the legitimate secrecy interests and protect them directly.

Section 7(k) protects public morality and etiquette. The latter is not generally considered to be a legitimate subject of public policy for public authorities. The former certainly is but, as with tension between ethnic groups, it is hard to see how the release of information held by government could harm it. This is also an exception which is not found in right to information laws in democracies.

Section 7(m) provides for the non-disclosure of information publicised through broadcasting or any other medium. The purpose of this exception, specifically as to what interest is being protected, is unclear.

We do not understand the translation of section 7(q) although it would not appear to be an exception which is found in other laws.

Recommendations:

- Clauses on severability, a public interest override and overall time limits should be added to the law.
- Mere classification of a document should not be allowed to override the right to information law.
- The right to information law should override secrecy laws to the extent of any

inconsistency, not the other way around.
- Duplicative exceptions should be removed from the law.
- All of the exceptions should be harm-based; where necessary, as in the case for non-final documents, specific protected interests should be set out.
- The exceptions noted above which do not protect legitimate interests should be removed from the law.

3.5. Appeals

Section 12(1) provides for an appeal to the courts for anyone dissatisfied with the decision of the chief executive pursuant to section 9(7) (noted above). The procedure for processing such an appeal shall be in accordance with the Summary Procedural Act, 2028. The court may, among other things, order the chief executive to provide the requested information to the applicant.

This is a positive provision and consistent with the practice of many countries. At the same time, experience in other countries has shown that there are serious shortcomings to court challenges. They are time consuming and expensive, and so very few requesters can be expected to pursue them. A far more accessible approach is to provide for an administrative level of appeal, whereby any refusal to comply with the right to information law may be appealed to an independent administrative body with binding powers to order disclosure and other appropriate remedies (such as reducing excessive fees). Such an administrative body can operate quickly and cheaply, and hence provide effective redress for a much wider range of requesters than the courts. Such a body could either be a new body specially created by the right to information legislation, such as an information commissioner, or an existing body, such as the National Human Rights Commission.

Recommendation:
- The right to information law should provide for an independent administrative appeal, in addition to the internal appeal to the chief executive and the external appeal to the courts.

3.6. Punishments and Protections

Section 13 of the draft Law provides that, where he or she has, without reasonable care, failed to provide information, the chief executive may be fined up to Rs. 10,000 by the court. This is a positive provision that will make chief executives treat the law seriously. At the same time, there is no reason to restrict this rule to the chief executive. Any public officer who wilfully acts to prevent the disclosure of information should be held liable. In many countries, punishment for this includes the possibility of imprisonment.

In parallel to this, protection is provided under section 15 for the chief executive where he or she acts pursuant to the right to information law and in good faith. It should be made clear, if this is not already the case, that this applies to all forms of punishment: whether based on employment, or administrative, civil or criminal law. Furthermore, as with punishment, there is no reason to restrict this protection to the chief executive. Indeed, it is to be expected that the information officer will be in greater need of such protection as he or she will be making

decisions to release information on a routine basis. 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.

Recommendations:

- Penalties should be imposed on anyone who wilfully acts to prevent the disclosure of information in breach of the right to information law.
- Similarly, all public officers should enjoy protection for good faith acts taken pursuant to the right to information law. Such protection should extend to all possible forms of sanction, whether employment-related or pursuant to a law.

3.7. Omissions

There are a number of features in good practice right to information laws that are lacking in the draft Law. Perhaps the most important of these are measures to promote awareness about and implementation of the law. There needs to be a programme of public education about the right to information once new legislation is adopted and the new law should at least provide for a locus of responsibility for this, for example allocating it to same body which is responsible for appeals, such as the information commissioner or National Human Rights Commission. The same body should be under an obligation to publish and widely distribute an easy-to-read guide to using the law, particularly on how to make a request for information.

Promotional measures should also be directed at public bodies. The law should provide for training for civil servants on their obligations under the law. It should also require each public body to file an annual report detailing its activities to implement the law. This should include information about the number of requests for information, how they have been dealt with, and how often each exception has been relied upon to refuse access. Reporting should be to a central body, such as the information commissioner, and that body should be required to file a report before the House of Representatives outlining progress and challenges in implementation.

Good record management is key to a successful right to information regime and is often a significant stumbling block. The right to information law should establish a system for promoting better record management, with flexibility to improve standards over time. In the United Kingdom, for example, the Freedom of Information Law provides for a minister to set central record management standards, which all public bodies are expected to comply with. The Information Commissioner is given a non-binding role in overseeing compliance with these standards.

Finally, the draft Law 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, such persons should be given protection.[26] Whistleblowers can play an important part in fulfilling the public's right to know, particularly in a country where right to information laws are a recent introduction and a culture of secrecy still pervades many public bodies.

[26] 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.

Recommendations:

- The law should task a central body should with raising public awareness of their right to access information and with publishing a guide on how to do this.
- The law should provide for training for public officials, as well as annual reporting on implementation by each public body.
- The law should put in place a good record management system.
- The law should provide protection for whistleblowers as long as they acted reasonably and in good faith.