ARTICLE 19

South Sudan: Right of Access to Information Bill, 2012

August 2012

Legal analysis

Executive summary

In August 2012, ARTICLE 19 analysed the Draft Right to Access Information Bill No. 54, 2012 ("the Draft Bill") of South Sudan, which is currently under consideration by the Council of Ministers. This analysis focuses on the extent to which the Draft Bill complies with international standards on the right of access to information.

ARTICLE 19 welcomes the initiative of the Government of South Sudan to create a legal framework for the implementation of the right to access information. The Draft Bill positively enshrines a number of progressive principles on the right of access to information. This includes the duty to disclose information stemming not from public ownership but from its public functions, the right to seek information from private bodies, a clear and simple procedure for accessing information, a comprehensive proactive disclosure regime, public accountability for information officers, the protection of whistleblowers and the creation of criminal offences to reinforce the right of access to information. With the adoption of the Bill, South Sudan would also join ten countries in Africa that have national freedom of Information laws, namely Angola, Ethiopia, Guinea-Conakry, Liberia, Nigeria, Niger, South Africa, Tunisia, Uganda and Zimbabwe

At the same time, the Draft Bill still contains several areas of concern, which ARTICLE 19 strongly urges the government to amend before enactment. In particular, ARTICLE 19 recommends the following changes:

- The Draft Bill and the principles of access to information it advances should take precedence above all other legislation.
- Everyone, not just citizens of South Sudan, should be entitled to access information under the Bill.
- Fees for provision of information should be limited to the reasonable reproduction costs of providing the information.
- The legitimate grounds for refusing disclosure of information should only be invoked where disclosure of the information poses an actual risk of substantial harm to that interest, subject to the public interest override.
- The right of all individuals to access information held by public and private bodies about themselves, and the right to correct that information, should be included in the Draft Bill.
- Public bodies should be required to proactively disclose contracts they have entered into above a specified sum, and their budget and expenditure plans.
- A standardised procedure for a first stage of review internal to the public body should be specified in the Draft Bill.
- The nominations and selection of the Information Commissioner should be made by a cross-party Parliamentary committee, and should not involve the President or the Ministry. Civil society and other representatives of the general public should be given the power and opportunity to nominate individuals to the post of Information Commissioner.
- Removal of the Information Commissioner from office should only be premised on serious violations of the constitution, gross misconduct, physical or mental incapacity to perform the functions of office, incompetence or bankruptcy. The Assembly must initiate and oversee any removal process.

Summary of Recommendations

Purposes

- The reference to "public interest" should be removed from Article 3 of the Draft Bill.
- "Incidental matters" in Article 3 should be substituted with informative purposes that adds substance to the provision.

Disclosure takes precedence

- Article 8(1) of the Draft Bill should be deleted and replaced with a provision asserting the principle that "disclosure takes precedence."

Right of access to information

- Article 6 of the Draft Bill should be titled "the right of access to information" and Article 7 titled "requests for access to information."
- The reference to "freedom of information" in Article 6 should be removed and the focus instead placed on the right of "access to information."
- The constitutive parts of Article 6 should be broken down into subsections, so that the right is guaranteed in clear and accessible terms.
- The right of access to information should be guaranteed to all people, not just citizens of South Sudan.
- "Information" should be added to the terms defined in Article 2 of the Draft Bill, and be defined broadly. It should substitute the use of the term "record."
- References to "public security" and "privacy" should be removed. Instead the right should be subject to the exceptions outlined in Chapter IV of the law and the public interest override.
- Article 6(1) should not assert that the right of access to information applies to all private bodies, but only those who hold information necessary for the exercise or protection of any right.
- Article 6(2) should also include the guarantee that no individual will have to accompany their information request with reasons or justification.

Format of requests and duties to assist requesters

- Article 9 of the Draft Bill should be divided into two provisions clearly showing the duties on information requesters and the duties on the recipients of information requests.
- Article 9 should allow information requests to be made in writing or orally. The right to make information requests orally should not be limited to the circumstances listed in Article 9(3).

Time limits

- The expedited process under Article 10(2) must be available in respect of any information request where the life or liberty of an individual is at stake. Where access to information is granted, it should also be made available within the specified time limit.

Payment of fees

- Article 12(1) must be amended to provide that only reasonable reproduction costs

may be charged for, and that the information requester must not bear the costs of searching for the information requested, the time spent examining and redacting the relevant information, or costs related to transcribing the information.
- Article 12 should provide that no fee will be issued where: (i) the public or private body has failed to comply with the requirements of timeliness and communication under Article 10, or (ii) a person suffering financial hardship has made the information request.
- The Information Commissioner should set a maximum fee amount at a level that would prevent individuals from being deterred from making information requests.

Means of communicating information
- Article 13(2) of the Draft Bill should also provide for the electronic transmission of requested information.

Schedule of exceptions and public interest override
- Article 22 should be titled "public interest override" and make it clear that where the public interest in disclosure outweighs the harm caused to the protected interest, the information must be disclosed. The body asserting the ground for refusing disclosure bears the burden of proof in establishing that the public interest does not require disclosure.
- The legitimate grounds for refusing disclosure may only be invoked where disclosure of the information poses an actual risk of substantial harm to that interest, subject to the public interest override.
- A public or private body should only be able to refuse to indicate whether or not it holds a record if to do so would fundamentally undermine the ability of that body to protect the specific interest.
- It should be clarified that "national defence" in the context of the Draft Bill should be understood as the protection of the state's existence or its territorial integrity against the use or threat of force or the state's capacity to respond to the use or threat of force.
- Article 31(3) of the Draft Bill should be deleted.
- Article 32(1)(b) and (d) of the Draft Bill should be deleted.
- The term "unreasonable" should be removed from the title to Article 33. A heightened standard of "manifestly vexatious or repetitive" should also be adopted.
- Article 33(2) of the Draft Bill should be deleted.

Access to and correction of personal information
- The right of all individuals to access information held by public and private bodies about themselves, and to correct that information where it is inaccurate or false, should be guaranteed in the law of South Sudan, either in the Draft Bill or legislation on data protection.

Proactive disclosure
- Article 17 of the Draft Bill should require that public bodies proactively disclose contracts they have entered into above a specified sum; and the budget and expenditure plans for the public body for the current and previous years.

Complaints and appeal
- A standardised procedure for a first stage of review internal to the public body should be specified in the Draft Bill.

Appointment of the Information Commissioner

- The Information Commissioner shall be formally appointed by the President after nomination by a qualified (a two-thirds majority) vote of the Assembly and after an open and transparent process with the participation of civil society and the public.
- The Information Commissioner, at the time of appointment, should not be a member of a political party or hold any position in government, elected or otherwise.

Removal of the Information Commissioner

- Article 35(6) of the Draft Bill must be deleted.
- Removal of the Information Commissioner from office should only be premised on serious violations of the Constitution, gross misconduct, physical or mental incapacity to perform the functions of office, incompetence or bankruptcy.
- The Assembly must initiate and oversee any removal process. A decision to establish an investigative tribunal should follow a vote of the Assembly. Appeal to the courts must be available following a tribunal decision.
- The President should have no role whatsoever in the removal of Information Commissioners.

Independence of the Information Commissioner

- The Draft Bill should guarantee that the budget for the Information Commissioner's office will be insulated from undue political influence.

Education

- The Draft Bill should provide that adequate funding is granted to the Information Commission in view of its duties to provide education and information promoting the goals of the legislation.

Protection of whistleblowers

- The requirement that information disclosed under Article 46(1) be "substantially true" should be removed.
- Article 46(3) should end with the sentence "conferred under this Act." The last clause "as long as they acted reasonably and in good faith" should be deleted.

Table of Contents

About the Article 19 Law Programme

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

On the basis of these publications and ARTICLE 19's overall legal expertise, the Law Programme publishes a number of legal analyses each year, Comments on legislative proposals as well as existing laws that affect the right to freedom of expression. This analytical work, carried out since 1998 as a means of supporting positive law reform efforts worldwide, frequently leads to substantial improvements in proposed or existing domestic legislation. All of our analyses are available online at http://www.article19.org/resources.php/legal/.

If you would like to discuss this analysis further, or if you have a matter you would like to bring to the attention of the ARTICLE 19 Law Programme, you can contact us by e-mail at legal@article19.org. For more information about the work of ARTICLE 19 in Eastern Africa, please contact Henry Maina, Director of ARTICLE 19 Kenya and Eastern Africa at henry@article19.org.

Introduction

In August 2012, ARTICLE reviewed The Right to Access Information Bill No. 54 ("the Draft Bill")[1] for its compliance with international standards on freedom of expression and access to information.

The Draft Bill was presented to the Council of Ministers on 26 March 2012 by Minister of Justice John Luk Jok. The Ministry of Information and Broadcasting drafted the Bill in collaboration with the Ministry of Justice. The Council of Ministers are now reviewing the Draft Bill before it is submitted to the National Legislative Assembly for further deliberation and eventual enactment.

The Draft Bill is intended to foster a culture of transparency and accountability in public institutions and give effect to the right to access information contained in Article 32 of the Constitution of South Sudan. The Minister of Information and Broadcasting drafted the Bill in collaboration with the Ministry of Justice. The Council of Ministers are now reviewing the Draft Bill before it is submitted to the National Legislative Assembly for further deliberation and eventual enactment.

ARTICLE 19's core mandate is to promote and protect the right to freedom of expression and information globally. In the past, the Law Programme has analysed numerous freedom of information laws in various countries, lending our expertise to establishment and reform processes worldwide. Furthermore, we have produced two standard-setting documents on the right to freedom of information: the Public's Right to Know: Principles on Freedom of Information Legislation1 ("ARTICLE 19 Principles"),[2] and Model Law on Access to Information ("ARTICLE 19 Model Law").[3] Both publications represent a broad international consensus on best practices regarding right to information legislation and form a basis for the analysis of the Draft Bill.

ARTICLE 19 considers the Draft Bill a positive step towards the effective protection of the right to freedom of information in South Sudan. It sets out the principles of access to public information, determines the subjects of the law (both right holders and duty bearers) and regulates the procedure for seeking public information. The Draft Bill also takes a progressive approach to access to information held by private bodies. Moreover, the Draft Bill establishes the office of the Information Commissioner and introduces an enforcement mechanism. With the adoption of the Bill, South Sudan would also join ten countries in Africa that have national freedom of Information laws, namely Angola, Ethiopia, Guinea-Conakry, Liberia, Nigeria, Niger, South Africa, Tunisia, Uganda and Zimbabwe.

While we broadly welcome the Draft Bill, the analysis highlights how aspects of it could be further improved and brought in compliance with international legal standards in this area. For example, it is concerning that the Draft Bill and the principle of maximum disclosure

[1] Copy of the Draft Bill is available upon request from ARTICLE 19.

[2] ARTICLE 19, The Public's Right to Know: Principles on Freedom of Information Legislation, London: June 1999; available at http://www.article19.org/data/files/pdfs/standards/righttoknow.pdf.

[3] ARTICLE 19, A Model Freedom of Information Law, London, July 2001; available at http://www.article19.org/data/files/pdfs/standards/modelfoilaw.pdf.

does not take precedence over other legislation in the South Sudan. The provisions articulating the nature of the right of access to information would also benefit from clearer wording, while the schedule of exceptions to the right should be more narrowly tailored.

ARTICLE 19 is also concerned that process for appointing and removing the Information Commissioner fails to safeguard the independence of that office. The Draft Bill also lacks provisions providing for the right to access information about oneself, and to correct that information where it is incorrect.

ARTICLE 19 urges the Council of Ministers to prioritise the adoption of the Draft Bill, and take this opportunity to revise aspects of the legislation that do not comply with international standards on access to information.

International Standards on the Right of Access to Information

The right of access to information is widely regarded as central to the right to freedom of expression and essential for the exercise of all human rights. The right reflects the fundamental premise that government is supposed to serve the people; and that they hold information not for themselves but on behalf of the public. Access to information has been described as the "oxygen of democracy" – as the ability of individuals to participate effectively in decisions that affect them depends on information, which also enables individuals to scrutinise the actions of their leaders and hold them to account through full and open debate. Access to information is therefore a key tool for asserting rights, combating corruption and exposing wrongdoing.

Universal Declaration of Human Rights

Article 19 of the Universal Declaration of Human Rights ("the UDHR")[4] recognises access to information as integral to the right to freedom of expression:

> 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.

The UDHR, as a UN General Assembly Resolution, is not directly binding on states. However, parts of it, including Article 19, are widely regarded as having acquired legal force as customary international law since its adoption in 1948.[5] South Sudan became a Member State of the United Nations on 14 July 2011.

International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights ("the ICCPR") elaborates upon and gives legal force to many of the rights articulated in the UDHR. The ICCPR binds its 167 states party to respect its provisions and implement its framework at the national level.[6] Sudan acceded to the ICCPR on 18 March 1986, but South Sudan has yet to sign or ratify the ICCPR. Article 19 of the ICCPR protects the right to freedom of expression and information in the following terms:

> 1. Everyone shall have the right to freedom of opinion
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his choice.

In 1998 the UN Special Rapporteur on Freedom of Opinion and Expression stated that "the right to seek, receive and impart information imposes a positive obligation on States to

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

[5] *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980) (US Circuit Court of Appeals, 2nd circuit).

[6] Article 2 of the ICCPR, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966); 999 UNTS 171; 6 ILM 368 (1967).

ensure access to information, particularly with regard to information held by Government."[7] Since 2000 the Special Rapporteur has recognised that the right is fundamentally important to the right to development.[8]

In General Comment No.34, the UN Human Rights Committee ("the HR Committee") elaborated upon the application of Article 19 of the ICCPR as including the right of access to information. They emphasised that "[t]he free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential." The General Comment specifies the duties of governments to proactively put in the public domain Government information of a public interest and to "make every effort to ensure easy, prompt, and effective and practical access to such information."[9] The right of access to information also encompasses the right to access information held about oneself, and to have erroneous information corrected.[10]

The ARTICLE 19 publication *The Public's Right to Know: Principles on Freedom of Information Legislation* reflects international standards on the right of access to information.[11] The UN Special Rapporteur on the Right to Freedom of Opinion and Expression endorsed these Principles in his 2000 report to the UN Human Rights Commission, who then referenced the Principles in its resolution on the right to freedom of expression. The Special Rapporteur pointed to nine areas of concern:

- Public bodies have an obligation to disclose information and every member of the public has a corresponding right to receive information; "information" includes all records held by a public body, regardless of the form in which it is stored;
- Freedom of information implies that public bodies publish and disseminate widely documents of significant public interest, for example, operational information about how the public body functions and the content of any decision or policy affecting the public;
- As a minimum, the law on freedom of information should make provision for public education and the dissemination of information regarding the right to have access to information; the law should also provide for a number of mechanisms to address the problem of a culture of secrecy within Government;
- A refusal to disclose information may not be based on the aim to protect Governments from embarrassment or the exposure of wrongdoing; a complete list of the legitimate aims which may justify non-disclosure should be provided in the law and exceptions should be narrowly drawn so as to avoid including material which does not harm the legitimate interest;
- All public bodies should be required to establish open, accessible internal systems for ensuring the public's right to receive information; the law should provide for strict time limits for the processing of requests for information and require that any refusals be accompanied by substantive written reasons for the refusal(s);
- The cost of gaining access to information held by public bodies should not be so high as to deter potential applicants and negate the intent of the law itself;

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

[8] 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. 42.

[9] HR Committee, General Comment No. 34, CCPR/C/GC/34, at para. 19.

[10] *Ibid.*, at para. 18.

[11] *Supra note* 2

- 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.

Convention Against Corruption

The United Nations Convention Against Corruption ("the UNCAC") was ratified by Sudan on 14 January 2005, but has not yet been ratified by South Sudan.[12] The UNCAC places a clear obligation on Member States to facilitate the right of access to information held by public bodies. Empowering all people with the right of access to information is essential for holding officials to account and exposing wrongdoing where it exists.

Article 10 of the UNCAC notes the importance of taking measures to enhance transparency in public administration, including with regard to its organisation, functioning, and decision-making processes. This includes the duty of proactive information disclosure (Article 10 (c)) and the promotion of public participation (Article 13), including the obligation to ensure that the public has effective access to information and to respect, promote and protect the freedom to seek, receive, publish and disseminate information concerning corruption.

African Union Human Rights Instruments

Article 9 (1) of the African Charter on Human and Peoples' Rights ("the Charter") guarantees to every individual the right to receive information. South Sudan became a Member State of the African Union on 2 July 2011, and is recognised by the African Commission as a state party to the Charter.[13]

The Declaration of Principles on Freedom of Expression in Africa[14] (the Declaration), adopted by the African Commission in 2002, elaborates on Article 9 (1) of the Charter at Principle IV:

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;

[12] The UN Convention against Corruption signature and ratification status website; available at: http://www.unodc.org/unodc/en/treaties/CAC/signatories.html

[13] 219: Resolution on the Situation Between Sudan and South Sudan, African Commission, adopted 2 May 2012; available at: http://www.achpr.org/sessions/51st/resolutions/219/

[14] African Commission on Human and Peoples' Rights, Declaration of Principles on Freedom of Expression in Africa, adopted 23 October 2002; available at: http://www.achpr.org/sessions/32nd/resolutions/62/.

- 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.

3. Everyone has the right to access and update or otherwise correct their personal information, whether it is held by public or by private bodies.

The right of access to information is integrated into a number of African Union treaties, signifying the importance of the right to the realisation of all civil, political, social, economic, and cultural rights. The African Union Special Rapporteur on Freedom of Expression and Access to Information has developed a draft model law on access to information reflecting international standards.[15] Ten African Union member states have now adopted a law or national regulation establishing the right of access to information.[16]

The African Charter on Democracy, Elections and Governance[17] lists among its purposes "the establishment of the necessary conditions to foster citizen participation, transparency, access to information, freedom of the press and accountability in the management of public affairs". The right of access to information is established at Article 19 (2) of the Charter.

The preamble to the African Youth Charter[18] notes that a lack of access to information is a driving factor in the marginalisation of African youth from mainstream society and recognises the potential for youth to be active agents in decision making and governance. Seven provisions recognise the importance of the right to access information, including: Article 4, "freedom of expression"; Article 10, "development"; Article 11, "youth participation"; Article 15, "sustainable livelihoods and youth employment"; Article 16, "health"; Article 20, "youth and culture"; and Article 28, "duties of the African Union Commission".

The African Charter on Values of Public Service and Administration[19] protects the right to access information at Article 6.

The African Union Convention on Preventing and Combating Corruption[20] requires states to adopt legislative and other measures to prevent, detect, punish and eradicate corruption and related offences in the public and private sector.

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[15] Draft Model Law for AU States on Access to Information: http://www.achpr.org/files/instruments/access-information/achpr_instr_draft_model_law_access_to_information_2011_eng.pdf.

[16] South Africa; Liberia; Uganda; Nigeria; Ethiopia; Tunisia; Guinea-Conakry; Niger; Angola, and Zimbabwe.

[17] The African Charter on Democracy, Elections and Governance, entered into force 15 February 2012; available at: http://www.africa-union.org/root/au/Documents/Treaties/text/Charter%20on%20Democracy.pdf.

[18] The African Youth Charter, entered into force on 8 August 2009; available at: http://www.au.int/en/sites/default/files/AFRICAN_YOUTH_CHARTER.pdf.

[19] The African Charter on Values of Public Service and Administration, not yet entered into force; available at: http://www.au.int/en/content/african-charter-values-and-principles-public-service-and-administration.

[20] The AU Convention on Preventing and Combating Corruption, 11 July 2003; available at: http://www.africa-union.org/official_documents/Treaties_%20Conventions_%20Protocols/Convention%20on%20Combating%20Corruption.pdf.

African Platform on Access to Information

In September 2011 the Pan-African Conference on Access to Information adopted the African Platform on Access to Information ("the APAI"),[21] a landmark regional declaration indicating support for right to information principles. It declares that:

> [A]ccess to information is instrumental to fostering access to education and health care, gender equality, children's rights, a clean environment, sustainable development and the fight against corruption.

The APAI also recognizes the "particular obligation" incumbent upon states to facilitate free access to information for disadvantaged minority groups.

London Declaration For Transparency, the Free Flow of Information and Development

The London Declaration for Transparency, the Free Flow of Information and Development ("London Declaration") was adopted in August 2010.[22] It advances four key principles to enhance the effectiveness of measures for achieving the Millennium Development Goals by maximising access to information and civic engagement.

Transitional Constitution of the Republic of South Sudan

The Transitional Constitution of the Republic of South Sudan[23] ("the Constitution") protects the right to freedom of expression and the right of access to information at Article 24 (1) and Article 32:

> Article 24 (1) Every citizen shall have the right to the freedom of expression, reception and dissemination of information, publication, and access to the press without prejudice to public order, safety or morals as prescribed by law.
>
> Article 32 Every citizen has the right of access to official information and records, including electronic records in the possession of any level of government or any organ or agency thereof, except where the release of such information is likely to prejudice public security or the right to privacy of any other person.

Limitations on the right to freedom of information

While the right to freedom of expression and information is a fundamental right, it is not guaranteed in absolute terms. Article 19(3) of the ICCPR permits the right to be restricted in the following respects:

> The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It 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, public health or morals.

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[21] African Platform on Access to Information; available at http://www.article19.org/resources.php/resource/2740/en/pan-africa:-landmark-regional-declaration-paves-way-for-access-to-information.

[22] The London Declaration for Transparency, the Free Flow of Information and Development, 25 August 2010; available at: http://www.article19.org/data/files/medialibrary/1798/London-Declaration.pdf.

[23] The Transitional Constitution of the Republic of South Sudan, 2011, 9 July 2011, available at: http://www.unhcr.org/refworld/docid/4e269a3e2.html.

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:

- The information concerns a legitimate, protected interest listed in the law;
- Disclosure threatens substantial harm to that interest; and
- The harm to the protected interest is greater than the public's interest in having the information.[24]

Each part of the three-part test is further elaborated below.

Legitimate Protected Interest

Freedom of information laws must contain an exhaustive list of all legitimate interests on which a refusal of disclosure can be based. This list should be limited to matters such as law enforcement, the protection of personal information, national security, certain commercial interests, 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 a legitimate interest. Furthermore, exceptions should be based on content, rather than on the type of document sought. In addition, 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.[26]

Substantial Harm

Once it has been established that the information falls within the scope of a listed legitimate aim, it must be established that disclosure of the information would cause substantial harm to that legitimate aim. Therefore this part of the test holds that simply because the information falls within the scope of a listed legitimate interest, does not mean non-disclosure is justified. Otherwise a class exception would be created that would seriously undermine the free flow of information to the public. Instead, the public body must demonstrate that the disclosure of the information would cause substantial harm to the protected interest.[27]

Harm Outweighs Public Interest Benefit in Disclosure

The third part of the test requires the information holder 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 and corrupt practices may concurrently undermine defence interests. However, the disclosure 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.[28]

If applied properly, the three part test would rule out all blanket exclusions and class exceptions as well as any provisions whose real aim may be to protect the government from

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[24] ARTICLE 19's Principles, *supra note* 2, Principle 4.

[25] See for example Articles 38-45 of the Draft African Model Law for African Union Member States.

[26] ARTICLE 19's Principles, *supra note* 2, Principle 4.

[27] *Ibid.*

[28] *Ibid.*

harassment or criticism, to prevent the exposure of wrongdoing, to avoid the concealment of information from the public or to preclude entrenching a particular ideology.

Analysis of the Right to Access Information Bill, 2012

Title, Structure and Purposes

The title of the proposed legislation, "The Right of Access to Information Act, 2012", makes clear the guarantee of access to information as a human right, rather than as a privilege or concession conferred by government. This title should be retained.

The Draft Bill contains forty-eight provisions divided between seven chapters: "preliminary provisions"; "the right of access to information"; "measures to promote transparency'; 'exceptions"; "information commissioner"; "enforcement by the commissioner", and "miscellaneous provisions."

In introducing the Draft Bill to the Committee of Ministers, Minister of Justice John Luk Jok stated that the legislation is intended to "foster a culture of transparency and accountability in public institutions through an open and transparent process that allows access to information. Such a process would allow the people of South Sudan to more fully exercise and protect their rights, make informed democratic choices and hold public institutions and those running them accountable".

Article 3 of the Draft Bill is less thorough in outlining the purposes of the legislation:

> The purpose of this Act is to give effect to the constitutional right of access to information; to promote maximum disclosure of information in the public interest; to establish effective mechanisms to secure that right; and to provide for incidental matters.

ARTICLE 19 welcomes the reference to the principle of "maximum disclosure of information" in the purposes of the Draft Bill. However, the reference to the "public interest" is misplaced, since the right of access to information applies to all information held by public bodies, and not only information that is in the public interest. The public interest is only relevant in two instances, in relation to the duty of proactive disclosure (all information of a public interest should be proactively disclosed by public bodies) and to the "public interest override" which may require a public body to disclose information even where serious harm may be caused to a listed protected interest in the law.

The reference to "incidental matters" is not specific and adds no value to determining the purposes of the legislation. Access to information legislation serves a number of purposes not indicated in Article 3 that the drafters should consider including. These include the promotion of transparency, accountability and effective governance, and the promotion of the swift and inexpensive exercise of the right of access to information. While Article 4 (2) acknowledges the role of the legislation in countering corruption, it would be more coherent for this provision to be included under Article 3.

Recommendations:

- The reference to "public interest" should be removed from Article 3.
- "Incidental matters" in Article 3 should be substituted with informative purposes that add substance to the provision.

Precedence of disclosure

Article 2 of the Draft Bill repeals provisions of existing legislation that are governed by the Draft Bill. However, Article 8 (1) of the Draft Bill provides that the Act applies "without prejudice" to any other legislation that prohibits or restricts the disclosure of information by a Public or Private body.

Article 8 (1) severely limits the scope of the Draft Bill. Principle 8 of the ARTICLE 19 Principles, titled "disclosure takes precedence", provides that laws inconsistent with the principle of maximum disclosure should be amended or repealed.[29] In particular, other laws should not be permitted to extend the regime of exemptions contained in law providing the right of access to information. For example, national security or official secrets laws should not permit officials to withhold information that they would otherwise be required to disclose under access to information legislation.

Recommendations:

- Article 8 (1) of the Draft Bill should be deleted and replaced with a provision asserting the principle that "disclosure takes precedence."

Right of access to information

Chapter II of the Draft Bill concerns "the right of access to information", and contains a total of nine provisions.

Article 6 contains a generic overview of the right of access to information, with Article 7 further elaborating on the substance of the right. The titles for these two provisions, "right to information" and "right of access to information", are overlapping and do not adequately represent their distinct purposes.

ARTICLE 19 recommends that the provisions be re-titled "right of access to information" and "requests for access to information" respectively.[30]

Article 6 guarantees the right of access to information in the following terms:

> 1. Every citizen shall have the right to freedom of information, including the right to access information and Records held by Public or Private Bodies, including electronic records in the possession of any level of government in South Sudan or any organ or agency thereof, subject only to the provisions of this Act, except where the release of such information is likely to cause serious prejudice to public security or the right to privacy of any person, in accordance with exceptions provided for in this Act.
> 2. No limitations may be put on the use of information obtained under this Act except in accordance with the law.

Article 6 raises a number of issues. While several aspects of the provision reflect international standards, the provision would benefit from substantial revision to ensure clarity and its consistency with other provisions in the Draft Bill. ARTICLE 19 would point the attention of the drafters to the following points:

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[29] ARTICLE 19 Principles, *supra note* 2, Principle 8.

[30] For an example of provisions making a clear distinction in this respect, see the African Union Model Law at Article 10 "right of access" and Article 11 "requests for access."

- **The right of access to information should be guaranteed in clear and accessible terms**. Although Article 6 (1) of the Draft Bill contains many elements important to the right of access to information, the presentation lacks clarity and undermines the accessibility of the Draft Bill. Article 6 (1) should be broken down into subsections that clearly distinguish the constitutive elements of the right and present them accurately.[31] Furthermore, it is unnecessary to guarantee both the right to "freedom of information" and the right of "access to information", since both are essentially the same right. For the purposes of the Draft Bill, the focus should be placed on the right of "access to information".

- **The right of access to information should be guaranteed to all people**. Article 6 only guarantees the right to "citizens", a legal classification that excludes stateless persons, foreign persons, and legal persons such as corporations. This is contradicted in Article 7, which refers to the right of "any person" to make information requests. All references to "citizen" should be substituted with "any person".

- **"Information" should be defined broadly**. "Information" is not among the list of defined terms offered in Article 5 of the Draft Bill. "Record" is defined in Article 5 as "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." This list complies with international standards, although it should also include records that have been classified, subjecting them to the same test as all other records.[32] Use of the terms "information" and "records" separately may create confusion, especially since "information" is not defined and is central to the articulation of the right. References to "record" should therefore be substituted with "information".

- **Exemptions to the right of access to information should reflect international standards**. Article 6 of the Draft Bill specifies that the right of access to information may be limited to protect "public security" and "the right to privacy". This does not represent the full list of exemptions contained in Chapter IV of the Draft Bill, or the variety of legitimate exceptions to the right of access to information under international law.[33] Article 6 also fails to make clear that even where a legitimate exemption is engaged, the public interest in disclosure may still necessitate disclosure of the information.

- **The right of access to information applies to private bodies performing public functions**. ARTICLE 19 welcomes the application of the right of access to information to all public bodies in Article 6. In particular, we commend the functional definition given to "public bodies" in Article 5, as including bodies: established by the Constitution; established by law; which forms part of any level or branch of the government; which is owned, controlled or substantially financed by funds provided by the Government or a State government; or is carrying out a statutory or public function. The body in question will only be considered "public" to the extent of their

[31] *Ibid*. Also see Article 2 of the African Union Model Law, "Principles".

[32] ARTICLE 19 Principles, *Supra note 2,* at Principle 1.

[33] For an example of a schedule of exemptions in conformity with international standards, see: Part IV of the African Union Model Law, "Exemptions".

public function. This definition of "public body" complies with international standards and should be retained.[34]

- **The application of the right of access to information only applies to a limited class of private bodies**. Article 6 (1) provides that the right of access to information applies to all information held by private bodies. ARTICLE 19 welcomes the application of the right of access to information to private bodies, but notes that only a specific subset of private bodies should be included within the scope of access to information legislation. As Article 7 of the Draft Bill states, private bodies should only be required to disclose information if it is necessary for the exercise or protection of any right. Article 6 should be revised to properly reflect international standards and the provisions of Article 7.

- **No limitations may be placed on the use of information obtained under the Act**. ARTICLE 19 welcomes Article 6 (2) of the Draft Bill, since it would be contrary to international standards for conditions to be placed on how information may be used following disclosure. This provision would be further strengthened if it made clear that no person can be requested to provide a justification or reason for requesting any information.[35]

Recommendations:

- Article 6 of the Draft Bill should be titled "the right of access to information" and Article 7 titled "requests for access to information."
- The reference to "freedom of information" in Article 6 should be removed and the focus instead placed on the right of "access to information".
- The constitutive parts of Article 6 should be broken down into subsections, so that the right is guaranteed in clear and accessible terms.
- The right of access to information should be guaranteed to all people, not just citizens of South Sudan.
- "Information" should be added to the terms defined in Article 2, and be defined broadly. It should substitute the use of the term "record."
- References to "public security" and "privacy" should be removed. Instead the right should be subject to the exceptions outlined in Chapter IV of the law and the public interest override.
- Article 6 (1) should not assert that the right of access to information applies to all private bodies, but only those who hold information necessary for the exercise or protection of any right.
- Article 6 (2) should also include the guarantee that no individual will have to accompany their information request with reasons or justification.

Requests for access to information

Article 7 of the Draft Bill elaborates upon Article 6 and provides greater detail on what the right of access to information entails in terms of requests for access to information. It provides that:

[34] See: Article 1 of the African Union Model Law, "Definitions".

[35] See: Article 11.4 of the African Union Model Law.

1. Any person making a request for information to a Public Body shall be entitled, subject to the provisions of Chapter II and IV of this Act:
    a. to be informed whether or not the Public Body holds a Record containing that information or from which that information may be derived; and,
    b. if the Public Body holds such a Record, to have that information communicated to him or her
2. Any person making a request for information to a Private Body which holds information necessary for the exercise or protection of any right shall, subject to the relevant provisions of Chapters II and IV of this Act, be entitled to have that information communicated to him or her.

Chapter II of the Draft Bill includes provisions that: prescribe the specificity and format of information requests (Article 9(1)); require that information requests to private parties cite the right the information is necessary for the exercise or protection of and why (Article 9(4)), and fees payable (Article 12). Chapter IV concerns exemptions to the right of access to information. These provisions are dealt with below.

Article 7 of the Draft Bill largely conforms with international standards. Again, ARTICLE 19 welcomes the broad definition given to "public body" in Article 5, and the application of the right of access to information to private bodies where necessary to exercise or protect a right.

The format of requests and the duty to assist requesters

Article 9 of the Draft Bill is titled "Requests for Information" and contains seven subsections.[36] The provisions concern the format and specificity required of information requests, and duties incumbent on individuals responding to those requests to assist requesters. ARTICLE 19 welcomes the attention paid to these issues, but suggests that the clarity of the Draft Bill would be enhanced if these two functions were dealt with in separate provisions.[37]

Article 9(1) requires that information requests be in sufficient detail to enable an official to identify, with reasonable effort, whether or not the body holds a record with that information.

Article 9(1) also requires information requests to be in writing, only allowing oral requests under an exemption in Article 9(3) where the requester is illiterate, has a disability, or a lack of knowledge of the relevant language. International standards require information requests to be accepted whether they are in writing or submitted orally. In the case of oral requests, the recipient must reduce the oral request to writing and provide a copy thereof to the requester.[38] The Draft Bill currently complies with this requirement, but only for those making oral requests under the conditions specified in Article 9(3). These conditions should be removed from the provisions.

Article 9(2) requires assistance to be rendered to information requesters whose request does not meet the formal requirements of the legislation. Placing this duty on recipients of information requests complies with international standards.[39] This provision should be

[36] To see the full text of Article 9, please contact ARTICLE 19 for a copy of the Draft Bill.

[37] African Union Model Law, at Article 11 and Article 12.

[38] African Union Model Law, at Article 11 (1) and (2).

[39] African Union Model Law, at Article 12.

retained.

Where information is requested from a private party for the purpose of exercising or protecting a right, Article 9(4) requires that the information request specify the right that forms the basis of the claim, and how the information is necessary for the exercise or protection of that right. This requirement conforms to international standards.

Article 9 (7) also requires any public or private body that receives a request for information to issue to the person making the request a receipt documenting the request. This provision is also in line with international standards.

Recommendations:

- Article 9 should be divided between the duties on information requesters and duties on the recipients of information requests.
- Article 9 should allow information requests to be made in writing or orally. The right to make information requests orally should not be limited to the circumstances listed in Article 9(3).

Time limits on responses to requests

Article 10 of the Draft Bill provides that information requests will be responded to "as soon as possible" and no later than after twenty working days.

Article 11 of the Draft Bill specifies what is required in a response. In relation to public bodies, the response must include: (i) the applicable fee for the information requested to be communicated and the form in which the information will be communicated (ii) sufficient reasons for any rejection, subject only to the provisions of Chapter IV (iii) indicate whether or not the public body holds that information, the fact of rejection and adequate reasons for it and (iv) details of any applicable right of appeal. In relation to private bodies the response must include (i) the applicable fee and (ii) adequate reasons for any rejection. Where the decision to disclose the requested information is affirmative, it must be furnished immediately subject to payment of fees under Article 12.

ARTICLE 19 welcomes the inclusion of a deadline for responding to information requests, and the requirements that the recipient of the request must fulfil within this deadline.

The time limit provided in Article 10 (1) may be extended by up to forty working days "to the extent strictly necessary" where the request is for a large number of records, requires searching through a large number of records, or where compliance with Article 10 (1) would unreasonably interfere with the activities of the body. Notice of the extension must be communicated in writing to the information requester. International standards permit extensions in these circumstances.

A much shorter deadline of forty-eight hours applies to requests received where the information request is necessary to safeguard the "life or liberty" of the person making the request (Article 10(2)). Again, it is insufficient to require a "response" within this time, access to the information must also be granted. Moreover, Article 10(2) should apply to information necessary to safeguard the life or liberty of any person, not only the information requester.

Where a public or private body fails to respond to an information request, the request will be deemed as a rejected request under Article 10 (4). Complaints may be submitted to the Information Commissioner under Chapter VI. This provision complies with international standards.

Recommendations

- The expedited process under Article 10 (2) must be available in respect of any information request where the life or liberty of an individual is at stake. Where access to information is granted, it should also be made available within the specified time limit.

Payment of Fees

Article 12 of the Draft Bill concerns "fees payable." Article 12(1) allows the issuance of requested information to be made conditional on the payment of "a reasonable fee which shall not exceed the cost of searching for, preparing and communicating the information."

Article 12(1) does not comply with international standards, which require that fees relate only to reasonable reproduction costs incurred in providing the requested information.[40] This fee should not include the cost of searching for the information requested, the time spent examining and redacting the relevant information, or costs related to transcribing the information. Article 12(1) should be amended to reflect these standards.

The Draft Bill provides at Article 12(2) that the fee shall not be payable in respect of (i) requests for personal information about the person making the request, and (ii) where the request is in the public interest. Article 12(4) provides that the fee will not be collected if it the cost of collection exceeds the cost of the fee. It would strengthen the provision if there were a presumption in favour of the request being in the public interest if the applicant's purpose relates to publication.

In addition, the Draft Bill ought to provide that the reasonable reproduction fee should not be applied where the public or private body has failed to comply with the requirements of timeliness and communication under Article 10, or where a person suffering financial hardship has made the information request.

Article 12(3) provides that the Information Commissioner, in consultation with the Minister of Information and the Ministry of Finance and Economic Planning, shall issue regulations providing for (a) the manner in which fees are to be calculated, (b) waiver or exemption of fees in prescribed cases, and (c) that any fee cannot exceed a certain maximum amount.

When setting the maximum fee, the Information Commissioner should bear in mind that any fee should not be so high as to deter individuals from requesting information, given the rationale for the law being to promote open access to information.[41]

Recommendations:

- Article 12(1) must be amended to provide that only reasonable reproduction costs may be charged for, and that the information requester must not bear the costs of

[40] African Union Draft Model Law, Article 21.

[41] ARTICLE 19 Principles, Principle 6.

searching for the information requested, the time spent examining and redacting the relevant information, or costs related to transcribing the information.

- Article 12 should provide that no fee will be issued where: (i) the public or private body has failed to comply with the requirements of timeliness and communication under Article 10, or (ii) a person suffering financial hardship has made the information request.
- The Information Commissioner should set a maximum fee amount at a level that would prevent individuals from being deterred from making information requests.

Means of Communicating Information

Article 13 provides for the means of communicating requested information. Article 13(1) obliges the recipient of the information request to provide the information in the preferred format of the requester, subject to subsections (2), (3), and (4).

Subsection 2 gives a list of formats that information may be communicated in, including: a true copy in permanent form; an opportunity to inspect the record using equipment normally available to the public or private body; an opportunity to copy the record using the requester's own equipment; a written transcript of the words contained in a sound or visual form; a transcript of the content of a record, in print, sound or visual form; or, a transcript of the record from shorthand or other codified form. These modes of communicating the information all comply with international standards. Added to this list should be the option of having the information communicated in the electronic form in which it is stored.

The preference of the information requester may be overridden where providing the information in the requested form would (i) unreasonably interfere with the effective operation of that body; or, (ii) be detrimental to the preservation of the record (Article 13(3)). This complies with international standards.

Article 13(4) provides that where the information is available in a number of languages, it shall be provided according to the preferred language of the information requester. This provision complies with international standards.

Recommendations:

- Article 13(2) should also provide for the electronic transmission of requested information.

Unavailable information and transfers of requests to other bodies

Article 14 of the Draft Bill requires that where a public body is in receipt of an information request but does not itself hold that information, it shall either refer the request to a public body that does hold that information and inform the person who made the request, or inform the information requester of which public body holds the information. The option most likely to ensure rapid access to the information must be taken. Where a private body is unable to provide the information, it must simply communicate that fact to the information requester. These provisions comply with international standards.

Schedule of exceptions and public interest override

Chapter IV of the Draft Bill contains a comprehensive breakdown of the schedule of exceptions to the right of access to information. ARTICLE 19 welcomes the inclusion of a public interest override and a clause on severability in this Chapter.

The first provision to Chapter IV contains the "public interest override", at Article 22:

> Notwithstanding the provisions of this Chapter, a Public or Private Body may not refuse to indicate whether or not it holds a record, or refuse to communicate information, unless in disclosure the harm to the protected public interest outweighs the public interest.

ARTICLE 19 recommends that the provision be titled "public interest override" rather than "public interest", as this fully captures the function of Article 22. This protection would be enhanced if it made it clear that where the public interest outweighs the harm to the protected public interest, the information must be released.

Article 22 is also silent in respect of the burden of proof in relation to the public interest override. It should be clear that the public or private body bears the burden of showing that the harm to the protected interest outweighs the public interest in disclosure.[42]

Article 24, titled "severability", allows documents that would otherwise be withheld under Chapter IV to be disclosed with the sensitive content severed or redacted from the disclosure. This provision conforms to international standards on the right of access to information.

The Draft Bill contains nine grounds on which a public body may refuse a request to disclose information. These are: personal information (Article 25); legal privilege (Article 26); commercial and confidential information (Article 27); health and safety (Article 28); law enforcement Article 29); defence and security (Article 30); public economic interest (Article 31); policy-making and operations of public bodies (Article 32), and vexatious, repetitive or unreasonable requests (Article 33). Private parties may rely on any of these grounds, except for those contained in Article 29, Article 31, and Article 32.

ARTICLE 19 is concerned that these provisions do not properly outline the "substantial harm test" which must be considered by any information officer assessing whether or not to disclose requested information. This test is summarised in the ARTICLE 19 Principles at Principle 4

> It is not sufficient that information simply fall within the scope of a legitimate aim listed in the law. The public body must also show that the disclosure of the information would cause substantial harm to that legitimate aim. In some cases, disclosure may benefit as well as harm the aim. For example, the exposure of corruption in the military may at first sight appear to weaken national defence but actually, over time, help to eliminate the corruption and strengthen the armed forces. For non-disclosure to be legitimate in such cases, the net effect of disclosure must be to cause substantial harm to the aim.

A number of provisions in the Draft Bill do not require a showing of substantial harm, but instead only require a showing of the "likeliness" of "prejudice" being caused to the

[42] Article 51 of the African Union Draft Model Law.

protected interest.[43] The test for each provision should be based on the showing of actual and substantial harm.

A number of provisions in the Draft Bill further allow a public or private body to refuse to acknowledge whether or not they hold information, on the same basis of "likeliness" of "prejudice" to that interest.[44] Refusing to acknowledge whether or not a document is in a public or private body's possession on the basis of "likeliness" and mere "prejudice" is incompatible with international standards on the right of access to information. A public or private body should only refuse to disclose whether or not they have the document in question where doing so would fundamentally undermine the ability of that party to protect that interest.

In a number of cases, the grounds for refusing to disclose information have no legitimate basis in international law:

- In Article 29, on "law enforcement", this includes protecting the "operation of immigration controls" and the "assessment by a Public Body of whether civil or criminal proceedings, or regulatory action pursuant to any enactment, would be justified."

- In Article 30, on "Defence and Security", it is concerning that the terms "national defence" and "security" are not defined. ARTICLE 19 notes that no clear definition of what constitutes 'national security' has emerged from international jurisprudence. The Human Rights Committee has at least made it clear that suppression of democratic discourse and human rights cannot be justified on the grounds of national security. The U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities has attempted to fill this analytical void in its *Siracusa Principles*.[45] Principle B(iv) defines when a restriction can be said to serve national security:

  > National security may be invoked to justify measures limiting certain rights only when they are taken to protect the existence of the nation or its territorial integrity or political independence against force or threat of force.
  >
  > National security cannot be invoked as a reason for imposing limitations to prevent merely local or relatively isolated threats to law and order.
  >
  > National security cannot be used as a pretext for imposing vague or arbitrary limitations and may only be invoked when there exists adequate safeguards and effective remedies against abuse.

  According to this definition, restrictions on the basis of national security are only justifiable if they address a threat to the "existence of the nation or its territorial integrity or political independence," as distinct from localised violence and ordinary criminal activities.[46]

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[43] See: Article 27(b)(ii) and (c); Article 29; Article 30; Article 31(1) and (2), Article 32(1).

[44] See: Article 25(1); Article 26; Article 28; Article 30; Article 31, and Article 32.

[45] Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, UN Doc E/CN.4/1984/4 (1984); available at http://www.unhcr.org/refworld/docid/4672bc122.html.

[46] See also the Johannesburg Principles on National Security, Freedom of Expression and Access to Information, at Principle 2. Alternatively, see Article 41(2) of the African Union Model Law.

- In Article 31(3), on "public economic interest," it is very concerning that the Draft Bill permits public bodies to refuse to disclose the results of "any product or environmental testing" where that information "reveals a serious public safety or environmental risk". This is not legitimate and must be removed.

- In Article 32, on "Policy-making and Operations of Public Bodies", the purpose of any refusal to disclose information must be premised on the basis of substantial harm to the deliberative process of the public body. Article 32(1)(b) and (d) should be therefore be deleted as they do not relate to the protection of the deliberative process.

- In Article 33(1), on "Vexatious, Repetitive or Unreasonable requests", the reference to "unreasonable" should be removed. A heightened standard of "manifestly vexatious or repetitive" should also be adopted.

- Article 33(2) of the Draft Bill allows information to be withheld if disclosure would "divert the resources" of the public or private body. This is not a legitimate basis for refusing the disclosure of information and should be deleted.

Recommendations:

- Article 22 should be titled "public interest override" and make it clear that where the public interest in disclosure outweighs the harm caused to the protected interest, the information must be disclosed. The body asserting the ground for refusing disclosure bears the burden of proof in establishing that the public interest does not require disclosure.
- The legitimate grounds for refusing disclosure may only be invoked where disclosure of the information poses an actual risk of substantial harm to that interest, subject to the public interest override.
- A public or private body should only be able to refuse to indicate whether or not it holds a record if to do so would fundamentally undermine the ability of that body to protect the specific interest.
- It should be clarified that "national defence" in the context of the Draft Bill should be understood as the protection of the state's existence or its territorial integrity against the use or threat of force or the state's capacity to respond to the use or threat of force.
- Article 31(3) of the Draft Bill should be deleted.
- Article 32(1)(b) and (d) of the Draft Bill should be deleted.
- The term "unreasonable" should be removed from the title to Article 33. A heightened standard of "manifestly vexatious or repetitive" should also be adopted.
- Article 33(2) of the Draft Bill should be deleted.

Public information officers

Every public body is required to establish an "information office" with a designated "information officer" under Article 16(1) of the Draft Bill. Members of the public should be given "easy access" to information concerning the Information Officer, including his or her name, function, and contact details.

The Information Officer has the obligation under Article 16(2) to (i) promote within the Public Body best practices in relation to record maintenance, achieving and disposal and (ii)

serve as a central contact for receiving information requests and assisting individuals where necessary in making requests.

In relation to maintaining public records, Article 19 requires all public bodies to "maintain its records in a manner which facilitates the right to information", to "ensure that adequate procedures are in place for the correction of personal information" and for the Information Commissioner to consult with interested parties and update a Code of Practice relating to the keeping, management, disposal and transfer of records.

Public bodies are also required to train their officials on the right of access to information and the effective implementation of the Act (Article 20).

These provisions broadly conform with international standards on access to information.

Correction of personal information

No provisions in the Draft Bill guarantee the right for individuals to access information held by public or private bodies about themselves. Similarly, no provision guarantees the right of individuals to correct such information where it is inaccurate.

It is recalled that the African Declaration provides at Principle IV (3) that:

> Everyone has the right to access and update or otherwise correct their personal information, whether it is held by public or by private bodies.

The scope of this right is distinct from the general right of access to information held by public or private bodies, because the request concerns information personal to the information requester. Furthermore, information requests of this nature engage the right to privacy and data protection, thus additional considerations must be borne in mind when dealing with such requests.

Firstly, the right to access information about oneself, and to correct that information where it is inaccurate, may be asserted against any public or private body. It should not be required to show that the public body falls within the definition of "public body", or that the information is required from the private body for the exercise or protection of a right.

Secondly, fewer exemptions to the principle of access to information and correction should be applicable.

If the Draft Bill is amended to provide for the right to access information about oneself, and the right to correct information where it is inaccurate, the scope of that provision should reflect these principles. Alternatively, this right could be incorporated to a law on data protection, and not included in the Draft Bill.

Recommendations:

- The right of all individuals to access information held by public and private bodies about themselves should be guaranteed in the law of South Sudan, either in the Draft Bill or legislation on data protection.
- The right of all individuals to correct information held by public and private bodies about them which is inaccurate or false should be guaranteed, either in the Draft Bill or legislation on data protection.

Measures to promote open government

Article 17 of the Draft Bill concerns the "duty to publish information". It requires all public bodies to publish and disseminate key information in the public interest. This must be in an accessible form, and done at least annually. Article 18 requires the Information Commissioner to issue regulations on minimum standards and best practices regarding proactive disclosure under Article 17, including enforcing those standards and best practices.

At Article 17 he Draft Bill advances a non-exhaustive eight-point list of information types that should be disclosed proactively by all public bodies. This includes: information about the public body and its functions and duties; details on services the public body provides directly to the public; information in respect of complaints mechanisms; information on its records-keeping system and the types and forms of information it holds; a description of the powers and duties of its senior officers and decision-making procedures; any regulations, policies, rules, guides or manuals regarding the discharge of duties; the content of all decisions or policies adopted which affect the public including reasons for them and any authoritative interpretation of them and important background materials, and any mechanism or procedure for the public making representations or otherwise influencing the formulation of police or exercise of powers by the public body.

ARTICLE 19 welcomes this broad list of proactive disclosure obligations. However, omitted from the list are (i) contracts entered into by that public body over a certain value and (ii) the budget and expenditure plans for the current financial year and any previous financial year. Public bodies should be required to disclose information regarding how it spends public money in the public interest.

Recommendations:

- Article 17 of the Draft Bill should require that public bodies proactively disclose contracts they have entered into above a specified sum, and the budget and expenditure plans for the public body for the current and previous years.

Complaints and appeal procedure

Chapter VI of the Draft Bill concerns enforcement and appeal procedures.

There is no provision in the Draft Bill for internal review of decisions of information officers where the information requester does not believe they have complied with the requirements of the Act. However, Article 4(b) provides that complaints to the Commission may be rejected where the applicant has failed to use any effective or timely internal appeal mechanisms.

ARTICLE 19 recommends that the Draft Bill prescribe the nature of internal review mechanisms and tasks informational officers with overseeing such complaints. It should not be left to individual public bodies to design these review mechanisms. Internal review mechanisms are often the most efficient and clear tools for enforcement.

Complaints to the Commission and adjudication

Articles 41 – 44 establish the procedure for complaints to the Information Commission.

Article 41 provides the right of any person who has made an information request to apply to the Commission for a decision that a Public or Private body has failed to comply with an obligation under the Act.

A list of seven potential claims is outlined, including: (a) refusing to indicate whether or not it holds a Record, or to communicate information, contrary to Article 7; (b) failing to respond to a request for information within the time limits established in Article 10; (c) failing to provide a notice in writing of its response to a request for information, in accordance Article 11; (d) failing to communicate information forthwith, contrary to subsection 11(2); (e) charging an excessive fee, contrary to Article 12; (f) failing to communicate information in the form requested, contrary to Article 13; or (g) wrongfully relying on one of the exceptions in Chapter IV.

Article 42 establishes that the Commission will decide on the complaint as soon as possible and no later than after 30 days, after giving both the complainant and the relevant public body or private body the opportunity to respond in writing.

The Commissioner is given the power to summarily reject frivolous, vexatious or clearly unwarranted applications. Applicants may also be rejected if they have failed to use effective and timely internal appeal mechanisms.

Article 42(4) of the Draft Bill empowers the Information Commissioner to: (a) reject the application (b) require the public of private body to take such steps as may be necessary to bring it into compliance with its obligations under the Act (c) require the public body to compensate the complainant for any loss or other detriment suffered and (d) in cases of egregious or wilful failure to comply with the Act, impose a fine on the public body.

Regardless of whether a complaint has been submitted but only following the opportunity of a public body to respond in writing, Article 43 allows the Commissioner to decide that a public body has failed to comply with the requirements to promote transparency under Chapter III. A number of enforcement mechanisms are available to the Commissioner under Article 43(2), including the power to issue fines.

Extensive investigative powers are also granted to the Commissioner under Article 44.

ARTICLE 19 considers these provisions to comply with international standards on access to information.

Appeals against the Commissioner's decisions and orders

Article 45 of the Draft Bill concerns appeals of the decision of the Information Commission to the "competent Court". Article 45(2) provides that the burden of proof shall be on the public or private body to show that it acted in compliance with Chapter II.

Following 45 days from the decision of the Commission, the Commission may certify in writing to the Court any failure to comply with its decision. The Court shall consider such a failure under the rule relating to contempt of court.

ARTICLE 19 considers these provisions to comply with international standards on access to information.

Recommendations:

- The Draft Bill should specify a standardised procedure internal to public bodies for reviewing disclosure decisions following a complaint.

Appointment of the Information Ccommissioner

Chapter V of the Draft Bill concerns the creation of the office of the Information Commissioner.

The appointment process for the office of Information Commissioner is set out in Article 35(1) and (2). The Information Commissioner will be appointed by the President upon nomination by the Minister (Article 35(1)) and subject to a simple majority vote of the Assembly (Article 35(2)). The vote of the Assembly will have regard to the "merit, integrity, competence, and moral standing" of the candidate.

The appointments process is initiated by the Minister of Information and Broadcasting, and "involves public participation" (Article 35(1)(a). Transparency and openness are specified as principles defining the process, which must include public Parliamentary hearings (Article 35(1)(b)), and an opportunity for the public to make representations concerning shortlisted candidates (Article 35(1)(c)).

ARTICLE 19 commends the provisions ensuring transparency, openness and public participation. These ensure the selection is meritocratic and raises awareness of the right of access to information among the general public. This would be enhanced if provisions were made for nominations to the post to be made by the public and civil society.

It is positive that the President plays only a limited role in the appointments process and does not have the power to nominate candidates or select the shortlist. However, the Minister of Information and Broadcasting plays a central role that may undermine the perceived independence of the appointed candidate.

ARTICLE 19 recommends that, instead, the Information Commissioner should be appointed by the President only after a nomination of either a qualified (two-thirds) majority of the Assembly or by a cross-party Parliamentary committee, and should not involve the President or the Ministry.[47] The President should only be given a symbolic power of appointment. We also believe that the civil society and the public at large should be allowed to participate in the nomination process and be able to nominate candidates. The final shortlist of the candidates should be made public.[48]

Article 35(3) of the Draft Bill places conditions of eligibility for the post of Information Commissioner. He or she must be: a South Sudanese citizen; not hold a position in a political party; not hold an elected position at any level of government; not be declared bankrupt or insolvent, or have been convicted of a crime involving violence, dishonesty or moral turpitude for which they not been pardoned. To further safeguard the position of Informational Commissioner, ARTICLE 19 recommends that at the time of appointment, he or she should not be a member of a political party or hold any position in government, elected or otherwise.

[47] ARTICLE 19 Principles, at Principle 6. See also ARTICLE 19 Model Law, Article 34 para 1.

[48] *Ibid.,* ARTICLE 19 Model Law.

The Information Commissioner will serve a term of three years, and may be reappointed for one additional term (Article 35(5)). This provision complies with international standards.

The functions of the Information Commissioner are set out in Article 39. They include: to (i) monitor and report on the compliance by Public Bodies with their obligations under this Act; (ii) make recommendations for reform; (iii) co-operate with or undertake training activities; (iv) refer cases which reasonably disclose evidence of criminal offences under this Act to the appropriate authorities, and (v) publicise the requirements of this Act and the rights of individuals under it. These functions are not exhaustive, but are "in addition" to other functions prescribed in the Draft Bill. Functions related to enforcement of the Draft Bill are set out in Chapter VI.

Recommendations:

- The Information Commissioner shall be formally appointed by the President only after nomination by a qualified (a two-thirds majority) vote of the Assembly and after an open and transparent process with the participation of civil society and the public and after a publication o shortlisted candidates.
- The Information Commissioner, at the time of appointment, should not be a member of a political party or hold any position in government, elected or otherwise.

Removal of the Information Commissioner

The President has the power, under Article 35(6), to remove the Information Commissioner on the recommendation of the Minister for Information and Broadcasting. No other requirement, other than the Ministerial recommendation, is required to enable the Informational Commissioner to be removed. This decision is not subject to appeal.

Article 35(6) grossly undermines the position of the Information Commissioner and the prospect of the Draft Bill functioning effectively.

The Information Commissioner must only be removed before the expiry of their term for serious violations of the constitution, gross misconduct, physical or mental incapacity to perform the functions of office, incompetence or bankruptcy. The removal decision must be made only by a vote of the Assembly fully apprised of the alleged causes for removal. Consideration should be given to establishing a tribunal to adjudicate any facts in contention, and the decision of any tribunal should be subject to appeal.

Recommendations:

- Article 35(6) on the removal of the Information Commissioner must be deleted.
- Removal of the Information Commissioner from office should only be premised on serious violations of the constitution, gross misconduct, physical or mental incapacity to perform the functions of office, incompetence or bankruptcy.
- The Assembly must initiate and oversee any removal process. A decision to establish an investigative tribunal should follow a vote of the Assembly. Appeal to the courts must be available following a tribunal decision.
- The President should have no role whatsoever in the removal of Information Commissioners.

Independence of the Information Commissioner

Article 36(1) guarantees the "independence" of the Information Commissioner. It secures the office "operational and administrative autonomy" "free from control or direction of any other person or entity or any of their agencies except as specifically provided by law."

ARTICLE 19 welcomes this guarantee for independence, but notes that the process for appointing and removing the Information Commissioner in Article 35 directly undermines and flatly contradicts this assurance.

Moreover, the Draft Bill contains no provisions detailing how the budget for Information Commissioner's office will be established and the circumstances in which revisions will be permissible. The Draft Bill should guarantee the budget for the Information Commissioner's office through a process insulated from undue political influence; for example, the budget and revisions thereto could be established and approved by Parliament.

Recommendations:

- The Draft Bill should guarantee that the budget for Information Commissioner's office will be insulated from undue political influence.

Public accountability of Information Officers and the Information Commission

The Information Officer for each public body is tasked with preparing and submitting annual reports to the Information Commissioner showing his or her office's compliance with the legislation (Article 21). The annual reports will include information about: the number of information requests received, granted in full or in part and rejected; how often and which sections of the Act were relied upon to reject, in part or in full, requests for information; appeals from rejections to communicate information; fees charged for requests to information; its activities pursuant to sections 18 and 19 of the Act, and; its actions pursuant to section 20 of the Act.

The Information Commissioner is required by Article 40 to submit annual reports on the compliance by public bodies with the Act to the assembly, as well as the activities of his office and the audited accounts of the office for that year. Other reports may be submitted to the Office of the President or the Minister "as he or she deems appropriate or as may be required".

ARTICLE 19 notes that Article 21 and Article 40 secure public accountability of Information Officers and the Information Commissioner. However, it would also be helpful if information officers collected information regarding the average number of days taken to comply with information requests and the number of staff hours and expense of complying with requests. Accountability would be enhanced if the Draft Bill gave powers to the Information Commission to impose penalties on public and relevant private bodies who fail to comply with the annual reporting obligation.

Recommendations:

- Information officers should be required to collect information on the average number of days taken to comply with information requests, the number of staff hours spent dealing with requests and information in respect of the expense of complying with information requests.

- The Information Commissioner should be give powers to promote accountability by imposing penalties on public and relevant private bodies who fail to comply with the annual reporting obligation.

Public Education

Article 15 of the Draft Bill requires that the Commissioner shall, "as soon as practicable", compile a clear and simple guide containing practical information to facilitate the effective exercise of rights under the legislation. The guide should be disseminated widely "in an accessible form", and be updated regularly as necessary.

ARTICLE 19 commends any measures that are aimed at maximising the accessibility of the legislation and the exercise of the rights contained therein. However, the Draft Bill should establish an exact time frame for the issuance of the guide so that it is issued "as soon as possible", rather than "as soon as practicable". The guide should also be available in multiple languages, and in formats that make it easily accessible to illiterate people and people with disabilities.

ARTICLE 19 recalls that international standards of the right to information provide that at the minimum, freedom of information legislation should make provision for public education and the dissemination of information regarding the right to access information, the scope of information which is available and the manner in which such rights may be exercised. We consider that the duty of the Information Commission to inform and educate the public as to their rights under the freedom of information act is in line with international standards. Information commissions in other countries have similar duties. However, the Information Commission will be unable to perform this duty unless it has adequate funding; therefore, we recommend that the law provide for adequate funding of the commission for training, education and information campaigns.

Recommendations:

- The Draft Bill should provide that adequate funding is granted to the Information Commission in view of its duties to provide education and information promoting the goals of the legislation.

Protection of whistleblowers

Article 46 of the Draft Bill protects all people from legal, administrative or employment-related sanctions for making "bona fide disclosures". A "bona fide disclosure" is a disclosure of information on wrongdoing, or a disclosure of information that would disclose a threat to health, safety or the environment. The disclosure must be made in good faith, be substantially true, and disclosed as evidence of wrongdoing or a serious threat to health, safety, or the environment.

"Wrongdoing" is defined in Article 46(2) as the commission of a criminal offence, failure to comply with a legal obligation, a miscarriage of justice, corruption or dishonesty, or serious maladministration regarding a public body.

Article 46(3) of the Draft Bill provides specific protection for employees who "blow the whistle" in good faith in the exercise, performance or purported performance of any power or

duty conferred under this Act. This provision unnecessarily repeats the term "reasonably and in good faith" at its end.

ARTICLE 19 welcomes this protection for whistleblowers and finds that it largely conforms with international standards. However, there should be no requirement that the disclosed information be "substantially true" if the person released the information in good faith.

Recommendations:

- The requirement that information disclosed under Article 46(1) be "substantially true" should be removed.
- Article 46(3) should end with the sentence "conferred under this Act." The last clause "as long as they acted reasonably and in good faith" should be deleted.

Offences and Penalties

Article 47 of the Draft Bill creates four criminal offences. These include: (i) to obstruct access to any record contrary to Chapter II of the Act; (ii) to obstruct the performance by a public body of a duty under Chapter III of the Act; (iii) to interfere with the work of the Commission, and (iv) to destroy records without lawful authority.

Available sanctions include imprisonment of up to two years, a fine, or both. ARTICLE 19 considers Article 47 to be in line with international standards.