MEMORANDUM

on

THE ACCESS TO INFORMATION DRAFT LAW OF IRAQ

JANUARY 2010

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SUMMARY OF RECOMMENDATIONS

Recommendations:

- The law should be entitled "Law on the Right of Access to Information" rather than its current name.
- A preamble should be added to the draft law which should introduce it as "an Act to promote maximum disclosure in the public interest, to guarantee the right of everyone to access information, and to provide for effective mechanisms to secure that right".
- All references to the "right of accessing information" in the draft law should be replaced by the "right of access to information".
- Article 2(1) and (2) should be replaced with a statement indicating that the particular purposes of the legislation are: "to provide a right of access to information held by public bodies in accordance with the principles that such information should be available to the public, that necessary exceptions to the right of access should be limited and specific, and that decisions on the disclosure of such information should be reviewed independently of government" and "to provide a right of access to information held by private bodies where this is necessary for the exercise or protection of any right, subject to only limited and specific exceptions".
- Article 3 should be amended to state: "everyone shall have the right to freedom of information, including the right to access information held by public bodies, subject only the provisions of this Law".
- Chapter One should be amended to include the general principle that "every public body is under an obligation to maintain its records in a manner which facilities the right of access to information". It should also provide for a Code of Practice to be issued, within a reasonable time and after appropriate consultation with interested bodies, by such a body as an independent Information Commissioner.
- Chapter One should be amended to include a provision stating that "every public body is under an obligation to maintain its records in a manner which facilities the right of access to information as provided for in this Act and in accordance with the Code of Practice". It should provide for a Code of Practice that "should be issued by such a body as an independent Information Commissioner within a reasonable time and after appropriate consultation with interested bodies". It should be "from time to time updated and contain practice rules relating to the keeping, management and disposal of records, as well as the transfer of records to archiving bodies".
- Chapter Two, in particular Articles 7 and 8, should be amended to include provisions obliging public bodies to publish the following types of information (in addition the types of information already included): "information on any requests, complaints or any other direct actions which members of the public may take in relation to the public body; guidance on processes by which members of the public may provide input into major policy or legislative proposals; the types of information which the body holds and the form in which this information is held; and the content of any decision or policy affecting the public, along with reasons for the decision and background material.
- The definition of information in Article 1 should be amended 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 it not it is classified.

- Article 1 should be amended to indicate that for the purposes of the draft law, a public institution includes any body that is: established by or under the Constitution or statute; which forms part of any level or branch of government; owned, controlled or substantially financed by funds provided by government or the state; or carrying out a statutory or public function.
- The draft law should contain a provision clearly indicating that the criteria for a request for information should be that it is a request in writing or orally to any official of a public or private body or institution and is in sufficient detail to enable an experienced official to identify, with reasonable effort, whether or not the body holds a record of that information.
- There should be a provision requiring the relevant official to render such reasonable assistance as may be necessary to those including illiterate and disabled individuals.
- There should be a provision providing that a public or private body communicating information following a request on for information should do so in accordance with that preference.
- Article 13 should be amended to indicate that the approval or rejection of a request for information should be made "as soon as reasonably possible" and no later within fourteen working days of the request.
- There should be a provision indicating that, where a request for information relates to information which reasonably appears to be necessary to safeguard the rights to life or liberty, a response must be provided within 48 hours.
- There should be a provision providing that a public or private body may by notice in writing within the initial twenty day period, extend the period for responding to the request by another forty days.
- There should be a provision concerning other requirements of the notice of response: adequate reasons for any refusals of requests and any right of appeal.
- Articles 42 and 43 should be amended to reflect that fees should be reasonable, not exceed the cost of copying and communicating the information, should be waived for personal information and requests in the public interest, and should not be levied where the cost of collection would exceed the amount of the fee.
- There should be a provision at the beginning of the section concerning exceptions which states the overriding principle: "[n]otwithstanding any provision in this Part, a body may not refuse to indicate whether or not it holds a record, or refuse to communicate information, unless the harm to the protected interest outweighs the public interest in disclosure".
- All categories of exceptions from Articles 19 – 28 should reflect the substantial harm test.
- Article 22 should be amended to provide that a body may refuse to indicate whether it holds information or refuse to communication information where to do so would, or would be likely to, cause serious prejudice to: "(a) the prevention or detection of crime; (b) the apprehension of prosecution of offenders; (c) the administration of justice; (d) the assessment or collection of any tax or duty; (e) the operation of immigration controls; or (f) the assessment of a public body of whether civil or criminal proceedings or regulatory

action pursuant to any enactment would justified".

- Article 28 should be amended and split into two parts. The first should state that a body may refuse to indicate whether or not it holds information where to do so would involve the unreasonable disclosure of personal information about an individual. The second part should state that the first does not apply if: (1) the individual has effectively consented to the disclosure of information; (2) the person making the request is the guardian of the individual, or the next of kin or executor of the will of a deceased individual; (3) the individual has been deceased for more than 20 years; or (4) the individual is or was an official of a public body and the information relates to his or her function as a public official.
- Article 23 should be amended to indicate that the exceptions indicated thereunder do 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.
- Article 24 should indicate that information should be refused if the information contains confidential information obtained from a third party, contains a trade secret or would or would be likely to seriously prejudice the commercial interests of the third party.
- Article 28 should be amended to state that only the unreasonable disclosure of personal information about an individual would be exempt.
- The draft law should provide additional categories of exceptions for legally privileged information and information which would or would be likely to cause serious prejudice to the effective formulation or development of government policy, frustrate the success of a policy, by premature disclosure of that policy, undermine the deliberative process in a public body by inhibiting the free and frank provision of advice or exchange of views or significantly undermine the effectiveness of a testing or auditing procedure used by a public body.
- The draft law should provide that "if a request for information falls within the scope of an exception listed in the law, any information in the record which is not subject to an exception shall, to the extent it may reasonably be severed from the rest of the information, be communicated to the requester."
- The draft law should clearly provide for a right to appeal to an independent administrative authority, such as the General Commission, concerning a decision a failure to comply with an obligation of the draft Law.
- The draft law should clearly indicate that appeal may be brought if a public or private body has failed to indicate whether or not it holds the information or failed to provide a notice in writing of its response.
- The phrase "from the date the institution concerned took the procedure the requester wanted to appeal for" should be clarified.
- The draft Law should provide that the General Commission shall decide an application for an appeal as soon as reasonably possible, and in any case within 30 days, after giving both the complainant and the relevant public or private body an opportunity to provide their views in writing. It should indicate that the Commissioner may summarily reject applications which are frivolous or vexatious, or where the applicant has failed to use any effective and timely internal appeals mechanisms provided by the relevant body. It should also indicate that the Commissioner may: (1) reject the application; (2) require the

public or private body to take such steps as may be necessary to bring it into compliance with its obligations; (3) require the public body to compensate the complainant for any loss or other detriment suffered; or (4) impose a fine on the body. It should state that the Commissioner shall serve notice of his or her decision, including any rights of appeal, on both the complainant and the public or private body.

- The draft law should provide that the General Commission may, after giving a public body an opportunity to provide their views in writing, decide that a body has failed to comply with an obligation under the draft Law.
- The draft law should state that a complainant or relevant body may, within 45 days, appeal to the court for a full review of a decision of the Commissioner. It should stipulate that the burden on the body to show that it acted in accordance with its obligations.
- The draft law should indicate that, after the expiry of the 45 day period for appeals, the Commissioner may certify in writing to the court any failure to comply with a decision and the court shall consider such failure under the rules relating to contempt of court.
- The draft law should also provide that a public or private body is not required to comply with a request for information which is vexatious or where it has recently complied with a substantially similar request from the same person, or to do so would unreasonably divert its resources.
- The draft law should provide that the office of the General Commissioner shall: enjoy operational and administrative autonomy from any other person or entity, including the government and its agencies; shall be appointed by the President after nomination by two-thirds majority vote of the Parliament and after a open, participatory and transparent nomination process; and that no-one may be appointed Information Commissioner if he or she holds an official office or is an employee of a political party or holds an elected position in the central or local government.
- The term "interrogate" in Article 40(2) should be replaced with the word "question".
- The relationship between the General Commissioner and General Commission should be clarified. The draft law should indicate that the General Commissioner chairs or leads the General Commission.
- In relation to "good faith disclosures" the draft law should state that "no one shall be subjected to civil or criminal action, or any employment detriment, for anything done in good faith in the exercise of, performance or purported performance of any power or duty in terms of this Act, as long as they acted reasonably and in good faith.
- The draft law should provide that it is a criminal offence to wilfully – (a) obstruct access to any record contrary to Part II of this Act; (b) obstruct the performance by a public body of a duty under Part III of this Act; (c) interfere with the work of the Commissioner; or (d) destroy records without lawful authority. It should go on to state that anyone who commits such an offence shall be liable on summary conviction to a fine not exceeding an appropriate amount and/or to imprisonment for a period not exceeding two years.
- A provision should be added to the draft law to protect individuals against any legal, administrative or employment-related sanctions for releasing information on wrongdoing, or that which would disclose a serious threat to health, safety or the environment, as long as they 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.

LEGAL ANALYSIS OF DRAFT LAW ON THE RIGHT OF ACCESS TO INFORMATION

1. Introduction

This is Memorandum on the "Information Access Right Draft Law" (the "draft law"), developed by *Temkin*, a group of experts, journalists and academics in Iraq, in late 2009.[1] ARTICLE 19 supports the initiative to introduce a comprehensive freedom of information framework in Iraq and has produced this analysis in order to promote the movement towards the adoption of freedom of information legislation which accords with international human rights standards.

ARTICLE recommends and supports the adoption of legislation that properly guarantees and implements that right in Iraq for several interrelated reasons. *First*, the right of access to information is a fundamental human right that is crucial to the functioning of a democracy and key to the protection of other rights. The right is especially important in the context of Iraq – a post-conflict state struggling to establish the rule of law and democracy in the face of continued and considerable sectarian violence and where human rights conditions remain extremely poor. Clearly, the consolidation of the democracy, the rule of law and human rights in Iraq should be the priority of the Iraqi government, and also the international community. *Second* and more specifically, a properly protected right of access to information would enhance the flow of information in the country and help to promote good governance, openness and transparency within Iraq's public administration. It would also increase a sense of trust amongst the people about the governmental and public authorities, whether at the national or local levels. *Third*, such legal protection would allow Iraq to join the community of over eighty states who have adopted legislation on the right to access information to date.[2] It would also address the gap between Iraq's domestic legal protection and practice, on the one hand, and international legal obligations, on the other, as a signatory to the International Covenant on Civil and Political Rights ("ICCPR"). The right to access information is guaranteed by international human rights law and in anti-corruption conventions signed and/or ratified by Iraq.[3] So far, however, Iraq has not enacted and implemented legislation protecting this right.

This Memorandum examines whether and the extent to which the draft law actually enhances the right of access to information in Iraq from an international human rights perspective. In doing so does it draws upon international law and best practice in the field of access to information, as crystallised in two key ARTICLE 19 documents: *The Public's Right to Know: Principles on Freedom of Information Legislation* ("FOI Principles")[4] and *A Model Freedom of Information Law* ("Model FOI Law").[5] Both publications represent broad international consensus on best practice in this area. The following sections contain a substantive analysis of the draft Law as well as recommendations for its improvement. The Appendices provide an overview of international law on access to information (Appendix 1) and a reproduction of the draft law (Appendix 2).

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[1] For the text of the draft law, see Annex I to this Memorandum.
[2] See Privacy International, *National Freedom of Information Laws, Regulations and Bills 2009* http://www.privacyinternational.org/foi/foi-laws.jpg
[3] See Appendix 1.
[4] London: June 1999.
[5] London: July 2001.

In summary, the draft law is a positive step because it would seeks to establish a right of access to information in Iraq. At the same time, the draft law is weakened by a number of significant shortfalls, many of which are related to a lack of specificity and clarity of its provisions whilst others are more substantive in nature. The draft law is vague in parts. For instance, it does not clearly assert the individual's right of access to information or the individual's right to appeal to an independent administrative authority. It also misses out important provisions in relation to the system of appeals and criminal and civil responsibility. Furthermore and significantly, the regime of exceptions does not reflect the consistently reflect the public interest test that is required under of international standards.

We recommend that the *Temkin* should amend the draft law according to the recommendations made in this Memorandum. We also urge the Iraqi legislature adopts a law on freedom of information according to the international standards upon which this Memorandum is based. The following sections analyse the key features of the draft law including its objectives and principles, measures to promote openness, the scope of the right of access to information, procedural rules, the appeals process, the oversight body and civil and criminal responsibility under the draft law.

2. Objectives and Principles of the draft law

General Provisions
Before turning to examine the objectives and principles of the draft law, we highlight some general features of the draft law contained in Chapter One and Chapter Seven.

Title of the draft law*:* The draft law, as it stands, is entitled the "Information Access Right Draft Law." In our view, it would be preferable to clarify the draft legislation and call it the "draft law on the Right of Access to Information" in line with international trends in the field.

Lack of Preamble: We note that the draft law has no preamble stating its overall purpose as featured at the beginning of legislation on the right of access to information. Whilst the objectives and principles are set down later in Article 2, in our view the draft law would benefit from a clear preambular statement of purpose towards promoting openness and transparency. While we do not suggest that the draft law requires an especially elaborate preamble, we do recommend that the draft law is strengthened through a preamble which at minimum introduces the draft law as "an Act to promote maximum disclosure in the public interest, to guarantee the right of everyone to access information, and to provide for effective mechanisms to secure that right".

More positively, we note that the draft law supersedes any existing legislation that is inconsistent with its provisions. Article 44 of the draft law states: "[a]ny provision inconsistent with the provisions of this law is annulled." According to Article 45, the "Cabinet shall issue the needed bills to execute this Law in no more than six months from the date of its publication". This is appropriate according to international standards and allows some time for making the necessary institutional, structural or attitudinal changes for the law to be implemented effectively.[6] Article 45 then states that "[a]ll the concerned bodies shall execute the provisions of this Law applicable to each of them" and that the law "shall be effective a year after the date of its publication".

[6] *Model FOI Law*, Article 52(2).

Objectives of the draft law
The objectives of the draft law are only indicated in Article 2 as "enabling the Iraqi citizen to practice the right of accessing information kept by the Public Institutions he is entitled to in accordance with the provisions of this Law" and "spreading the spirit of transparency and accountability in the Public Institutions and encouraging openness to the people" (Article 2(1) and (2)). (Chapter Two of the draft law concerns "principles of the information access right", though this section does not further elaborate on the goals of the draft law.) While we generally welcome the references to openness, transparency and governmental accountability to the people, the formulation of the objectives of the draft law falls short of international standards because of the apparent restriction of the right of access to information to Iraqi citizens. We recommend the objectives should reflect that the right of access to information is a fundamental human right, rather than one for Iraqi citizens only.

The practical implementation of the principle of maximum disclosure – the presumption that all information held by public bodies should be subject to disclosure and that this presumption may be overcome only in very limited circumstances – should be the overall objective of the legislation and be properly reflected in it provisions.[7] This principle has two interrelated aspects: on the one hand, public bodies have an obligation to disclose information and, on the other, every member of the public has a corresponding right to receive information. We therefore recommend that the draft law should indicate that the particular purpose of the legislation is to provide a right of access to information held by public bodies in accordance with the principles that such information should be available to the public, that necessary exceptions to the right of access should be limited and specific, and that decisions on the disclosure of such information should be reviewed independently of government. In our view, the draft law should also recognise the need to gain access to information held by private bodies where this is necessary for the exercise or protection of any right, subject to only limited and specific exceptions.

We also recommend that Article 3, which indicates that only Iraqi citizens may gain access to information of public institutions, should be amended. In its place there should be a clear and positive assertion of the principle encompassing the human right that "everyone shall have the right to freedom of information, including the right to access information held by public bodies, subject only the provisions of this Act".[8] Such a formulation is important as it demonstrates the essential human rights characteristic of the right of access to information and means that this right, as a human right, applies to all within the jurisdiction of Iraq. Moreover, such a statement should come at the very start of any legislation on the right of access to documents.

Recommendations:
- The law should be entitled "Law on the Right of Access to Information" rather than its current name.
- A preamble should be added to the draft law which should introduce it as "an Act to promote maximum disclosure in the public interest, to guarantee the right of everyone to access information, and to provide for effective mechanisms to secure that right".
- All references to the "right of accessing information" in the draft law should be replaced by the "right of access to information".
- Article 2(1) and (2) should be replaced with a statement indicating that the particular purposes of the legislation are: "to provide a right of access to information held by public bodies in accordance with the principles that such information should be available to the

[7] *FOI Principles*, Principles 1 and 4.
[8] *Model FOI Law*, Article 3.

public, that necessary exceptions to the right of access should be limited and specific, and that decisions on the disclosure of such information should be reviewed independently of government" and "to provide a right of access to information held by private bodies where this is necessary for the exercise or protection of any right, subject to only limited and specific exceptions".

- Article 3 should be amended to state: "everyone shall have the right to freedom of information, including the right to access information held by public bodies, subject only the provisions of this Act".

3. Measures to Promote Openness

The draft law contains a number of provisions which aim to promote openness in government. Article 6 states that public institutions "shall conduct training courses for their employees on the importance of the Information access Right to enable the citizens to practice it, on how to save information, and on the best and fastest means to retrieve the information". This provision is important as it makes public authorities responsible for providing their own employees with appropriate training on the right of access to information and the effective implementation of the draft law.

Article 5 states that public institutions "shall organize their information in a manner that enables the Concerned Officer to retrieve them". Article 1 defines the Concerned Officer as the officer appointed by a "public institution" to handle the requests for information access. Article 5 then states that public institutions shall "organize their information in a manner that enables the Concerned Officer to retrieve them" and "when possible .... shall save the information electronically". In our view, these provisions would be improved if accompanied with a provision stating the overarching principle that every public body is under an obligation to maintain its records in a manner which facilities the right of access to information. It would be further enhanced if it provided for a Code of Practice to be issued by such a body as an independent Information Commissioner. This Code of Practice should be issued within a reasonable time and after appropriate consultation with interested bodies. It should be from time to time updated and contain practice rules relating to the keeping, management and disposal of records, as well as the transfer of records to archiving bodies.[9]

Article 7 requires the dissemination by public institutions of annual reports including: "(1) management information on the work mechanism of the Public Institution including the costs, objectives, audited accounts, rules and achievements; (2) procedures according to which individuals can identify the general policy and projects of the Public Institution; (3) kinds of information kept by the Public Institution and the means with which it is saved; (4) content of any decision or policy that may affect the people, the reasons behind making this decision and expected objectives; (5) any other data the General Commissioner deems necessary to disseminate". It is positive that Article 8 then goes on to require both public *and private* industrial institutions to disseminate bi-annual reports that state at least the following information: "(1) locations of used toxic materials, their natures and their dangers; (2) quantity of emissions from manufacturing; (3) how the wastes are disposed of".

Although these provisions' recognition of the importance of publishing key information is clearly positive, it is not comprehensive in terms of the key categories of information that should be

[9] *Model FOI Law*, Article 19.

published. The provision should explicitly also encompass: information on any requests, complaints or any other direct actions which members of the public may take in relation to the public body; guidance on processes by which members of the public may provide input into major policy or legislative proposals; the types of information which the body holds and the form in which this information is held; and the content of any decision or policy affecting the public, along with reasons for the decision and background material.[10]

Recommendations:

- Chapter One should be amended to include the general principle that "every public body is under an obligation to maintain its records in a manner which facilities the right of access to information". It should also provide for a Code of Practice to be issued, within a reasonable time and after appropriate consultation with interested bodies, by such a body as an independent Information Commissioner.
- Chapter One should be amended to include a provision stating that "every public body is under an obligation to maintain its records in a manner which facilities the right of access to information as provided for in this Act and in accordance with the Code of Practice". It should provide for a Code of Practice that "should be issued by such a body as an independent Information Commissioner within a reasonable time and after appropriate consultation with interested bodies". It should be "from time to time updated and contain practice rules relating to the keeping, management and disposal of records, as well as the transfer of records to archiving bodies".
- Chapter Two, in particular Articles 7 and 8, should be amended to include provisions obliging public bodies to publish the following types of information (in addition the types of information already included): "information on any requests, complaints or any other direct actions which members of the public may take in relation to the public body; guidance on processes by which members of the public may provide input into major policy or legislative proposals; the types of information which the body holds and the form in which this information is held; and the content of any decision or policy affecting the public, along with reasons for the decision and background material.

4. Scope of the Right

Definition of "Information"
Article 1 sets out the definitions of numerous terms in the draft law. "Information" is defined as "information found in records and documents whether written or electronically saved, drawings, maps, tables, photographs, films, microfilms, audio records, video tapes, charts, any data read on special equipment, or any other forms the General Commissioner thinks are listed under the category of *information* in accordance to this Law". This is an unduly narrow definition of "information". Indeed, the term information should 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 it not it is classified.[11]

Bodies covered
Under Article 1 of the draft law, the term "public institution" refers to "all ministries, executive authorities, legislative and judicial institutions, local governments and the independent bodies stated in the constitution and related to the Council of Representatives from the monitoring

[10] *FOI Principles*, Principle 2.
[11] *Model FOI Law*, Article 7.

view". Although this seems to encompass a broad range of bodies within the scope of the draft law (particularly through the concept of "independent bodies"), we argue that the draft law should expressly focus on the *function* performed by the body, rather than its formal designation or the degree of control or authority exercised by government over it.[12] To this end, the draft law should encompass clearly all branches and levels of government, including local government, elected bodies, bodies which operate under a statutory mandate, nationalised industries and public corporations, non-departmental bodies or quangos and judicial bodies, as well as private bodies carrying out public functions. In other words, if the function performed is a public one, the body should be included within the scope of the draft law to ensure uniform coverage over all bodies that perform public functions.

Recommendations:

- The definition of information in Article 1 should be amended 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 it not it is classified.
- Article 1 should be amended to indicate that for the purposes of the draft law, a public institution includes any body that is: established by or under the Constitution or statute; which forms part of any level or branch of government; owned, controlled or substantially financed by funds provided by government or the state; or carrying out a statutory or public function.

5. Procedural Rules

Procedure for requesting information

Chapter Three of the draft law set out the procedures for requesting information. The role of the "Concerned officer", the officer appointed by the public institution to handle the requests for information access, is central to the implementation of these provisions. Under Article 11, "*written* requests for having access to information shall be submitted to the Public Institution that holds the information" (emphasis added). However, we submit that the only criteria for a request for information should be that it is a request in writing or orally to *any* official of a public or private body and is in sufficient detail to enable an experienced official to identify, with reasonable effort, whether or not the body holds a record of that information.[13] Any rules on the form of application for requesting information – including a restriction allowing written requests only – is unduly restrictive upon potential requesters. A public body employee who receives an oral request should then reduce that request to writing, to include their name and position, and give a copy to the requester.

The draft law should also provide more details concerning the procedure for making a request for information. It should provide that a request for information should be made in sufficient detail to identify, with reasonable effort, whether or not the body holds a record with that information. If the request does not meet this standard, the official receiving the request should provide such reasonable assistance, free of charge, as may be necessary to enable it to comply.[14] In addition, there should be provision stating that where a request indicates a preference as to the form of communication of information (eg a true copy, an opportunity to inspect, an opportunity to copy, a written transcript), a body should respond in accordance with that preference unless it would be

[12] *Model FOI Law*, Article 6.
[13] *Model FOI Law*, Article 8(1).
[14] *Model FOI Law*, Article 8.

an unreasonable interference with the effective operation of the body to do so or be detrimental to the preservation of the record. Information should be given in the preferred language of the person making the request.[15]

Provision of information by public bodies
Article 15 states that the Concerned Officer shall offer the requester the information "in accordance with the format available in the Public Institution". It then goes on to state that the "Concerned Officer shall not be satisfied with informing the requester orally without a document that contains the information". We find this provision unduly restrictive on the ability of requesters to request preferences as to the form of information – whether a true copy of the record in permanent or other form, an opportunity to inspect the record, an opportunity to copy the record, 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. A public body should not be required to communicate information in the form indicated by the requester only if to do so would either unreasonably interfere with the effective operation of the body or be detrimental to the preservation of the record.

It is positive that Article 16 provides for the presentation of information in "an alternative form that suits the disability of the requester" provided, however, that this alternative form is available to the public institution. After all, there should be specific provision in such legislation for individuals who are unable, because of illiteracy or disability, to make a written request for information to make an oral request, and for the receiving official to reduce that oral request into writing and give a copy of that request to the individual.[16] However, the Concerned Officer may transfer the information in the alternative form only if "he deems necessary". And if the requester accepts the transformation, the Concerned Officer shall transfer the information provided that the requester pays for the costs. These provisions accord discretion on the Concerned Officer to decide whether or not a requester with special needs deserves information. More seriously, this provision implies that a requester would special needs would necessarily need to pay for the costs of information. The "chapter" of the draft law does not, however, indicate that requesters without special needs would need to pay costs – suggesting there would be discrimination between requesters with and those without special needs with only the former required to pay fees for information. In our view, fees for information should only be levied – regardless of the requester's disability status – if they are reasonable and do not exceed the actual cost of searching for, preparing and communicating the information. (See discussion of fees regime below).

Time limit for responding to requests
Article 13 states that the Concerned Officer shall respond to the request within 15 days from the date of the request. The officer is entitled to "extend this period only once for no more than 15 days if the request contains a large number of pieces of information, or retrieving the piece of information requires consulting a third party or another Public Institution". It goes on, "not responding within this period is considered a rejection to the request". Article 14 then states that the Concerned Officer shall enable the requester to access the information stated in the request if the request is approved. These provisions have a number of shortfalls and may be improved in numerous ways.

- *First*, the draft law should provide that notification of approval or rejection to applicants of their requests should be made "as soon as possible" to encourage bodies to deliver

[15] *Model FOI Law*, Article 12.
[16] *Model FOI Law*, Article 8(3).

their decisions speedily and in any event within 15 days from the date of the request (though anything up to 20 days would be reasonable).

- *Second*, the draft law should consider situations where it is necessary to gain access to information within a much shorter period of time in order to protect individuals from coming to harm. Accordingly it should provide that where a request for information relates to information which reasonably appears to be necessary to safeguard the life or liberty of a person, a response must be provided in 48 hours.
- *Third*, the draft law should consider situations where the information requested may not be able to be provided to the requester within 30 days after the request being made (i.e. the initial deadline period plus the extended deadline period in Article 13). We recommend that the draft law should extend the deadline for forty days from the end of the initial deadline for delivering responses. Otherwise, the 30 day period could preclude responses to requests which are for a large number of records or require a search through a large number of records.[17]
- *Fourth*, not only should the time limits for responding to request be framed by the draft law, but the contents of the response itself should be too. The response should state adequate reasons for any refusal of a request or any refusal to indicate whether or not the public body holds a record containing the relevant information and any right of appeal the requester may have.[18] An absence of a response should not constitute a rejection of a request, as indicated by Article 13. It is positive though that Article 14 provides that the Concerned Officer shall specify the cost of accessing the needed information. Under that provision, he or she is also entitled to allow the requester to access part of the information in case the other part of the information is listed under the exceptions specified in the draft law. This is in line with ARTICLE 19's Model Law which provides that if a request for information relates to a record containing information which falls within the scope of an exception, any information in the record which is not subject to an exception shall, to the extent it may be reasonably be severed from the rest of the information, be communicated to the requester.[19]

Transfer of requests

It is positive that the draft law, in Article 17, provides for that the Concerned Officer may transfer or "reassign" the request for information to "another institution when he realizes that the other institution is more related to the information". In such a case, the request shall be considered "submitted to the Public Institution to which the request is reassigned.

Recommendations:

- The draft law should contain a provision clearly indicating that the criteria for a request for information should be that it is a request in writing or orally to any official of a public or private body or institution and is in sufficient detail to enable an experienced official to identify, with reasonable effort, whether or not the body holds a record of that information.
- There should be a provision requiring the relevant official to render such reasonable assistance as may be necessary to those including illiterate and disabled individuals.
- There should be a provision providing that a public or private body communicating information following a request on for information should do so in accordance with that preference.

[17] *Model FOI Law*, Article 9(1).
[18] *Model FOI Law*, Article 10.
[19] *Model FOI Law*, Article 24.

- Article 13 should be amended to indicate that the approval or rejection of a request for information should be made "as soon as reasonably possible" and no later within fourteen working days of the request.
- There should be a provision indicating that, where a request for information relates to information which reasonably appears to be necessary to safeguard the rights to life or liberty, a response must be provided within 48 hours.
- There should be a provision providing that a public or private body may by notice in writing within the initial twenty day period, extend the period for responding to the request by another forty days.
- There should be a provision concerning other requirements of the notice of response: adequate reasons for any refusals of requests and any right of appeal.

6. Costs

Chapter Six, Articles 42 and 43 deal with fees. We welcome the fact that the fees are to centrally set by the "General Commissioner and issued by the Cabinet". According to the provisions, the fee should not exceed a set figure which is to be determined later except to "cover the costs of copying or photocopying the needed pictures according to their costs in the market", or "the cost of the Alternative Forms of the information according to their costs in the market" or if the "request contains more than one people of information".

However, it is important to ensure that individuals should not be deterred from making requests for information by excessive costs, given that the rationale behind the legislation should to be the promotion of open access to information.[20] The level of fees should be reasonable and not exceed the cost of searching for, preparing and communicating the information. Furthermore, public bodies should *not* charge fees where the cost of collecting the fee would exceed its amount.[21]

Recommendations:

- Articles 42 and 43 should be amended to reflect that fees should be reasonable, not exceed the cost of copying and communicating the information, should be waived for personal information and requests in the public interest, and should not be levied where the cost of collection would exceed the amount of the fee.

7. The Regime of Exceptions

Chapter Four, Articles 19-28 concern exceptions to disclosure. These are, broadly speaking, national security and general order (Article 19-22), economic security issues (Article 23), commercial secrets (Article 24), internal affairs of the institution (Article 25), general health and security (Articles 26-27) and privacy (Article 28).

There a number problems with this list of exceptions from the perspective of international legal standards. Under international law, the regime of exceptions should to adhere to a three-part test as follows:

- the information must relate to a legitimate aim listed in the law;

[20] *FOI Principles*, Principle 6.
[21] *Model FOI Law*, Article 11.

- disclosure must threaten to cause substantial harm to that aim; and
- the harm to the aim must be greater than the public interest in having the information.[22]

The draft law falls short to these requirements for several reasons.

First, and perhaps most significantly, the draft law makes no mention at all to the three part test or "public interest override" as a general principle underlying all the provisions contained in the list of exceptions. This 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 "unproved expectations on natural disasters or infectious diseases" (Article 26) but it may nevertheless be in the public interest to reveal that information to contribute to ongoing debates on such matters as climate change, for example. Furthermore, information may often be withheld abusively for reasons other than the public interest, in order to cover up corruption or maladministration within government.

Therefore, in relation to all the exceptions stated in this draft law, the harm to a specific 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 and as such:

> "Notwithstanding any provision in this Part, a body may not refuse to indicate whether or not it holds a record, or refuse to communicate information, unless the harm to the protected interest outweighs the public interest in disclosure."[23]

Second and relatedly, relevant public 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. For non-disclosure to be legitimate in cases where disclosure may benefit as well as harm the aim, the net effect of disclosure must be to cause *substantial* harm to the aim. Whilst some of the categories of exemption refer to "harm" (Article 22 on the investigation of crimes) or "damage" (Article 23 on economic security issues), many of the provisions simply refer to information "affecting" or "concerning" a particular interest (eg Articles 19 and 20). Certain information that may simply "affect the defensive capabilities and national security of the state" may well include information on the provision of adequate training and equipment to military personnel and it would be in the public interest to disclose such information, particularly if there was a shortfall in such equipment.

Third, some of the aims indicated by the categories of exceptions in Chapter Four *are overly broad*. First, Article 22 states that information on "investigating crimes, and police operations ... which represents harm to the investigations and execution of the needed tasks" or "information that may affect the reputation of individuals who are not convicted yet". This provision should be more narrowly focussed on the precise objectives of law enforcement.[24] Second, the exceptions indicated in the category of "economic and security issues" under Article 23 should not apply insofar as a request relates to the results of any product or environmental testing, and the

[22] *FOI Principles*, Principle 4.
[23] *Model FOI Law*, Article 22.
[24] *FOI Model Law*, Article 29.

information concerned reveals a serious public safety or environmental risk.[25] Third, in relation to commercial interests, Article 24 should be more carefully honed in to indicate that information should be refused if the information contains confidential information obtained from a third party, contains a trade secret or would or would be likely to seriously prejudice the commercial interests of the third party. Fourth, the category of privacy under Article 28 should include a standard of reasonableness so that only the unreasonable disclosure of personal information about an individual would be exempt.

Fourth, the draft law fails to acknowledge other interests which might justify a refusal to provide information legally privileged information and information which would or would be likely to cause serious prejudice to the effective formulation or development of government policy, frustrate the success of a policy, by premature disclosure of that policy, undermine the deliberative process in a public body by inhibiting the free and frank provision of advice or exchange of views or significantly undermine the effectiveness of a testing or auditing procedure used by a public body.[26]

Fifth, the draft law lacks a provision which allows for a record to be reasonably severed if part of the requested information falls within the scope of a legitimate exception indicated in the law.[27]

To address the problems indicated with the regime for exceptions, ARTICLE 19 recommends that the relevant provisions should be amended according to international standards and best practices as reflected in the ARTICLE 19 *Model FOI Law*.

Recommendations:

- There should be a provision at the beginning of the section concerning exceptions which states the overriding principle: "[n]otwithstanding any provision in this Part, a body may not refuse to indicate whether or not it holds a record, or refuse to communicate information, unless the harm to the protected interest outweighs the public interest in disclosure".
- All categories of exceptions from Articles 19 – 28 should reflect the substantial harm test.
- Article 22 should be amended to provide that a body may refuse to indicate whether it holds information or refuse to communication information where to do so would, or would be likely to, cause serious prejudice to: "(a) the prevention or detection of crime; (b) the apprehension of prosecution of offenders; (c) the administration of justice; (d) the assessment or collection of any tax or duty; (e) the operation of immigration controls; or (f) the assessment of a public body of whether civil or criminal proceedings or regulatory action pursuant to any enactment would justified".
- Article 28 should be amended and split into two parts. The first should state that a body may refuse to indicate whether or not it holds information where to do so would involve the unreasonable disclosure of personal information about an individual. The second part should state that the first does not apply if: (1) the individual has effectively consented to the disclosure of information; (2) the person making the request is the guardian of the individual, or the next of kin or executor of the will of a deceased individual; (3) the individual has been deceased for more than 20 years; or (4) the individual is or was an official of a public body and the information relates to his or her function as a public official.

[25] *Model FOI Law*, Article 31.
[26] *Model FOI Law*, Articles 32.
[27] *Model FOI Law*, Article 24.

- Article 23 should be amended to indicate that the exceptions indicated thereunder do 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.
- Article 24 should indicate that information should be refused if the information contains confidential information obtained from a third party, contains a trade secret or would or would be likely to seriously prejudice the commercial interests of the third party.
- Article 28 should be amended to state that only the unreasonable disclosure of personal information about an individual would be exempt.
- The draft law should provide additional categories of exceptions for legally privileged information and information which would or would be likely to cause serious prejudice to the effective formulation or development of government policy, frustrate the success of a policy, by premature disclosure of that policy, undermine the deliberative process in a public body by inhibiting the free and frank provision of advice or exchange of views or significantly undermine the effectiveness of a testing or auditing procedure used by a public body.
- The draft law should provide that "if a request for information falls within the scope of an exception listed in the law, any information in the record which is not subject to an exception shall, to the extent it may reasonably be severed from the rest of the information, be communicated to the requester."

8. Appeals

Article 32-34 and 36 provide for a system of appeals to the "General Commission" whose "recommendations" are binding under Article 39. There are a number of problems with the appeals regime in this draft law.

Under Article 32, the Commission has the competence to receive appeals from individuals whose requests for information have been rejected, who have been asked to pay high fees for their request, whose request for information in an "alternative form" has been rejected, whose "period needed to respond to his request was extended in a manner that violated the provisions of Article 13 of this law", whose request had been referred to more than one institution without getting approach, and any other cases approved by the General Commissioner for information. An appeal should also be able to be brought if a public or private body has failed to indicate whether or not it holds the information or failed to provide a notice in writing of its response.

The request for should be submitted to the Commission within 30 days from the date of the rejection of the request or "from the date the institution concerned took the procedure the requester wanted to appeal for". This latter phrase in Article 33 is unclear and ought to be clarified.

Article 34 states that the Commission shall respond to the appeal request in no more than three months from the date of submitting the request. In our view, three months is too long a period from the date of the original request submission for the Commission to respond to an appeal. We suggest that the provision states that the Commission should respond within 30 days.[28]

We note that there is a complete absence of provisions elaborating on such matters as: the grounds on which a complaint or an appeal may be brought; the powers of an administrative to

[28] *Model FOI Law*, Article 42.

deal with appeals; the grounds on which an appeal may be summarily rejected; the burden of proof in appeals; the remedies that may be granted (eg compensation); direct implementation of the decision of the independent administrative body; and the possibility and time period for filing an application for appealing a decision of the independent administrative body to the courts' system.

On this basis, ARTICLE 19 recommends that a proper appeals' system be established according to international standards and best practices as reflected in the ARTICLE 19 *Model FOI Law*.[29]

Recommendations:

- The draft law should clearly provide for a right to appeal to an independent administrative authority, such as the General Commission, concerning a decision a failure to comply with an obligation of the draft Law.
- The draft law should clearly indicate that appeal may be brought if a public or private body has failed to indicate whether or not it holds the information or failed to provide a notice in writing of its response.
- The phrase "from the date the institution concerned took the procedure the requester wanted to appeal for" should be clarified.
- The draft Law should provide that the General Commission shall decide an application for an appeal as soon as reasonably possible, and in any case within 30 days, after giving both the complainant and the relevant public or private body an opportunity to provide their views in writing. It should indicate that the Commissioner may summarily reject applications which are frivolous or vexatious, or where the applicant has failed to use any effective and timely internal appeals mechanisms provided by the relevant body. It should also indicate that the Commissioner may: (1) reject the application; (2) require the public or private body to take such steps as may be necessary to bring it into compliance with its obligations; (3) require the public body to compensate the complainant for any loss or other detriment suffered; or (4) impose a fine on the body. It should state that the Commissioner shall serve notice of his or her decision, including any rights of appeal, on both the complainant and the public or private body.
- The draft law should provide that the General Commission may, after giving a public body an opportunity to provide their views in writing, decide that a body has failed to comply with an obligation under the draft Law.
- The draft law should state that a complainant or relevant body may, within 45 days, appeal to the court for a full review of a decision of the Commissioner. It should stipulate that the burden on the body to show that it acted in accordance with its obligations.
- The draft law should indicate that, after the expiry of the 45 day period for appeals, the Commissioner may certify in writing to the court any failure to comply with a decision and the court shall consider such failure under the rules relating to contempt of court.
- The draft law should also provide that a public or private body is not required to comply with a request for information which is vexatious or where it has recently complied with a substantially similar request from the same person, or to do so would unreasonably divert its resources.

[29] *Model FOI Law*, Articles 41 to 46.

9. Oversight Body

We welcome the fact that the draft law indicates that the oversight body, a "General Commissioner of Information", shall have "needed independence to perform its tasks" under Article 29. Moreover, the General Commissioner "shall not perform any other work, or occupy any other job, or post, or profession whether paid or not paid" under Article 37.[30] However, the appointments process under Article 35, casts doubt as to whether the position shall be able legitimately to claim true independence given that the relevant person shall "be appointed by the Prime Minister and approved by the COR" (Council of Representatives). In our view, the draft law should be amended to provide that the General Commissioner should proper enjoy operational and administrative autonomy from any other person or entity, including the government and its agencies. The General Commissioner should be appointed by the President but only after nomination by two-thirds majority vote of the Parliament and after an open, participatory and transparent nomination process.

The various functions of the General Commission, which is presumably headed up by the General Commissioner, are set out in Article 30 and these functions properly include: "1. the making, organizing and executing the programs, plans and policies of defending the individual's right of information access; 2. Educating and boosting the awareness of the citizens on the importance of the right of information, access and the positive results of practicing it at the individual, community and state levels; 3. Participating in training the officers and officials working for the public institutions on how to enable individuals to access information and on the importance of this act; and 4. Observing the violations and publishing the reports and studies that include the obstacles of practicing the right of having access to information and how to overcome them". In our view, the relationship between the General Commission and the General Commissioner ought to be clarified with a specific provision setting out its nature.

Article 40 provides the General Commissioner with broad investigative powers to enter a public institution and to search its records, as well as to "interrogate" any officer order to access the needed information. In our view, the use of the word "interrogate" is inappropriate because it implies far reaching and potentially abusive powers for the General Commissioner.

Recommendations:

- The draft law should provide that the office of the General Commissioner shall: enjoy operational and administrative autonomy from any other person or entity, including the government and its agencies; shall be appointed by the President after nomination by two-thirds majority vote of the Parliament and after a open, participatory and transparent nomination process; and that no-one may be appointed Information Commissioner if he or she holds an official office or is an employee of a political party or holds an elected position in the central or local government.[31]
- The term "interrogate" in Article 40(2) should be replaced with the word "question".
- The relationship between the General Commissioner and General Commission should be clarified. The draft law should indicate that the General Commissioner chairs or leads the General Commission.

[30] *Model FOI Law*, Part V.
[31] *Model FOI Law*, Part V.

10. Criminal and Civil Responsibility

We note that the draft law provides no system of penalties. Such a system should be narrowly focussed to serve the particular objectives of the law. We recommend that such a system be provided for in accordance with international standards.

Recommendations:

- In relation to "good faith disclosures" the draft law should state that "no one shall be subjected to civil or criminal action, or any employment detriment, for anything done in good faith in the exercise of, performance or purported performance of any power or duty in terms of this Act, as long as they acted reasonably and in good faith.
- The draft law should provide that it is a criminal offence to wilfully – (a) obstruct access to any record contrary to Part II of this Act; (b) obstruct the performance by a public body of a duty under Part III of this Act; (c) interfere with the work of the Commissioner; or (d) destroy records without lawful authority. It should go on to state that anyone who commits such an offence shall be liable on summary conviction to a fine not exceeding an appropriate amount and/or to imprisonment for a period not exceeding two years.

11. Miscellaneous

We note the draft law does not deal with the protection of whistleblowers – persons who release information on wrongdoing ("blow the whistle"). International standards and the best practice of states indicate that a provision on whistleblowers' protection should be part of any freedom of information legislation. It should provide for protection against any legal, administrative or employment related sanctions for individuals who release information on wrongdoing, or which would disclose 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.[32]

Recommendations:

- A provision should be added to the draft law to protect individuals against any legal, administrative or employment-related sanctions for releasing information on wrongdoing, or that which would disclose a serious threat to health, safety or the environment, as long as they 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.

[32] See *FOI Principles*, Principle 9, and *Model FOI Law*, Part VII.

IRAQ'S OBLIGATIONS UNDER INTERNATIONAL LAW ON THE RIGHT TO FREEDOM OF INFORMATION

1. The importance of access to information

The right of access to information held by public bodies – often referred to as "freedom of information" or the "right to information" – is a fundamental human right recognised in international law.[33] It is crucial as a right in its own regard as well as central to the functioning of democracy and the realisation of all other human rights. Without an individual right to access information, state authorities can control the flow of information, "hiding" material that is damaging to the government and selectively releasing information which government deems appropriate for public consumption only. In such a climate, corruption thrives and human rights violations can remain unchecked.

In the earliest international human rights instruments, the right to information was not set out separately, but included as part of the fundamental right to freedom of expression, which includes the right to seek, receive and impart information. Article 19 of the *Universal Declaration on Human Rights* (UDHR), adopted as a United Nations General Assembly resolution in 1948,[34] states:

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

While the UDHR is not directly binding on States, parts of it, including Article 19, are widely regarded as having acquired legal force as customary international law.[35] Article 19 of the *International Covenant on Civil and Political Rights* (ICCPR), which Iraq ratified on 25 January 1971, guarantees the right to freedom of expression and information in terms similar to the UDHR.[36]

There is now little doubt that there is growing international recognition of a general right of access to information as well as of the importance of adopting the legislative and other measures necessary to make this right effective. The United Nations Special Rapporteur on Freedom of Opinion and Expression,[37] for example, has repeatedly called on all States to adopt and implement right to information legislation.[38] In 1995, the UN Special Rapporteur stated:

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[33] Toby Mendel, *Freedom of Information: A Comparative Legal Study* (UNESCO, Paris: 2008).
[34] UN General Assembly Resolution 217A (III), adopted 10 December 1948.
[35] For judicial opinions on human rights guarantees in customary international law, see *Barcelona Traction, Light and Power Company Limited Case* (Belgium v. Spain) (Second Phase), ICJ Rep. 1970 3 (International Court of Justice); *Namibia Opinion*, ICJ Rep. 1971 16, Separate Opinion, Judge Ammoun (International Court of Justice); *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980) (US Circuit Court of Appeals, 2nd Circuit). For an academic critique, see M.S. McDougal, H.D. Lasswell and L.C. Chen, *Human Rights and World Public Order*, (Yale University Press: 1980), pp. 273-74, 325-27. See also United Nations General Assembly Resolution 59 (1), 1946.
[36] UN General Assembly Resolution 2200A (XXI), adopted 16 December 1966, in force 23 March 1976.
[37] The Office of the Special Rapporteur on of Opinion and Expression was established by the UN Commission on Human Rights, the most authoritative UN human rights body, in 1993: Resolution 1993/45, 5 March 1993.
[38] See, for example, the Concluding Observations of the Human Rights Committee in relation to Trinidad

> "The Special Rapporteur, therefore, underscores once again that the tendency of many Governments to withhold information from the people at large … is to be strongly checked."[39]

His comments were welcomed by the UN Commission on Human Rights, which called on the Special Rapporteur to "develop further his commentary on the right to seek and receive information and to expand on his observations and recommendations arising from communications".[40] In his 1998 Annual Report, the Special Rapporteur reaffirmed that the right to information includes the right to access information held by the State:

> "[T]he right to seek, receive and impart information imposes a positive obligation on States to ensure access to information, particularly with regard to information held by Government in all types of storage and retrieval systems…."[41]

The UN Special Rapporteur was joined in his call for legal recognition of the right to information by his regional counterparts – the Representative on Freedom of the Media of the Organisation for Security and Cooperation in Europe and the Special Rapporteur on Freedom of Expression of the Organisation of American States – in a Joint Declaration issued in November 1999. The three reiterated their call in December 2004, stating:

> "The right to access information held by public authorities is a fundamental human right which should be given effect at the national level through comprehensive legislation (for example Freedom of Information Acts) based on the principle of maximum disclosure, establishing a presumption that all information is accessible subject only to a narrow system of exceptions."[42]

The right to information has also been explicitly recognised in all three regional systems for the protection of human rights. Within the Inter-American system, the Inter-American Commission on Human Rights approved the *Inter-American Declaration of Principles on Freedom of Expression* in October 2000.[43] The Principles unequivocally recognise a right to access information held by the State, as both an aspect of freedom of expression and a fundamental right on its own:

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

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

[39] Report of the Special Rapporteur, 4 February 1997, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/1997/31.

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

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

[42] 6 December 2004. Available at: http://www.cidh.org/Relatoria/showarticle.asp?artID=319&lID=1.

[43] 108th Regular Session, 19 October 2000.

Shortly after the adoption of these Principles, a group of experts met in Lima, Peru and adopted the *Lima Principles*.[44] These Principles elaborate in greater detail on the content of the right to freedom of information in the context of the Americas. Two years later, in November 2003, a major international conference on freedom of information was again held in Peru, bringing together a wide range of civil society experts, as well as officials and politicians. The conference adopted the *Declaration of the SOCIUS Peru 2003: Access to Information Seminar*, which states, among other things:

> "We recommend that Governments Adopt and implement access to information laws based on the underlying principle of openness, as elaborated in the attached "Guidelines on Access to Information Legislation"."[45]

The Guidelines set out in some detail the standards to which freedom of information legislation should conform.[46]

These standards are confirmed by a Resolution of the General Assembly of the Organisation of American States adopted in 2003, stating:

> "2. To reiterate that states are obliged to respect and promote respect for everyone's access to public information and to promote the adoption of any necessary legislative or other types of provisions to ensure its recognition and effective application."[47]

The General Assembly followed this up in 2004 with a Resolution calling on Member States to adopt and implement legislation ensuring "broad access to public information".[48] In 2005, reaffirming the previous two resolutions, the General Assembly urged States to provide for civil society participation in the drafting of access to information laws, and also urged States to include in their laws "clear and transparency exception criteria."[49]

Regional human rights bodies in other parts of the world have also recognised access to information as a human right. The African Commission on Human and Peoples' Rights recently adopted a *Declaration of Principles on Freedom of Expression in Africa*,[50] Principle IV of which states, in part:

> "1. Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law.
>
> 2. The right to information shall be guaranteed by law in accordance with the following principles:
>
> - everyone has the right to access information held by public bodies;
> - everyone has the right to access information held by private bodies which is necessary for the exercise or protection of any right;
> - any refusal to disclose information shall be subject to appeal to an independent body and/or the courts;

[44] Adopted in Lima, 16 November 2000.
[45] 28 November 2003.
[46] Available at: http://www.britishcouncil.org/socius/english/declaration.pdf.
[47] AG/RES. 1932 (XXXIII-O/03), of 10 June 2003.
[48] AG/RES. 2058 (XXXIV-O/04), of 8 June 2004.
[49] AG/RES. 2121 (XXXV-O/05), of 26 May 2005.
[50] Adopted at the 32nd Session, 17-23 October 2002.

- public bodies shall be required, even in the absence of a request, actively to publish important information of significant public interest;
- no one shall be subject to any sanction for releasing in good faith information on wrongdoing, or that which would disclose a serious threat to health, safety or the environment save where the imposition of sanctions serves a legitimate interest and is necessary in a democratic society; and
- secrecy laws shall be amended as necessary to comply with freedom of information principles."

Within Europe, on 27 November 2009, the Council of Europe adopted the Convention on Access to Official Documents which will be open for signature on 17 June 2009. Even more recently, in its recent decision concerning the Hungarian Civil Liberties Union, the European Court of Human Rights recognised that when public bodies already hold information that is needed for public debate, the refusal to provide it to those who are seeking it is a violation of the right to freedom of expression and information.[51] These recent developments stand against the backdrop of the Committee of Ministers of the Council of Europe Recommendation on Access to Official Documents of 2002.[52] Principle III provides generally:

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

The rest of the Recommendation goes on to elaborate in some detail the principles which should apply to this right.

The Commonwealth has also recognised the fundamental importance of the right to information, and has taken a number of significant steps to elaborate on the content of that right.[53] Finally, although the Arab Charter on Human Rights, adopted by the Arab League on 22 May 2004,[54] has been criticised for its significant deficiencies as a human rights instrument,[55] it does contain an express guarantee of the right to information.[56]

Implementation of the right to access to information is also a key requirement imposed on States parties to the UN Convention against Corruption. Iraq ratified this Convention on 17 March 2008.[57] Article 13 of the Convention requires that States should "[ensure] that the public has effective access to information".

The right of access to information is not guaranteed by the Constitution of Iraq.[58] However, Article 19 of the Constitution of 1973 indicates that "[e]very citizen shall have the right to

[51] *Társaság a Szabadságjogokért v. Hungary*, Application no. 37374/05 14 April 2009.
[52] Recommendation No. R(2002)2, adopted 21 February 2002.
[53] See the *Communiqué*, Meeting of Commonwealth Law Ministers (Port of Spain: 10 May 1999).
[54] Arab Charter on Human Rights reprinted in 12 Int'l Hum. Rts. Rep. 893 (2005), entered into force 15 March 2008.
[55] These deficiencies include the death penalty for children and the rights of women and non-citizens. See the comments of the UN High Commissioner of Human Rights, Louise Arbour, upon entry into force of the Arab Charter on Human Rights, 30 January 2008.
[56] Article 32, Arab Charter of Human Rights.
[57] See http://www.unodc.org/unodc/en/treaties/CAC/signatories.html
[58] See Constitution of Iraq http://www.Iraqi.org/Iraq/constitution/part2.ch1.html

freedom of speech and expression, and there shall be freedom of the press, subject to any reasonable restrictions imposed by law…"[59]

National right to information laws have been adopted in record numbers over the past ten years, in countries as diverse as India, Israel, Jamaica, Japan, Mexico, Iraq, Peru, South Africa, South Korea, Thailand, Trinidad and Tobago, and the United Kingdom, as well as most of East and Central Europe. These nations join a number of other countries which enacted such laws some time ago, such as Sweden, the United States, Finland, the Netherlands, Australia and Canada, bringing the total number of States with right to information laws to over 80.[60] In addition, states such as Vietnam and Yemen are seriously considering the adoption of access to information laws. Moreover, a growing number of inter-governmental bodies, such as the European Union, the UNDP, the World Bank and the Asian Development Bank, have also adopted policies on the right to information. With the adoption of a strong right to information law, Iraq would join a long list of nations which have already taken this important step towards guaranteeing this fundamental right.

3. The content of the right of access to information

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

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

> "[T]he Special Rapporteur directs the attention of Governments to a number of areas and urges them either to review existing legislation or adopt new legislation on access to information and ensure its conformity with these general principles. Among the considerations of importance are:
>
> - Public bodies have an obligation to disclose information and every member of the public has a corresponding right to receive information; "information" includes all records held by a public body, regardless of the form in which it is stored;
>
> - Freedom of information implies that public bodies publish and disseminate widely documents of significant public interest, for example, operational information about how the public body functions and the content of any decision or policy affecting the public;

[59] Constitution of Iraq of 12 April 1973.
[60] See http://www.right2info.org/

- As a minimum, the law on freedom of information should make provision for public education and the dissemination of information regarding the right to have access to information; the law should also provide for a number of mechanisms to address the problem of a culture of secrecy within Government;

- A refusal to disclose information may not be based on the aim to protect Governments from embarrassment or the exposure of wrongdoing; a complete list of the legitimate aims which may justify non-disclosure should be provided in the law and exceptions should be narrowly drawn so as to avoid including material which does not harm the legitimate interest;

- All public bodies should be required to establish open, accessible internal systems for ensuring the public's right to receive information; the law should provide for strict time limits for the processing of requests for information and require that any refusals be accompanied by substantive written reasons for the refusal(s);

- The cost of gaining access to information held by public bodies should not be so high as to deter potential applicants and negate the intent of the law itself;

- The law should establish a presumption that all meetings of governing bodies are open to the public;

- The law should require that other legislation be interpreted, as far as possible, in a manner consistent with its provisions; the regime for exceptions provided for in 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."[61]

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

4. Limits to the right to information

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

> "The exercise of the rights [to freedom of expression and information] may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> (a) For respect of the rights or reputations of others;

[61] *Ibid*., para. 44.

(b) For the protection of national security or of public order (ordre public), or of public health or morals."

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

1. The information concerns a legitimate protected interest listed in the law;
2. Disclosure threatens substantial harm to that interest; and
3. The harm to the protected interest is greater than the public interest in having the information.[62]

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

"IV. Possible limitations to access to official documents

1. Member states may limit the right of access to official documents. Limitations should be set down precisely in law, be necessary in a democratic society and be proportionate to the aim of protecting:
   i. national security, defence and international relations;
   ii. public safety;
   iii. the prevention, investigation and prosecution of criminal activities;
   iv. privacy and other legitimate private interests;
   v. commercial and other economic interests, be they private or public;
   vi. the equality of parties concerning court proceedings;
   vii. nature;
   viii. inspection, control and supervision by public authorities;
   ix. the economic, monetary and exchange rate policies of the state;
   x. the confidentiality of deliberations within or between public authorities during the internal preparation of a matter.

2. Access to a document may be refused if the disclosure of the information contained in the official document would or would be likely to harm any of the interests mentioned in paragraph 1, unless there is an overriding public interest in disclosure."

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

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

[62] Principle 4, *FOI Principles*.

ANNEX 1: DRAFT ACCESS TO INFORMATION LAW OF IRAQ

INFORMATION ACCESS RIGHT DRAFT LAW

Chapter One
General Provisions

Article 1

For the purposes of applying this Law, the following terms are defined as follows:

General Commissioner is the general commissioner of information.

General Commission is the general commission of information.

Public Institution refers to all ministries, executive authorities, legislative and judicial institutions, local governments and the independent bodies stated in the constitution and related to the Council of Representatives from the monitoring view.

Concerned officer is the officer appointed by the public institution to handle the requests for information access.

Information is the information found in records and documents whether written or electronically saved, drawings, maps, tables, photographs, films, microfilms, audio records, video tapes, charts, any data read on special equipment, or any other forms the General Commissioner thinks are listed under the category of *information* in accordance to this Law.

Alternative Form is the form that enables these with special needs to be informed of the needed Information.

Article 2

This Law has the following objectives:

1. Enabling the Iraqi citizen to practice the right of accessing information kept by the Public Institutions he is entitled to in accordance with the provisions of this Law.
2. Spreading the spirit of transparency and accountability in the Public Institutions and encouraging openness to the people.

Article 3

All the information of the Public Institutions can be accessed by the Iraqi citizen except that excluded in this Law.

Article 4

The Public Institution shall appoint a Concerned Officer to handle the requests for information access. This officer shall be granted the needed authorizations to search for and access the needed Information.

Article 5

The Public Institutions shall organize their information in a manner that enables the Concerned

Officer to retrieve them. When possible, the Public Institutions shall save the information electronically.

Article 6

The Public Institutions shall conduct training courses for their employees on the importance of Information Access Right to enable the citizens to practice it, on how to save information, and on the best and fastest means to retrieve the information.

CHAPTER TWO
Principles of the Information Access Right
Obligatory Dissemination

Article 7

Public Institutions shall disseminate annual reports including at least:

1. Management information on the work mechanism of the Public Institution including the costs, objectives, audited accounts, rules and achievements.
2. Procedures according to which individuals can identify the general policy and projects of the Public Institution.
3. Kinds of information kept by the Public Institution and the means with which it is saved.
4. Content of any decision or policy that may affect the people, the reasons behind making this decision and expected objectives.
5. Any other data the General Commissioner deems necessary to disseminate.

Article 8

Public and private industrial institutions shall disseminate bi-annual reports that state at least the following information:

1. Locations of used toxic materials, their natures and their dangers.
2. Quantity of emissions from manufacturing.
3. How the wastes are disposed of.

Publicity of Meetings
Article 9

A Public Institution that intends to hold a public meeting shall announce the place and time of the meeting in addition to its objective. Unless specified differently in this Law, the public shall not be prevented from attending this meeting.

Informant Protection
Article 10

The officer, who reveals information on violations or infringements of the Law, shall not be punished.

CHAPTER THREE
Request to Access Information

Article 11

A written request for having access to information shall be submitted to the Public Institution that holds the information. The request shall contain enough details that enable the Concerned Officer

to retrieve the information with simple effort.

Article 12

After receiving the request, the Concerned Officer shall immediately inform the requester by a written document of the date of request, kind of needed information, and period needed to respond to the request.

Article 13

The Concerned Officer shall respond to the request within 15 days from date of request. The Concerned Officer is entitled to extend this period only once for no more than 15 days if the request contains a large number of pieces of information, or retrieving the piece of information requires consulting a third party or another Public Institution. Not responding within this period is considered a rejection to the request.

Article 14

If the request is approved, the Concerned Officer shall enable the requester to access the information stated in the request. The Concerned Officer shall specify the cost of accessing the needed information. If the request contains more than one piece of information, the Concerned Officer is entitled to allow the requester to access part of the information in case the other part of the information is listed under the exceptions specified in this Law.

Article 15

When the request is approved, the Concerned Officer shall offer the requester the information in accordance with the format available in the Public Institution. The Concerned Officer shall not be satisfied with informing the requester orally without a document that contains the information. Instructions issued by the General Commissioner shall specify the way with which the requester gets copies of the requested information.

Article 16

If the requester is one with a special need, the Concerned Officer shall present the information in an alternative form that suits the disability of the requester provided that this alternative form is available in the Public Institution. The Concerned Officer may transfer the information in the alternative form as he deems necessary. If the requester accepts the transformation, the Concerned Officer shall transfer the information provided that the requester pays for the costs.

Article 17

After informing the requester, the Concerned Officer may reassign the request to another institution when he realizes that the other institution is more related to the information. This includes the case in which the other institution was the one that made the information, or it has an alternative form of the information. In this case, the request shall be considered submitted to the Public Institution to which the request is reassigned.

Article 18

If the request is rejected, the Concerned Officer shall state the reason in a written reply to the requester. The reason shall not exceed the following:

1. The institution does not have the information
2. The needed information is listed under the exceptions specified in this Law.

CHAPTER FOUR
Exceptions

National Security and General Order

Article 19

The Concerned Officer shall reject the revelation of any information if it is proved that this revelation may affect the defensive capabilities and national security of the state. This includes the following:

1. Arms, tactics, strategies, armed forces, and military operations that aim to protect the nation.
2. Intelligence information on foiling aggressive operations and crimes that affect the internal or external security of the state in accordance to the effective Laws.
3. International communications and correspondences on defensive affairs and military coalitions.
4. Any information the General Commissioner is convinced that it shall affect the security and general order.

Article 20

The Concerned Officer shall reject to reveal any information that concerns a foreign state or organization with which it is agreed to keep this information secret.

Article 21

A Concerned Officer shall not refuse to reveal the information in the cases stated in Articles 19 and 20 of this law if this information is still held by the institution and goes back for more than 20 years unless the General Commissioner is convinced that this information should remain secret for another extendable period of time.

Article 22

In the institutions that perform the tasks of investigating crimes, finding out violations, and police operations, a Concerned Officer may refuse to reveal information if this revelation represents a harm to the investigations and execution of the needed tasks. The Concerned Officer may also refuse to reveal information that may affect the reputation of individuals who are not convicted yet.

Economic Security Issues

Article 23

The Concerned Officer may refuse to reveal information that contains the following:

1. Professional or commercial secrets of the institution.
2. Secrets the revelation of which may cause financial damages to the economic interests of the state, may damage its ability to manage the national economic, or may result in special gains for an individual or an institution. This includes the following:
    a. Current exchange rates in Iraq.
    b. Expected changes in the custom tariff fees, taxes, fees and any other resources for revenues.
    c. Expected changes in the interest price of the governmental loans.
    d. Expected changes in the public property prices including stocks, movable property and real estate.
    e. Bargains the Public Institution intends to make regarding merchandise, the revelation of which may affect the prices of this merchandise in the market.

Commercial Secrets

Article 24

The Concerned Officer shall refuse to reveal any information that contains professional secrets of a third party, the revelation of which may weaken the competitive stance of this third party unless the third party approves the revelation.

Internal Affairs of the Institution
Article 25

The Concerned Officer may refuse to reveal information that concerns the internal affairs of an institution: its employees, internal orders, discussions and prior suggestions.

General Health and Security
Article 26

The Concerned Officer may refuse to reveal information that concerns unproved expectations on natural disasters or infectious diseases that are faintly expected.

Article 27

The Concerned Officer may refuse to reveal any information the revelation of which may lead to the harm of the safety of the individuals.

Privacy
Article 28

The Concerned Officer may refuse to reveal any information that concerns a private life of a third party except in the following cases:

1. The concerned individual approves the revelation.
2. The information is disseminated publically.
3. The revelation is requested by a judicial writ or according to an approval from the General Commissioner.
4. The requester is the custodian of the third party.
5. The requester is a relative of another and the request is submitted at least 20 years after the death of the third party.

CHAPTER FIVE
General Commissioner of Information

Article 29

In accordance to the provisions of this Law, an independent commission is established called "the General Commission of Information". This Commission shall have an artificial personality and needed independence to perform its tasks. The Commission shall be related to the Council of Representatives (COR) and a special budget is allocated for the Commission within the public balance of the Iraqi state.

Article 30

The Commission shall represent a body for appeal for the one whose request to access information is denied. The aim of the Commission is to ensure the execution of the provisions of this Law and to achieve its objectives. The Commission shall be entitled the following authorizations:

1. Making, organizing and executing the programs, plans, and policies of defending the individual's right of information access.
2. Educating and boosting the awareness of the citizens on the importance of the right of information access and the positive results of practicing it at the individual, community

and state levels.

3. Participating in training the officers and officials working for the public institutions on how to enable individuals to access information, and on the importance of this act.
4. Observing the violations and publishing the reports and studies that include the obstacles of practicing the right of having access to information and how to overcome them.

Article 31

The headquarters of the Commission shall be in Baghdad. It may establish branches in all the governorates.

Article 32

The Commission shall represent a body of appeal for everyone:

1. Whose request to access information was rejected.
2. Who was asked to pay high fees for his request.
3. Whose request to access information in an Alternative Form was rejected.
4. Whose period needed to respond to his request was extended in a manner that violated the provisions of Article 13 of this Law.
5. Whose request was referred to more than one institution without getting approval.
6. Any other cases approved by the General Commissioner of Information.

Article 33

The request for appeal shall be submitted to the Commission within 30 days from the date of rejecting the request or from the date the institution took the procedure the requester wanted to appeal for.

Article 34

The Commission shall respond to the appeal request in no more than three months from the date of submitting the request. As soon as the Commission receives the request and accepts it, it shall address a letter to the Concerned Officer in the institution, which has rejected the information access request, informing of the appeal and demanding the reasons of rejection.

Article 35

a. The General Commissioner shall be appointed by the Prime Minister and approved by the COR.
b. The General Commissioner shall serve a term of four not renewable years only once.
c. The General Commissioner shall have the rights, privileges and authorities of a minister.

Article 36

a. The General Commissioner shall issue and follow up the decisions on the appeal request submitted to the Commission.
b. The General Commissioner shall appoint the Commission employees and shall write their own working system.

Article 37

The General Commissioner of Information shall devote all his working time to his Commission. While occupying this post, the General Commissioner shall not perform any other work, or occupy any other job, or post, or profession whether paid or not paid.

Article 38

The services of the General Commissioner shall expire in the following events:

1. When he is convicted of a crime, or a misdemeanor involving moral turpitude and

honesty.
2. When he practices any other job or occupies any other post.
3. When he is interdicted or he announces his bankruptcy.

Article 39

The recommendations issued by the General Commissioner shall be binding for all Public Institutions.

Article 40

To perform his tasks, the General Commissioner shall be authorized to do the following:

1. Enter any Public Institution and search its records and identification documents that are related to the requested information.
2. Interrogate any officer personally in order to access the needed information.
3. Refer the ones responsible for hiding, damaging or altering information in a manner that differs from their realty to evade submitting it to the courts.
4. Request clarification from the senior officials of the state such as ministers and their equals for reasons behind denying information access in case the denial results from orders issued directly by them. In this case, the General Commissioner, when not convinced by the offered justifications, may submit an immediate report to the Chairman of the COR or the Prime Minister to take the suitable measures.

Article 41

The General Commissioner shall submit periodical reports every six months to the Chairman of COR or the Prime Minister. The reports shall contain the following:

1. Unjustified cases of denying access to information.
2. Executive problems that face his tasks.
3. Any other recommendations the General Commissioner deems suitable.

CHAPTER SIX
Fees

Article 42

Information access request fees shall be specified by a bill organized by the General Commissioner and issued by the Cabinet. The fee shall not exceed (TBD later) except in the following cases:

1. To cover the costs of copying or photographing the needed pictures according to their costs in the market.
2. To cover the cost of the Alternative Forms of the information according to their costs in the market.
3. The request contains more than one piece of information.

Article 43

The appeal fees shall not exceed (TBD later).

CHAPTER SEVEN
Final Provisions

Article 44

Any provision inconsistent with the provisions of this law is annulled.

Article 45

The Cabinet shall issue the needed bills to execute this Law in no more than six months from the date of its publication.

Article 46

All the concerned bodies shall execute the provisions of this Law applicable to each of them. This Law shall be effective a year after the date of its publication.