



Comments on Draft Rwandan Law on Access to Information¹

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1. Overview

ARTICLE 19 strongly welcomes this initiative to adopt an access to information law. Overall the bill provides for a progressive system of access to information. Many of its sections reflect best practices from around the world. It could become a model for both the region and for all of Africa. Some of the positive features include:

- Application of the law to the private sector when necessary to protect rights;
- A requirement that bodies respond in a timely manner;
- A strong system of oversight and enforcement by the Ombudsman;
- A broadly based public interest test; and
- An extensive system of proactive disclosure;

However, there are some provisions which could be clarified to strengthen the draft:

- Procedure for application of the law to private bodies
- Scope and duration of exemptions;
- Protection of whistleblowers;
- Costs that can be imposed under the fee regime;
- Powers and funding of the Ombudsman.

¹ These comments are based on a draft provided to ARTICLE 19 by the Media High Council in October 2009.

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The right to access information (ATI) held by public authorities is a fundamental human right recognised in international human rights law, including the Universal Declaration of Human Rights (UDHR) and the African Charter on Human and Peoples' Rights.² The African Union Declaration of Principles on Freedom of Expression in Africa sets out detailed recommendations for states to adopt:

IV Freedom of Information

1. Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law.

2. The right to information shall be guaranteed by law in accordance with the following principles: everyone has the right to access information held by public bodies; everyone has the right to access information held by private bodies which is necessary for the exercise or protection of any right;

any refusal to disclose information shall be subject to appeal to an independent body and/or the courts; public bodies shall be required, even in the absence of a request, actively to publish important information of significant public interest;

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

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

The right to information is important to promote democratic participation and respect for other rights. Enhancing the flow of information helps to promote government accountability and a sense of trust amongst the people about the government and public authorities. It is also a key tool in combating corruption and other forms of public wrongdoing. The right to information is, therefore, a key public policy tool for promoting good governance and other social benefits.⁴

Nearly 90 countries around the world have so far adopted laws or national regulations on access to information. Thus far in Africa, there has been a more limited adoption of FOI laws. Only South Africa, Angola, Uganda and Zimbabwe have adopted laws. Many other countries in the region including Tanzania, Kenya, Ghana and Sierra Leone are considering adopting laws.

² Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

³ Adopted by The African Commission on Human and Peoples' Rights, meeting at its 32nd Ordinary Session, in Banjul, The Gambia, from 17th to 23rd October 2002.

⁴ See African Convention Against Corruption, §12; Country Self-Assessment For The African Peer Review Mechanism (Master Questionnaire), October 16, 2004.

2. Coverage of the law

The draft covers both the public sector and importantly, some parts of the private sector. This section should especially be applauded as it recognises that the division between public and private bodies is increasingly unclear and it is necessary to extend the application of ATI to beyond public bodies to ensure that the right to information is fully realised. Only a few countries including South Africa have adopted similar provisions.

Under Article 2, public authorities is extensively defined. However, there is a potential gap for bodies that are conducting public business but not a public authority. In many countries, there are a variety of these quasi-public bodies including privatized industries, law societies, public-private partnerships and other contractually based relationships. Under 5(e), the draft is unclear if it automatically applies to private bodies that receive money other than through a grant approved by the Parliament.

Under Article 2, section 5(j), the Minister is given broad discretion to designate additional bodies for coverage under the law. However, there are no guidelines or limits on the discretion.

A broader definition of public authorities should be applied. For example, under the South African Promotion of Access to Information Act (PAIA), the law applies to:

any other functionary or institution when--

- (i) exercising a power or performing a duty in terms of the Constitution or a provincial constitution; or
- (ii) exercising a public power or performing a public function in terms of any legislation;⁵

Article 15 sets out rights on access to information held by private bodies when access is “necessary for the enforcement or protection of any right or freedom recognized under the Constitution or any written law.”

Under Article 16, the minister may designate any private body or class of bodies as being under the effect of the law. The Minister is given wide discretion to approve bodies and those bodies may appeal their designation. However, the Ombudsman or members of the public are not given the right to appeal the non-designation of any body or class of bodies.

If the body is not designated by the Minister, any person can apply to the High Court to require the body to provide the information in the case that the information is urgently and immediately required in the interests of the preservation of the law or liberty of the person.

This approach has the potential effect of severely limiting the right. In those cases where the Minister has not approved the addition of a body, information can only be obtained in the much narrower situation of it being “urgently and immediately required in the interests of the preservation of the law or liberty of the person” rather than when “necessary for the enforcement or protection of any right or freedom recognized under the Constitution or any written law.” It will also put a significant burden on the requestor to appear in court against

⁵ Promotion of Access to Information Act, §1

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organisations such as large corporations that are far better able both financially and legally to resist any imposition.

A better approach would be for the legislation to set out certain categories or types of information that are necessarily covered if held by private bodies. It should also designate the Ombudsman to develop the list of bodies to be covered by the law and to include on a case-by-case basis other bodies where the protection of rights or freedoms are involved.

Recommendations:

- The legislation should spell out specifically that it applies to private bodies that are exercising a public function or receiving public funding from any source.
- The legislation should designate the Ombudsman to choose the private bodies that should be included and set out categories of bodies and information that are automatically included.

3. Fees

Article 13 sets out a system for fees which is generally progressive but could be clarified. No fees are allowed for the submission of requests. Fees can be imposed for the actual costs of making copies and supplying them to the applicant. The costs are limited by a requirement that the fees shall not be “so high as to defeat the objectives of the law.” Fees can also be waived when they cause financial hardship, the disclosure is in the public interest or the cost of the collection of the fee exceeds the fee itself.

It is important that the term “actual costs” should be clarified to cover only the reproduction and postage and not any associated staff or search costs. These additional costs can be considerable.

Fees should also be automatically waived for any person who can show that their income is below a certain level. Under the Indian Right to Information Act, “no such fee shall be charged from the persons who are of below poverty line”.⁶

It should also be clear that requests from the media and non-governmental organisations should be treated automatically as in the public interest.

Recommendations:

- Clarify the fee regime to only apply to reproduction and postage costs.
- Automatically waive all fees for those under a certain income.
- Ensure that media and NGO requesters are given public interest waivers.

⁶ Right to Information Act, § 7(5).

4. Exemptions

Article 5 sets out the categories of information which can be designated as exempt information. These include for reasons of national security, impeding justice, invasion of privacy, protecting trade secrets, undermining the public authorities ability to consider a matter and legal advice. It also sets up a public interest test for disclosure of information and decrees that information shall not be exempt after 30 years.

In general, the exemptions are broadly defined, which is somewhat mitigated by the public interest test.

4.1. National Security

Exemption 1 allows for the withholding of information that “would cause serious harm to the national security of Rwanda”. A further section requires that the Minister shall develop guidelines based on international standards to determine what would cause serious harm.

We strongly recommend that the Johannesburg Principles on National Security, Freedom of Expression and Access to Information be used in the development of the guidelines.⁷ The Principles were developed by a working group of experts in 1995 and have been subsequently endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression, the UN Human Rights Commission and various courts.⁸

The Principles set out best practices on access to information and national security based on international standards:

Principle 11: General Rule on Access to Information

Everyone has the right to obtain information from public authorities, including information relating to national security. No restriction on this right may be imposed on the ground of national security unless the government can demonstrate that the restriction is prescribed by law and is necessary in a democratic society to protect a legitimate national security interest.

Principle 12: Narrow Designation of Security Exemption

A state may not categorically deny access to all information related to national security, but must designate in law only those specific and narrow categories of information that it is necessary to withhold in order to protect a legitimate national security interest.

Principle 13: Public Interest in Disclosure

In all laws and decisions concerning the right to obtain information, the public interest in knowing the information shall be a primary consideration.

Principle 14: Right to Independent Review of Denial of Information

The state is obliged to adopt appropriate measures to give effect to the right to obtain information. These measures shall require the authorities, if they deny a request for information, to specify their reasons for doing so in writing and as soon as reasonably possible; and shall provide for a right of review of the merits and the validity of the denial by an independent authority, including some form of

⁷ See the Johannesburg Principles on National Security, Freedom of Expression and Access to Information. Available at <http://www.article19.org/pdfs/standards/joburgprinciples.pdf>

⁸ Report of the Special Rapporteur, Promotion and protection of the right to freedom of opinion and expression, UN Doc. E/CN.4/1996/39, 22 March 1996, para. 154; Commission Res. 1996/53; Gamini Athukoral “Sirikotha” and Ors v. Attorney-General, 5 May 1997, S.D. Nos. 1-15/97 (Supreme Court of Sri Lanka) and Secretary of State for the Home Department v. Rehman [2001] UKHL 47 (House of Lords).

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judicial review of the legality of the denial. The reviewing authority must have the right to examine the information withheld.

Principle 15: General Rule on Disclosure of Secret Information

No person may be punished on national security grounds for disclosure of information if (1) the disclosure does not actually harm and is not likely to harm a legitimate national security interest, or (2) the public interest in knowing the information outweighs the harm from disclosure.

Principle 16: Information Obtained Through Public Service

No person may be subjected to any detriment on national security grounds for disclosing information that he or she learned by virtue of government service if the public interest in knowing the information outweighs the harm from disclosure.

Principle 17: Information in the Public Domain

Once information has been made generally available, by whatever means, whether or not lawful, any justification for trying to stop further publication will be overridden by the public's right to know.

The article should also make clear that any other law relating to national security, including the Penal Code, the Media Act, and other rules or sanctions are overruled.

4.2. Commercial Confidentiality

Exemption 4 allows for the withholding of information designated as commercially confidential or trade secrets. This is the only exemption that does not require a showing that harm would occur if the information is released. It may also raise problems about the withholding of information developed or paid for by public bodies such as consulting reports.

This exemption should be amended to include a harm test which requires a showing of substantial harm to an identifiable commercial interest. It should also ensure that information and other work created by public funds is not withheld on commercial grounds.

4.3. Privacy

Exemption 3 provides that information should not be released if it would result in the “unwarranted invasion of privacy of an individual”. It would be additionally useful to include a provision clarifying that this specifically does not apply to information about the activities of public employees. For example, the South African PAIA sets out that information cannot be withheld when it is:

about an individual who is or was an official of a public body and which relates to the position or functions of the individual, including, but not limited to

- (i) the fact that the individual is or was an official of that public body;
- (ii) the title, work address, work phone number and other similar particulars of the individual;
- (iii) the classification, salary scale or remuneration and responsibilities of the position held or services performed by the individual; and
- (iv) the name of the individual on a record prepared by the individual in the course of employment.⁹

⁹ §34(2)(f)

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4.4. Duration of Exemptions

Article 5 also provides that “unless the contrary is proved by a public authority, information is presumed not to be exempt if the information is more than thirty years old.”

While the sentiment of the section, that once-sensitive information is no longer sensitive because of the passage of time and should be released, is an important one, the working of this section is unlikely to be effective in ensuring that it will be released in a timely manner.

The duration proposed is longer than international practices. The current trend is to set shorter limits on the maximum duration of exempt information to between ten and twenty years.

In the UK, a special committee set up by the UK government recommended this year that the UK’s 30 year rule be reduced to 15 years. As noted by the committee:

The majority of evidence we have received and heard strengthens our preliminary view that the maintenance of the present 30 year rule is anachronistic and unsustainable. Indeed the case for reduction is very powerful: internationally and domestically, that is the direction in which both government practice and public expectation are moving; the passing of the Freedom of Information [FoI] Act has decisively and irreversibly enhanced the right of the public to have greater access to much more recent official information; and a rule that allows records to remain closed for 30 years, unless access is requested under FoI, thus appears to be an unenforceable relic from a different age.¹⁰

This trend of reducing time frames is widespread and not limited to developed countries. Under the Indian Right to Information Act, 2005:

[A]ny information relating to any occurrence, event or matter which has taken place, occurred or happened twenty years before the date on which any request is made under section 6 shall be provided to any person making a request under that section.¹¹

Under the Mexican Federal Law of Transparency and Access to Public Government Information:

Privileged information, according to Articles 13 and 14, may remain as such for a period of up to twelve years. Said information may be declassified when the causes that originated said characterization are terminated or when the reserve period has been completed. The availability of said information shall not be impaired by whatever is stated in other compelled laws.¹²

In the US, the Executive Order on Classification sets a default that information can only be classified for ten years.¹³

¹⁰ Review of the 30 Year Rule, January 2009. <http://www2.nationalarchives.gov.uk/30yrr/30-year-rule-report.pdf>

¹¹ §9(3)

¹² §15

¹³ Executive Order 12958, 25 March 2003.

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The threshold that information can be withheld if “the contrary is proved by a public authority” is also problematic. It should set a higher threshold to ensure that the decision to withhold information is based on objective facts and a showing of probable harm.

Recommendations:

- Apply the Johannesburg principles as best international standards.
- Limit the ability of public authorities to claim commercial confidentiality of information created by public funds.
- Clarify privacy exemption on information relating to the public activities of public officials.
- Shorten the application of exemptions to 15 years. Clarify requirements needed to override the default.

5. Whistleblower Protections

Article 28 on “Protection of person making disclosure” sets out protections for individuals who release information obtained in confidence if the information is accurate and released in the public interest.

Whistleblower protections are an important complement to access to information laws by facilitating the disclosure of information in the public interest. A number of international and regional conventions now require the adoption of these protections to fight corruption. The United Nations Convention Against Corruption recommends that countries adopt “appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention”.¹⁴ Article 5 of the African Union Convention on Preventing and Combating Corruption requires countries to “Adopt legislative and other measures to protect informants and witnesses in corruption and related offences, including protection of their identities...[and]...[a]dopt measures that ensure citizens report instances of corruption without fear of consequent reprisals.”

Whistleblower protection laws have gained strong interest around the world in the past few years,¹⁵ including in a number of African states. In South Africa¹⁶ and Ghana¹⁷,

¹⁴ UN Convention on Anti-Corruption. §33 http://www.unodc.org/unodc/en/crime_convention_corruption.html

¹⁵ See e.g. Calland and Dehn, *Whistleblowing Around the World: Law Culture and Practice*, ODAC and PCAW, 2004; Brown, A.J., (editor), *Whistleblowing in the Australian Public Sector: Enhancing the theory and practice of internal witness management in public sector organizations*, ANU Press, 2008. http://epress.anu.edu.au/anzsog/whistleblowing/pdf/whole_book.pdf; Banisar, David. *Whistleblowing International Standards and Developments*, Investigación preparada para la Primera Conferencia Internacional sobre Corrupción y Transparencia: Debatiendo las Fronteras entre Estado, Mercado y Sociedad, Laboratorio de Documentación y Análisis de la Corrupción y la Transparencia. Instituto de Investigaciones Sociales, UNAM. Ciudad Universitaria, Marzo de 2006. http://www.corrupcion.unam.mx/documentos/investigaciones/banisar_paper.pdf;

¹⁶ Act No. 26, 2000. Available at <http://www.info.gov.za/view/DownloadFileAction?id=68192>

¹⁷ Whistleblower Act, 2006.

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comprehensive laws have been adopted to protect whistleblowers in both public and private employment. In a number of other countries including Kenya¹⁸, Malawi¹⁹, and Sierra Leone²⁰, more limited provisions have been adopted in anti-corruption legislation. In Uganda, there are limited protections in the Access to Information Act 2005.²¹

Article 28 provides a limited framework for whistleblowing which follows international practices but more detailed provisions are necessary to ensure adequate protection. In particular, it should set out the types of information that are to be protected, the procedures for release of that information, and the role of the Ombudsman or other bodies in the oversight and enforcement of sanctions against those that violate the provisions.

Recommendations:

- A more comprehensive system should be considered for protecting whistleblowers. Two models that might be useful are the South African Protected Disclosures Act, 2000 and the Ghanaian Whistleblower Act, 2006.
- The Ombudsman should be given specific powers of oversight, promotion and enforcement for the provision similar to the powers he or she holds for the rest of the bill.

6. Funding and Activities of the Ombudsman

Under Title V, the Ombudsman is given extensive functions and powers to enforce and promote access to information. The activities set out appear to be comprehensive.

It is important to consider the additional resources that will be needed by the office to conduct these activities. In other countries such as South Africa, Ireland, and the United Kingdom, FOI enforcement functions have been given to an existing body. This has proven beneficial in terms of infrastructure and expertise.

However, It has also been problematic when the bodies were not given adequate additional funding to do the activities and thus reduced the effectiveness of the offices for both ATI enforcement and their other activities. In South Africa, the Human Rights Commission was hampered in its initial efforts to promote the law by limited resources. In the UK, there are substantial delays before the Office of the Information Commissioner can respond to appeals due to lack of adequate resources.

Recommendations:

- Adequate resources, both human and financial, should be provided for the Ombudsman in the initial legislation.

¹⁸ Anti-Corruption and Economic Crimes Act, 2003.

¹⁹ The Corrupt Practices Act, 1995.

²⁰ Anti-Corruption Act 2000.

²¹ Access to Information Act 2005, §44

About the ARTICLE 19 Law Programme

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

<http://www.article19.org/publications/law/standard-setting.html>.

On the basis of these publications and ARTICLE 19's overall legal expertise, the Law Programme's operates the Media Law Analysis Unit which publishes around 50 legal analyses each year, commenting on legislative proposals as well as existing laws that affect the right to freedom of expression. The Unit was established in 1998 as a means of supporting positive legal reform efforts worldwide, and our legal analyses frequently lead to substantial improvements in proposed or existing domestic legislation. All of our analyses are available online at

<http://www.article19.org/publications/law/legal-analyses.html>.

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