



## COMMENT

# On the Decree on Access to the Administrative Documents of Public Authorities of Tunisia

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## **SUMMARY OF RECOMMENDATIONS**

With this Comment, ARTICLE 19 seeks to make a constructive contribution to the process of democratic transition in Tunisia through building a culture of transparency, protecting the right to know and strengthening accountability. We see the adoption of the Decree regarding access to the administrative documents held or produced by public authorities as an important milestone in this process and welcome its adoption.

While ARTICLE 19 commends the current version of the Decree, our recommendations outlined in this Comment are two-fold. First, we have identified some key issues in the Decree that need to be improved through urgent action of the Interim Government both in terms of the Decree's provisions and its implementation. Second, due to the interim nature of the Decree, ARTICLE 19 recommends a set of measures that must be adopted by the new Government and the Parliament when transforming the Decree into the law.

### **Key recommendations concerning the current text of the Decree and its implementation:**

- The regime of exceptions to the right to information outlined in the Decree should be amended in order to comply with international standards. According to international law in this area, information should never be withheld unless it affects a legitimate interest protected by law, release of the information would cause actual harm to that interest and this harm would be greater than the harm caused to the public interest by non-disclosure. The provisions of the Decree on exceptions (Articles 16 to 18) should be replaced by a single provision clearly laying down this three-part test;
- ARTICLE 19 also calls on the Interim Government to urgently develop and adopt Guidelines clarifying the limited scope of the exceptions in the Decree in order to assure a progressive interpretation of the Decree, in line with international freedom of expression standards;
- ARTICLE 19 urges the Interim Government to quickly develop a comprehensive action plan on the implementation of the Decree, in order to assure that the Decree be made operational with the shortest delay possible;
- Adequate resources should be allocated for the training of officials designated as information officers within their respective public authorities on the right to information and the effective implementation of the legislation on access to information;
- The Interim Government should amend the provisions of the Decree dealing with the entry to force and implementation. Experience from other countries that have adopted right to information legislation within their democratic transitions shows that the implementation period of such a Decree can be accomplished within a period of months rather than years and realistically should be no more than six months.

### **Recommendations for future measures regarding the right to information in Tunisia:**

- ARTICLE 19 recommends that the new Constitutional Assembly adopt a law on access to information, as such a law will be a more effective legislative instrument to protect the right to information than a decree. This new law should maintain positive features of the

Decree but improve its deficiencies. In the interim, the Decree should remain in effect and should be thoroughly implemented;

- The right to information legislation should make clear that it concerns “the right of access to information” in a broad extent, not just access to “administrative documents”;
- The right to information legislation should include a Preamble referring to international standards on freedom of expression;
- The right to information legislation should expand the list defining key terms, including terms such as “information”, “record”, “information officer” and others;
- The definition of “administrative documents” should be replaced with a definition of “record” that includes “any recorded information, regardless of its form, source, date of creation, or official status, whether or not it was created by the body that holds it and whether or not it is classified”;
- The right to information legislation should contain a general interpretative clause providing that every public authority should interpret its provisions so as to give best effect to the right to information;
- The right to information legislation should expand the list of bodies covered by the legislation to cover all three branches of government, including the judiciary;
- The Tunisian legislators should consider the definition of public and private bodies obliged to provide information under the right to information legislation, as provided by the ARTICLE 19 Model Freedom of Information Law;
- The regime of exceptions to right to information should comply with a three part test. Information should never be withheld unless it affects a legitimate interest protected by law, release of the information would cause actual harm to that interest and this harm would be greater than the harm caused to the public interest by non-disclosure. The right to information legislation should include a provision laying down time limits beyond which the exemptions from disclosure would no longer apply;
- The right to information legislation should require public bodies to use clear and comprehensible language when providing key information;
- The right to information legislation should also include a clear obligation of public authorities to publish information that is a part of proactive disclosure on the Internet, as well as an obligation to maintain their websites and update the information contained in them regularly (at least annually);
- The right to information legislation should provide that requests may be made in person, submitted in writing, verbally (including over the phone) or electronically, by post (or mail) or through a lay or legal representative;
- The right to information legislation should make it clear that any individual or legal entity requesting access to an administrative document need not justify his or her request;
- The legislation should provide a fee waiver for requests for personal information and requests in the public interest;
- The right to information legislation should also stipulate that fees should not be charged for individuals on a low income and that the fees should be set by a central authority and should not exceed a certain amount;
- The Tunisian legislators should consider establishing an Information Commissioner or Ombudsperson mechanism as an intermediate appeal level before which refusals to disclose information may be challenged;
- The right to information legislation should also provide that a person who has made a request for information may apply to an independent mechanism for a decision that a public or private body has not complied with the terms of the law by failing to (1) indicate whether or not it holds a record, or to communicate information; (2) respond to a request

for information within the time limits; (3) provide a notice in writing of its response to a request for information; (4) communicate information; (5) charge a reasonable fee; or (6) communicate information in the form requested;

- Implementation of this type of legislation should be overseen by means of an independent mechanism, such as an Information Commissioner or Ombudsperson;
- The right to information legislation should include provisions on protection of whistleblowers; that is, a protection against any legal, administrative or employment related sanctions for individuals who release information on wrongdoing or disclose evidence of a serious threat to health, safety or the environment. This protection should apply where the individual acted in good faith and in the reasonable belief that the information was substantially true and disclosed evidence of wrongdoing or a serious threat to health, safety or the environment. Wrongdoing should be defined to include 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;
- The type of sanctions that may be meted out against officials who fail to comply with the law should be clearly identified;
- The law should contain a provision exempting from civil, administrative or criminal action, officials who disclose administrative documents in good faith in the exercise or performance of their duties or powers;
- The right to information legislation should require that other legislation be interpreted, as far as possible, in a manner consistent with its provisions. Where this is not possible, other legislation dealing with publicly-held information should be subject to the principles underlying the freedom of information legislation. In particular, secrecy laws should not make it illegal for officials to divulge information which they are required to disclose under the right to information legislation.
- Over the longer term, a commitment should be made to bring all laws relating to information into line with the principles underpinning the right to information legislation.

## I. Introduction

This Comment concerns the Decree No. 2011-41 of 26 May 2011 regarding access to the administrative documents held or produced by public authorities (*hereinafter* “the Decree”), which was promulgated by the Interim President of the Republic of Tunisia on 26 May 2011.<sup>1</sup> The purpose of this Comment is to assess the compatibility of the Decree with relevant international standards on the right to information<sup>2</sup> as well as the effect it will have on free flow of information and, more broadly, on the rule of law in Tunisia. This Comment therefore considers the Decree from the perspective of international and comparative law and best practices of other states on the right to information (*hereafter* “RTI”).<sup>3</sup>

This Comment has been prepared with a view toward informing the work of the Tunisians legislators, Interim Government, media experts and human rights activists as well as the forthcoming debates in Tunisia on future legislation on access to information. ARTICLE 19 understands that the Decree is one of several interim measures adopted by the Interim President to regulate certain issues related to human rights in the transitional period before the new Constitutional Assembly is elected. ARTICLE 19 stands ready to provide further assistance in the process of bringing domestic legal framework into compliance with international law, including the issues addressed in the present Decree, and to participate in public consultations on those issues.

At the outset, ARTICLE 19 welcomes the efforts of the Tunisian Interim Government to enact specific legislation on access to information as an important step in democratic transition. Access to information is a fundamental human right, crucial to the functioning of a democracy and key to the enforcement of other rights. The Decree has, therefore, great potential to play an important role in abolishing the culture of secrecy that marked the previous regime and in establishing democratic, open and transparent governance in Tunisia. ARTICLE 19 believes that a proper implementation of the Decree will increase a sense of trust amongst the people in Tunisia regarding governmental and public authorities. The Decree should also enhance the role of independent media that have been previously restricted, heavily censored and undermined in bringing information to the public. It also addresses the gap in implementing international legal obligations of Tunisia related to freedom of expression. Finally, with this Decree, Tunisia becomes the second country (alongside Jordan) in the Middle East and North Africa region to adopt dedicated RTI legislation.

To this extent, ARTICLE 19 commends a number of features of the Decree. In particular, the right of access to administrative documents is granted to everyone (Article 3); public authorities have a positive obligation to publish key categories of information of significant public interest

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<sup>1</sup> This Comment is based on an unofficial translation which was transmitted to ARTICLE 19 in June 2011. ARTICLE 19 received an unofficial translation from Arabic to French which was subsequently translated into English. ARTICLE 19 takes no responsibility for the accuracy of the translation or for comments made on the basis of any inaccuracies in the translation.

<sup>2</sup> ARTICLE 19’s analysis of the Decree is based on international standards outlining best practice for access to information laws. It refers specifically to two of our key publications: ARTICLE 19, *The Public’s Right to Know: Principles on Freedom of Information Legislation* (“ARTICLE 19 FOI Principles”; available at [www.article19.org/pdfs/standards/righttoknow.pdf](http://www.article19.org/pdfs/standards/righttoknow.pdf)) (London: June 1999) and ARTICLE 19, *A Model Freedom of Information Law* (“ARTICLE 19 Model FOI Law”; available at [www.article19.org/pdfs/standards/modelfoilaw.pdf](http://www.article19.org/pdfs/standards/modelfoilaw.pdf)) (London: July 2001) – which encapsulate the accepted international standards in this area.

<sup>3</sup> See ARTICLE 19, *Draft Global Right to Information Index*; available at <http://www.article19.org/pdfs/press/rti-index.pdf> (released for comments on 21 September 2010).

(Articles 4 and 5); public authorities are required to assist individuals and legal entities seeking access to administrative documents and facilitate such access (Article 9); dissatisfied applicants can appeal against a refusal to disclose a requested document before the courts (Article 19); and access to documents is in principle free of charge subject to, but not exceeding, any costs incurred by the public body in supplying the requested document(s) (Article 15).

At the same time, the Decree falls short of international standards on RTI in a number of respects. In particular, the language used in the Decree is unduly restrictive in places, such as the definition of “public authorities” which should more explicitly cover all private bodies exercising a public function. The Decree further fails to deal with a number of issues, including the protection of whistleblowers for releasing information on wrongdoing that would disclose evidence of a serious threat to health, safety or the environment. Nor does the Decree provide for an independent oversight mechanism, such as an Information Commissioner or Ombudsman with overall responsibility for the implementation of the Decree. The regime of restrictions on provision of information should be revised in line with international standards; moreover a subject to a comprehensive public interest override test. More generally, any subsequent RTI legislation would benefit from an apparent and clear structure, including titles for each Article indicating the matter being dealt with by that Article. Finally, the concluding provisions of the Decree are unclear and confusing as for the time of the entry of the Decree into force and as for the obligations of public authorities to implement it. Therefore, the Comment suggests ways in which the future legal framework on RTI should be improved by the new Constitutional Assembly in order to fully comply with international standards on freedom of expression and freedom of information.

ARTICLE 19 hopes that the new Government and the Constitutional Assembly will make the adoption of the RTI legislation a priority. Till such new legislation is adopted, the Decree should remain in force and be immediately implemented. We also call on the media, civil society, experts and other stakeholders to both make the Decree operational and support the adoption of the RTI law in the next period. At the same time, we urge all stakeholders to promote broader public understanding of RTI legislation before and after it has been enacted.

This Comment is divided into two parts. The first part highlights the positive aspects of the Decree that should be maintained in the future legislation. The second part discusses in detail matters of ARTICLE 19’s concerns with the Decree and provides key recommendations that need to be addressed by the new Government and the Constitutional Assembly when transforming the Decree into the RTI Law. The Decree is reproduced in the Appendix.

## **II. Positive aspects of the Decree**

As already noted, ARTICLE 19 welcomes the adoption of the Decree itself as an improvement for the protection of RTI and the effective participation of the Tunisian people in the transition process towards a meaningful democracy in Tunisia. In addition, we wish to emphasize the following progressive aspects of the Decree that should be sustained in the subsequent RTI legislation:

- The Decree is relatively comprehensive and includes many of the key elements of a modern and progressive freedom of information legislation;

- The Decree creates a presumption that all documents held or produced by public authorities are subject to disclosure and that this presumption may be overcome only in very limited circumstances laid down in the Decree;
- The right of access to those documents is granted to everyone;
- Public bodies have a positive obligation to publish key categories of information of significant public interest;
- The procedure for requesting information is specific and generally satisfactory;
- The Decree suggests that requests for administrative documents be dealt with by specifically designated information officers within each public authority, which presumes the establishment of such functions within public authorities;
- Public authorities are required to update information held by them once a year where necessary;
- Public authorities are required to assist individuals seeking access to administrative documents and facilitate access to those documents;
- The process for getting access to administrative documents is kept within reasonable time limits;
- If the request for access to an administrative document or documents has a direct influence on the private life or liberty of the person requesting disclosure of the document, the public authority must respond immediately, and in any case, within a period not exceeding two working days;
- Individuals or legal entities can appeal against a refusal to disclose a requested document before the courts;
- Any public official who fails to comply with the provisions of the Decree is liable to administrative action;
- Access to documents is in principle free of charge subject to, but not exceeding, any costs incurred by the public body in supplying the requested document(s);
- Public authorities are required regularly to report on the implementation of the Decree.

### **III. ARTICLE 19's concerns with the Decree**

In summary, as an Interim Government initiative protecting the right to information as well as strengthening transparency and openness in Tunisia, the Decree is a positive step. At the same time, ARTICLE 19 finds a number of weaknesses of the Decree, outlined in this section, that should be addressed in the future legislation.

ARTICLE 19 would like to reiterate its encouragement to adopt a dedicated RTI law, rather than a decree, as soon as the new Constitutional Assembly is elected. We believe this would be a more effective legislative instrument for the protection of RTI. We are also concerned that the existing legislative and regulatory provisions concerning access to administrative documents will remain in force for a period of two years while the Decree is implemented (see below, the comments to Article 22 of the Decree). Any law on the right of access to information would also benefit from including a general interpretative clause providing that every public authority should interpret its provisions so as to give best effect to the right to information.

#### **1. General provisions**

The Title of the Decree, “Decree on access to the administrative documents held or produced by public authorities”, fails to clearly identify the legislation as one which protects a human right. ARTICLE 19 suggests the title of any future piece of legislation should make clear that it concerns “the right of access to information.” This is linked to another notable flaw in the Decree, namely that its scope is inappropriately confined to disclosure of “administrative documents” held or produced by “public authorities” (see further below).

Secondly, we note that the Decree does not include a Preamble or clearly stated objectives but refers to a number of national laws following the French legislative drafting tradition. We have not had sight of those laws. We note, however, that the recital fails to include relevant international standards, such as the Universal Declaration of Human Rights or the International Covenant on Civil and Political Rights. We believe that it would be appropriate for the relevant international standards to be included in the Preamble or recital, as a guide to interpretation.

#### **Recommendations:**

- ARTICLE 19 recommends that the new Constitutional Assembly adopt the Law on Access to Information as a more effective legislative instrument to protect RTI than a decree. Such new law should maintain positive features of the Decree but improve its deficiencies. The Decree should remain in effect in interim and should be thoroughly implemented;
- The RTI legislation should make clear that it concerns “the right of access to information” in broad extent, not just access to “administrative documents”;
- The RTI legislation should include a Preamble referring to international standards on freedom of expression.

## **2. Scope of the Decree**

### ***a) Information covered***

ARTICLE 19 notes that the Decree does not create a general right to information but rather a right of access to “administrative documents” held or produced by “public authorities”. Article 2 of the Decree defines administrative documents as “the documents produced or held by the public authorities, within the context of their activities as a public authority, regardless of their date, form and support”.

While we appreciate that this definition of administrative documents is relatively broad, it is still unsatisfactory because it fails to reflect the nature of the underlying right, i.e. to *information* rather than the form in which the information may be held. For example, the reference to documents suggests that individuals or legal entities seeking access to information want to be given physical access to original documents, when in most cases it is the information contained in those documents which is being sought. Moreover, applicants do not usually have a specific document in mind when lodging an information request. Officials may interpret a right of access to administrative documents narrowly in order to reject, instead of responding in substance to, requests for information. Accordingly, we recommend that any legislation on the right of access to information should use the term “information” rather than “administrative documents”.

ARTICLE 19 believes that the Decree would benefit from expanding the list of definitions it contains. In addition to definitions of “public authorities” and “administrative documents”, this



list should include further key terms used in the text of the Decree, such as “information”, “record”, “information officer”, “official” and other terms used, in order to avoid misunderstanding and disperse ambiguity that these terms might cause. We believe that the Tunisian legislators should consider definitions of these terms as outlined in the ARTICLE 19 Model FOI Law.

Information, moreover, should be broadly defined to cover *any* recorded information, regardless of its form, source, date of creation, *or official status*, whether or not it was created by the body that holds it and whether or not it is classified. Under the Liberian Freedom of Information Act 2010, for example, public record means a record, manual book, regulation, or other document produced or received by, used by, possessed by or under the control of a public authority, whether in written form, recorded, or stored in electronic form or in any other device.<sup>4</sup>

We also note that the terms “information” and “data” are used in other parts of the Decree,<sup>5</sup> and reference is also made to requests for “services”. Using the term “information” rather than “documents” would not only be consistent with the broader right, but would also ensure that the legislation on this issue is more internally coherent.

#### *b) Bodies covered by the Decree*

Under Article 2 of the Decree, “public authorities” include “the central and regional departments of State administration, the local communities, public enterprises and establishments”. Although this definition cuts across various levels of government, ARTICLE 19 notes that it fails to encompass the courts and holders of judicial office. There is no reason in principle why all three branches of government, including the judiciary, should not be covered. Furthermore, limiting the scope of the law to certain branches of government runs contrary to the idea that the right to information is a human right and that it therefore imposes obligations on *all* public bodies. The draft law should apply to the judiciary and those exercising a judicial function.

Moreover, the Decree only applies to “public authorities”. Although this includes “public enterprises”, other private bodies exercising public functions fall outside the scope of the regulation. Again, there is no reason in principle why all private bodies carrying out public functions should not be covered by the Decree.

More generally, ARTICLE 19 would draw the attention of Tunisian legislators to ARTICLE 19’s Model FOI Law, which defines public bodies obligated to provide information under the RTI law broadly and includes all bodies “a) established by or under the Constitution, b) established by statute, c) which forms part of any level or branch of Government, d) is owned, controlled or substantially financed by funds provided by Government or the State, or e) is carrying out a statutory or public function to the extent of their statutory or public functions.”<sup>6</sup> Moreover, Ministers may designate any body which carries out a public function as a public body.<sup>7</sup> Similarly, the legislators should also consider the definition of “private bodies” covered by the RTI law outlined in the ARTICLE 19 Model FOI Law.

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<sup>4</sup> Section 1.3.12 of the Liberian Freedom of Information Act 2010.

<sup>5</sup> See for example Articles 4 and 5 of the Decree.

<sup>6</sup> See ARTICLE 19’s Model FOI Law, Section 6.

<sup>7</sup> *Ibid.*

### Recommendations:

- The RTI legislation should expand the list of definition of key terms, including terms such as “information”, “record”, “information officer” and others;
- The definition of “administrative documents” should be replaced with a definition of “record” that includes: *“any recorded information, regardless of its form, source, date of creation, or official status, whether or not it was created by the body that holds it and whether or not it is classified”*;
- The RTI legislation should contain a general interpretative clause providing that every public authority should interpret its provisions so as to give best effect to the right to information;
- The RTI legislation should expand the list of bodies covered by the RTI law to cover all three branches of government, including the judiciary;
- The Tunisian legislators should consider the definitions of public and private bodies obliged to provide information under the RTI legislation, as provided by the ARTICLE 19 Model FOI Law.

### 3. Regime of Exceptions

The regime of exceptions to the principle of disclosure is contained in Articles 16 to 18 of the Decree. Unfortunately, this regime is the weakest point of the Decree as it fails to strike a careful balance between the right of the public to know and the need to protect other important individual and social interests.

Our main concern relates to Article 17 of the Decree which provides that public authorities may withhold information which is “likely to undermine” the following interests:

- Relations between Tunisia and foreign countries or international organisations
- A political strategy of the government
- Public security or national defence
- The fight against or the prevention of criminal activity
- The arrest or sentencing of persons charged
- The proper function of the judicial services and the principles of justice, fairness and transparency in the process of granting procurement contracts
- Processes involving dialogue, exchanges of views, control and expertise and relating to the commercial and financial interests of the public authority in question.

Article 16 provides for further restrictions on the disclosure of information for the protection of a number of private interests, including the protection of personal data, intellectual property rights and interests which are protected by a court order or current legislation.

ARTICLE 19 points out that the test for withholding information must meet the strict three-part test which is generally recognised under international law. According to this test, a refusal to disclose information is not justified unless the public authority can show the following:

1. The information relates to a legitimate aim listed in the law;
2. The disclosure threatens to cause *substantial harm* to that aim (so called “harm test”);
3. The harm to the aim must be greater than the public interest in having the information (so called “public interest override”).<sup>8</sup>

<sup>8</sup> See, for example ARTICLE 19 FOI Principles, Principle 4.

The regime of exception fails to meet this test in a number of ways:

- Article 17 of the Decree provides that information may be withheld if it is “*likely to undermine*” the interests listed under that provision. Instead, the legislation should provide that information may be withheld if it threatens to cause *substantial harm* to those interests. This means that relevant bodies should be required to show that the disclosure of information would cause substantial harm to a legitimate aim in order to qualify as an exception to the principle of maximum disclosure.
- Some of the exceptions to the principle of disclosure are too broadly drafted. In particular, ARTICLE 19 notes that categories such as “political strategy” and “relations between Tunisia and foreign countries or international organisations” are not a permitted exception to the disclosure principle under international law. In our view, this category should be focused on only exempting information which would be likely to cause prejudice to the defense or national security of the country. As it currently stands, the provisions would encompass information which might concern a whole range of other issues that should be in the public realm (e.g. abuses of human rights involving foreign governments).<sup>9</sup> Further, the exceptions related to commercial and financial interests research should not apply insofar as a request relates to the results of any product or environmental testing and the information concerned reveals a serious public safety or environmental risk.<sup>10</sup> As for the category of privacy and personal information (in Article 6 of the Decree), ARTICLE 19 suggest that these provisions should indicate situations where the exception should not apply, such as when an individual has consented to the disclosure of her/his personal information.<sup>11</sup>
- We are also proposing to improve the test of the “public interest override”. This requirement is so far provided in somewhat unclear manner in Article 18 of the Decree. The provisions of Article 18 stipulate that the exceptions mentioned under Article 17 do not apply to certain documents (i.g. those related to “human rights and war crimes” and to those who related to “individual interests” certain situations occur). We suggest that the test of public interest override, which means that even if it can be shown that disclosure of information would cause substantial harm to a legitimate and narrowly drawn objective, the information should still be disclosed if the benefits of disclosure outweigh the harm. For example, certain information may be contained in a document that Articles 16 and 17 of the Decree prevent from being published or made accessible but that may well expose high-level corruption or maladministration within the government. The harm to the legitimate aim should be weighed against the public interest in having the information made public. Where the latter is greater, the law should provide for disclosure of the information. To this end, we strongly encourage the inclusion of an overarching provision indicating the public interest override to give effect to the fundamental principle of maximum disclosure. More specifically, we recommend a clear formulation of the public interest override at the very beginning of the section on exceptions.
- In addition, we recommend that the legislation should include a provision laying down time limits beyond which the exemptions from disclosure would no longer apply. In this

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<sup>9</sup> See, ARTICLE 19 Model FOI Law, Section 30.

<sup>10</sup> See ARTICLE 19 Model FOI Law, Section 29.

<sup>11</sup> See ARTICLE 19 Model FOI Law, Section 25.

regard, it may be noted that the UK recently held an extensive consultation on this issue and is currently adopting legislation to reduce the time period to 20 years.<sup>12</sup>

To address the problems indicated with the regime for exceptions, ARTICLE 19 recommends the adoption of the relevant provisions of ARTICLE 19's Model FOI Law.

**Recommendations:**

- The regime of exceptions to RTI should be amended in order to comply with a three part test. Information should never be withheld unless it affects a legitimate interest protected by law, release of the information would cause actual harm to that interest and this harm would be greater than the harm caused to the public interest by non-disclosure. Articles 16 to 18 of the Decree should be replaced by a single provision clearly laying down this three-part test.
- The legislation should include a provision laying down time limits beyond which the exemptions from disclosure would no longer apply.

#### ***4. Proactive transparency***

Articles 4 to 6 of the Decree deal with the obligations of public authorities to publish key information in a number of areas. We welcome these provisions as a generally very positive step towards greater government transparency. We note, however, that Article 6 of the Decree could be improved by requiring public bodies to use clear and comprehensible language when providing key information.

Any future legislation would also benefit from a clear statement that public authorities are required to publish such information on the Internet and that they are accordingly required to maintain their website and update the information contained in it regularly (at least annually). Alongside this requirement, adequate resources should be allocated for the training of officials designated as information officers within their respective public authorities on the right to information and the effective implementation of the legislation on access to information.

**Recommendations:**

- The RTI legislation should require public bodies to use clear and comprehensible language when providing key information;
- The RTI legislation should also include a clear obligation of public authorities to publish information that is a part of proactive disclosure on the Internet, as well as an obligation to maintain their websites and update the information contained in them regularly (at least annually);
- Adequate resources should be allocated for the training of officials designated as information officers within their respective public authorities on the right to information and the effective implementation of the legislation on access to information.

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<sup>12</sup> Review of the 30 Year Rule, January 2009. <http://www2.nationalarchives.gov.uk/30yrr/30-year-rule-report.pdf>, Ministry of Justice, Opening up public bodies to public scrutiny, 7 January 2011: <http://www.justice.gov.uk/news/newsrelease070111a.htm>.

## 5. Procedures

ARTICLE 19 has already noted that the procedure for requesting administrative documents, set in the Decree, is generally satisfactory. However, there are some ways in which the legislation on this matter could be improved.

*First*, we note that the Decree requires that requests for access to administrative documents be made in writing, using a simplified application form provided by the authority. In our view, however, individuals should not be bound to fill in a particular form, even if assistance is provided to fill in the form. Instead, any future legislation should provide that requests may be made in person, submitted in writing, verbally (including over the phone) or electronically, by post (or mail) or through a lay or legal representative.

*Secondly*, Article 8 of the Decree provides that the request for access to an administrative document must contain “the necessary information concerning the subject of the request”. This is ambiguous. The “necessary information” could be interpreted by an official as including the reason for the request where all that is needed is that the requested information is identified as clearly as possible. The legislation should ensure that any individual or legal entity requesting access to an administrative document need not justify his or her request.

### Recommendations:

- The RTI legislation should provide that requests may be made in person, submitted in writing, verbally (including over the phone) or electronically, by post (or mail) or through a lay or legal representative;
- The legislation should make it clear that any individual or legal entity requesting access to an administrative document need not justify his or her request.

## 6. Fees

Under Article 15 of the Decree, delivery of a copy of administrative documents is, in principle, free of charge, except to the extent that the relevant public authority incurs costs in issuing them. Although Article 15 of the Decree appropriately provides that the effective total costs must not exceed the total costs borne by the public authority in question, this Article could be improved by providing for a fee waiver for requests for personal information and requests in the public interest.

Moreover, fees should also not be charged for individuals on a low income. It would be helpful to indicate that any fee cannot exceed a certain maximum amount and, as such, should be set by a central authority.

### Recommendations:

- The RTI legislation should provide a fee waiver for requests for personal information and requests in the public interest;
- The RTI legislation should also stipulate that fees should not be charged for individuals on a low income, and that the fees should be set by a central authority and should not exceed certain amount.

## **7. Institutional Framework**

### ***a) Appeals***

Under Article 19 of the Decree, a refusal to disclose a document can be appealed before the head of the public authority concerned and thereafter before the administrative courts. Insofar as the internal appeals mechanism is concerned, this is a useful approach which can help address mistakes, build confidence among lower-ranking officials to disclose information and ensure internal consistency.<sup>13</sup> However, in our view the creation of a special unit dedicated to dealing with such appeals within each public authority would contribute to the transparency of the process.

Alternatively, the RTI legislation could provide for the possibility of appealing to an external body, such as an Information Commissioner or Ombudsperson, which can review complaints about a failure of bodies to release information. Moreover, this institution of the Information Commissioner or Ombudsperson could also decide appeals on issues such as complaints that a public or private body has not complied with the terms of the law by failing to a) indicate whether or not it holds a record, or to communicate information; b) respond to a request for information within the time limits; d) provide a notice in writing of its response to a request for information; e) communicate information; f) charge a reasonable fee; or g) communicate information in the form requested. In this respect, ARTICLE 19 notes that the appeal or complaint mechanism for all these issues is currently not provided by the Decree. We also note that currently over sixty countries around the world, including India, Japan and Indonesia, have already opted for the establishment of such independent mechanisms (either the Information Commissioners or Ombudspersons) as an intermediate appeal level before which refusals to disclose information may be challenged. Such oversight bodies are often crucial to the effective functioning of right to information systems in countries, particularly when direct appeals to the court process are too time-consuming and expensive for most applicants, as campaigns in the US and South Africa for the establishment of an oversight body have highlighted.<sup>14</sup>

### ***b) Implementation oversight***

Implementation of the Decree is subject to regular reporting by all public authorities to various departments of the Prime Minister's office. In our view, this is insufficient and clearly falls short of international standards. As a part of the Prime Minister's office, the respective departments lack independence and autonomy from the government, making it fundamentally flawed as an oversight body to any RTI legislation.

Again, as noted about, ARTICLE 19 points out that many countries provide for an independent, administrative oversight body to review refusals to provide access to information and oversee the implementation of the RTI legislation. Establishment of an independent mechanism should be considered for the implementation oversight as well. If a special mechanism for RTI disputes and oversight is established, the legislation should provide for such a body to be independent and impartial and have budgetary, operational and decision-making autonomy.

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<sup>13</sup> T. Mendel, *Freedom of Information: A Comparative Legal Survey* (UNESCO: 2008), 2<sup>nd</sup> ed., at 37.

<sup>14</sup> T Mendel, *The Right to Information in Latin America: A Comparative Legal Survey* (UNESCO: 2009) at 168.

**Recommendations:**

- The Tunisian legislators should consider establishing an Information Commissioner or Ombudsperson mechanism as an intermediate appeal level before which refusals to disclose information may be challenged;
- The RTI legislation should also provide that a person who has made a request for information may apply to an independent mechanism for a decision that a public or private body has not complied with the terms of the law by failing to (1) indicate whether or not it holds a record, or to communicate information; (2) respond to a request for information within the time limits; (3) provide a notice in writing of its response to a request for information; (4) communicate information; (5) charge a reasonable fee; or (6) communicate information in the form requested;
- Implementation of this type of legislation should be overseen by means of an independent mechanism, such as an Information Commissioner or Ombudsperson.

**8. Protections and Sanctions**

ARTICLE 19 notes that the Decree does not include any provision protecting whistleblowers, persons who release information on wrongdoing. In the absence of comprehensive legislative protection for whistleblowers, the RTI legislation law should provide for this in accordance with international standards and the best practice of states. Whistleblower protections are an important complement to access to information laws by facilitating the disclosure of information in the public interest. A number of international and regional instruments require the adoption of these protections to fight corruption. The UNCAC recommends that countries adopt “appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention”.<sup>15</sup> Whistleblower protection laws have gained a strong interest around the world. In this respect, we would respectfully draw the attention of the Tunisian legislators to Part VII of ARTICLE 19’s Model Freedom of Information Law<sup>16</sup>, which reflects international standards of protection of freedom of expression as well as best practices in this area, and which we hope will prove useful when considering any future legislation on the right to access to information.

In addition, although Article 20 is welcome insofar as it purports to impose sanctions on civil servants who fail to comply with their obligations to give best effect to the right to information under the Decree, we are concerned that the sanctions are not clearly set out, or indeed set out at all, in the Decree. Nor does the Decree make any reference to any specific legislation where such sanctions would be clearly identified, such as the Administrative Code. Moreover, the Decree does not include a provision exempting from civil, administrative or criminal action officials who disclose administrative documents in good faith in the exercise or performance of their duties or powers.

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<sup>15</sup> Article 14, UN Convention on Anti-Corruption, available at [http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026\\_E.pdf](http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf).

<sup>16</sup> ARTICLE 19’s Model Freedom of Information Law is available at <http://www.article19.org/pdfs/standards/modelfoiaw.pdf>.

**Recommendations:**

- The RTI legislation should include provisions on protection of whistleblowers; that is, a protection against any legal, administrative or employment related sanctions for individuals who release information on wrongdoing or disclose evidence of a serious threat to health, safety or the environment. This protection should apply where the individual acted in good faith and in the reasonable belief that the information was substantially true and disclosed evidence of wrongdoing or a serious threat to health, safety or the environment. Wrongdoing should be defined to include 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;
- The type of sanctions that may be meted out against officials who fail to comply with the law should be clearly identified;
- The law should contain a provision exempting from civil, administrative or criminal action officials who disclose administrative documents in good faith in the exercise or performance of their duties or powers.

**9. Time frame for implementation**

Article 22 of the Decree provides for a two year period for the implementation of the Decree. Additionally, Article 23 of the Decree stipulates that until “complete compliance with the provisions of this Decree is reached, the legislative and regulatory texts relating to access to administrative documents shall remain in force”.

ARTICLE 19 is very concerned with these provisions as they indicate that the Decree need not be implemented immediately and that the authorities have a two year period to make the Decree operational. Given the interim nature of the Decree and the fact that it is presumed that the new Constitutional Assembly shall eventually replace this regulation with a law, the provisions of Articles 22 and 23 defeat the whole purpose of the Decree. The two year implementation period is too long for an interim regulation and allows for a culture of secrecy to continue and flourish. Moreover, this means that the Decree will not have any possibility to contribute to the creation of open and transparent government within a democratic transition.

In view of the foregoing, we recommend reducing the implementation period to the shortest possible time - no more than six months.

**Recommendations:**

- The Interim Government should amend the provisions of the Decree dealing with the entry to force and implementation. The implementation period of a Decree of this kind should be no more than six months.
- RTI legislation should require that other legislation be interpreted, as far as possible, in a manner consistent with its provisions. Where this is not possible, other legislation dealing with publicly-held information should be subject to the principles underlying the freedom of information legislation. In particular, secrecy laws should not make it illegal for officials to divulge information which they are required to disclose under the RTI legislation.
- Over the longer term, a commitment should be made to bring all laws relating to information into line with the principles underpinning the RTI legislation.





## Appendix:

### **The Decree No. 2011-41 of 26 May 2011 concerning access to the administrative documents of public authorities (unofficial translation)**

The Interim President of the Republic,

At the proposal of the Prime Minister,

In view of Organisation Law No. 2004-63 dated 27 July 2004 concerning the protection of personal data,

In view of Law No. 1988-95 dated 2 August 1988 concerning archives,

In view of Law No. 1999-32 dated 13 April 1999 concerning the national statistics system,

In view of Decree Law No. 2011-14 dated 23 March 2011 concerning the provisional organisation of public authorities,

In view of Decree Law No. 1993-1880 dated 13 September 1993 concerning the system of administrative communication and orientation,

In view of the opinion of the National Authority for Information and Communication Reform,

In view of the debate of the Council of Ministers,

Adopts the decree law the content of which follows:

#### Article 1

This decree law fixes the principles and rules governing access to the administrative documents of public authorities.

#### Article 2

The following expressions have the following meanings:

- Public authorities: the central and regional departments of State administration, the local communities, businesses, and public establishments
- Administrative documents: the documents produced or held by the public authorities, within the context of their activities as a public authority, regardless of their date, form and support.

#### Article 3

Any individual person or legal entity shall have right of access to the administrative documents defined in Article 2 above, by means of voluntary and direct circulation or at the request of the person interested, unless in exceptional cases provided for by the present decree law.

#### Article 4

Subject to the provisions of the present decree law, all public authorities are required to publish regularly:

- All information relating to its organisational flowchart, prerogatives and policies
- Decisions and policies of interest to the public
- Procedures applied in the decision-making and control process
- A list of names of its employees and agents and their respective capacities
- A list of names of its agents responsible for information, containing all information relevant to them

- The procedural manuals applied by the organisation and by its agents in the fulfilment of their tasks
- Services and programmes intended for the public and their results
- Information on government programmes, including indicators relating to output and the results of public invitations to tender for large contracts
- A list of the public authority's electronic documents
- A guide for users in the authority relating to the procedures to be followed when accessing administrative documents

#### Article 5

The public authority is required to publish regularly:

- Statistical, economic and social data, including national accounts and detailed statistical surveys
- All information relating to public finances, the quantitative economy, debts and interest on debts, medium-term debt forecasts, valuation and management of public finance, and all detailed data relating to the budget at national, regional and local level<sup>17</sup>
- Data relating to social programmes and services

#### Article 6

The administrative documents mentioned in Articles 4 and 5 of the present decree law must be easily accessible and updated at least once a year where necessary.

#### Article 7

Requests for access to administrative documents shall be made in writing. The public authority shall make available to its users a simplified form containing the necessary information provided for by Article 8 of the present decree law. The request may be submitted directly to the public authority, which is required to issue a receipt therefore, or by post or electronically.

#### Article 8

The request for access to an administrative document must contain: the full name of the applicant, the address for individuals and the corporate name for legal entities, and the necessary information concerning the subject of the request.

#### Article 9

The agents responsible for information within a public authority are required to assist applicants for services in cases of difficulty.

#### Article 10

All public authorities are required to answer a request for services within fifteen (15) days, with respect for the legal deadlines provided for in current legislation. The public authority is not required to respond more than once to the same request relating to the same subject. In this case, the refusal must be justified.

#### Article 11

If the request for access to administrative documents has a direct influence on the private life or freedom of the applicant, the public authority must respond immediately and within a period not exceeding two (2) working days.

#### Article 12

The fifteen-day period specified in Article 10 may be extended by an equal period if the response to the request requires the gathering of numerous documents or the consultation of other parties to obtain them.

#### Article 13

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<sup>17</sup> May also translate "to the budget and to national, regional and local plans".

Absence of response from the public authority within the periods specified in Articles 10, 11 and 12 of the present decree law is considered as an implicit refusal, which confers the right to an appeal before the competent administrative and judicial authorities.

#### Article 14

If the documents requested by the applicant are not available from the public authority in question, that authority must, within five (5) days, transfer the request to the competent authority or inform the applicant of its non-competence. If the request is transferred to another organisation, the applicant must be informed accordingly.

#### Article 15

All persons have the right to access administrative documents free of charge. If access to certain documents incurs costs, the applicant must be informed beforehand that the costs shall be paid by him. The effective total of costs must not exceed the total borne by the administrative organisation in question. Documents shall not be supplied to the applicant until after payment of costs.

#### Article 16

The public authority may refuse to issue administrative documents protected by current legislation, and especially by the law concerning protection of personal data and intellectual and artistic property rights, or on the basis of a legal decision if the documents concerned are secrets obtained in this regard by the public authority in question.

#### Article 17

The public authority may refuse to issue a document likely to undermine:

- Relations between Tunisia and foreign countries or international organisations
- A political strategy of the government
- Public security or national defence
- The fight against or the prevention of criminal activity
- The arrest or sentencing of persons charged
- The proper function of the judicial services and the principles of justice, fairness and transparency in the process of granting procurement contracts
- Processes involving dialogue, exchanges of views, control and expertise and relating to the commercial and financial interests of the public authority in question

#### Article 18

The exceptional cases mentioned in Article 17 of the present decree law do not apply to:

- Documents classified as public domain, subject to current legislation concerning archives in particular
- Documents required to be published and relating to serious violations of human rights and to war crimes
- Documents relating to cases requiring the protection of the general interest to the detriment of individual interests, whenever there is an issue of protection of public health, public security and the environment, or to the prevention of criminal acts, corruption or embezzlement in the public sector.

#### Article 19

In the case of a refusal to issue an administrative document, or a violation of the provisions of this decree law, the applicant may launch an appeal with the head of the public authority concerned within a period not exceeding fifteen (15) days following the date of notification of refusal, and demand a response within ten (10) days of the date of submission of his request. The applicant may challenge the decision of the head of the public authority in question before the administrative court within a period not exceeding thirty (30) days. The administrative court shall sit on an interim basis to examine the requests mentioned in Article 11 of this decree law.

#### Article 20

Any civil service official who does not respect the provisions of this decree law shall be subjected to administrative action in accordance with current legislation.

Article 21

All public authorities are required to send to the Prime Minister's competent authorities an annual report on activities connected with access to administrative documents during the first quarter of the following year.

Article 22

The public authorities are required to comply with the provisions of this decree law within a period of two years from the date of its entry into force.

During the period specified in the first paragraph of this article, the public authorities are required to send to the Prime Minister's competent departments, within ten (10) days of the beginning of each quarter, a report on the progress of the measures adopted to ensure proper application of this decree law.

Article 23

Until complete compliance with the provisions of this decree law is reached, the legislative and regulatory texts relating to access to administrative documents shall remain in force.

Article 24

This decree law shall be published in the Official Journal of the Republic of Tunisia.

Tunis, 26 May 2011

Foued Mebazaa

Interim President of the Republic

**(Unofficial translation)**