Sierra Leone's draft Access to Information Bill

Statement of Support

London
December 2005

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

CONTENTS

I. INTRODUCTION

ARTICLE 19 welcomes the proposed draft Right to Access Information Bill for Sierra Leone, as proposed by the Society for Democratic Initiatives. If taken forward, this Bill will provide an excellent basis for implementing in Sierra Leone the fundamental right of every person to freedom of information, as guaranteed in international law.

The right to access information has been shown to be fundamental to eradicating corruption; to help enforce other rights such as the right to housing or education; and it is also fundamental to the functioning of democracy. Without freedom of information, State authorities can control the flow of information, 'hiding' material that is damaging to the government and selectively releasing 'good news'. Freedom of information can also be a key tool in conflict prevention: openness and transparency and a free exchange of information engender trust between institutions of government and its citizens. For these reasons, a record number of countries have over the last decade introduced freedom of information legislation or are in the process of doing so.[1] In Africa, these include South Africa, Uganda, Ghana, Nigeria, Malawi and Angola, to name but a few.

The draft Right to Access Information Bill for Sierra Leone includes all elements needed to make freedom of information a reality. It provides a clear statement of the right to access any information held by a public body, as well as information held by private bodies when necessary to enforce a right, subject only to narrow exceptions. The Bill envisages a low threshold access regime that would allow everyone, including disadvantaged persons, to gain access; it requires proactive publication of a wide range of important information; and it establishes an Information Commissioner to monitor implementation of the right to information.

We encourage the Society for Democratic Initiatives to continue to lobby for adoption of the Bill and to build a network of other civil society organisations to support it. Access to information laws are important to all sections of society – from gender activists to environmentalists – and it is important that the Bill is developed in a cooperative spirit. We also encourage the Government to be involved from as early a stage as possible. An important part of the implementation of access to information laws consists of raising awareness of the importance of freedom of information and encouraging a 'culture of openness' in government institutions; and this process must start at the earliest opportunity.

This Statement elaborates on the importance of the right to freedom of information. Section II outlines the body of international law requiring Sierra Leone to introduce freedom of information legislation; and Section III provides support for key sections of the draft Bill.

[1] See http://www.privacyinternational.org/ or http://www.freedominfo.org/survey.htm for a global survey of access to information legislation.

II. INTERNATIONAL STANDARDS ON ACCESS TO INFORMATION

The right to freedom of information refers primarily to the right to access information held by public bodies. It reflects the principle that public bodies do not hold information for themselves, but rather for the benefit of all members of the public. Individuals should thus be able to access this information, unless there is an overriding public interest reason for denying access. In addition, the right to freedom of information goes beyond the passive right to access documents upon request and includes a second element, a positive obligation on States to publish and widely disseminate key categories of information of public interest.

Freedom of information has been recognized not only as crucial to participatory democracy, accountability and good governance, but also as a fundamental human right, protected under international and constitutional law. Authoritative statements and interpretations at a number of international bodies, including the Commonwealth, the United Nations, the Organisation of American States, the Council of Europe and the African Union, as well as national developments in countries around the world, amply demonstrate this.

Within the UN, freedom of information was recognized early on as a fundamental right. In 1946, during its first session, the UN General Assembly adopted Resolution 59(1), which referring to freedom of information in its broadest sense as the circulation of information, stated:

> Freedom of information is a fundamental human right and … the touchstone of all the freedoms to which the UN is consecrated.[2]

In ensuing international human rights instruments, freedom of information was not set out separately but as part of the fundamental right of freedom of expression, which includes the right to seek, receive and impart information. The most important of these is the *International Covenant on Civil and Political Rights* (ICCPR),[3] a treaty ratified by over 150 States, including Sierra Leone.[4] Article 19 of the ICCPR states:

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

This has been interpreted as imposing on States the obligation to enact freedom of information laws. The UN Human Rights Committee, the body established to supervise the implementation of the ICCPR, has long commented on the need for States to introduce freedom of information laws;[5] and the UN Special Rapporteur on Freedom of Opinion and Expression[6] has noted:

---

[2] 14 December 1946.
[3] UN General Assembly Resolution 2200A(XXI), adopted 16 December 1966, in force 23 March 1976.
[4] Sierra Leone acceded to the ICCPR on 23 August 1996.
[5] See, for example, its comments on implementation of the ICCPR in Azerbaijan: UN Doc. CCPR/C/79/Add.38; A/49/40, 3 August 1994, under "5. Suggestions and recommendations" (there are no page or paragraph numbers).
[6] 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.

> The right to seek or have access to information is one of the most essential elements of freedom of speech and expression … [It] 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.[7]

The African Charter on Human and Peoples' Rights, the main regional human rights treaty, ratified by Sierra Leone in 1983,[8] also protects the right to freedom of expression and information. Drawing on Article 9 of the Charter, the African Commission on Human and Peoples Rights[9] has adopted a *Declaration of Principles on Freedom of Expression*.[10] Principle IV of this Declaration affirms the right to freedom of information:

> *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.

The Commonwealth, of which Sierra Leone has been a member since 1961, has long recognised the importance of freedom of information. In 1980, the Law Ministers of the Commonwealth, meeting in Barbados, stated that "public participation in the democratic and governmental process was at its most meaningful when citizens had adequate access to official information."[11] At their 1999 Meeting in Trinidad and Tobago, the Commonwealth Law Ministers adopted a Declaration which stated that "[m]ember countries should be encouraged to regard freedom of information as a legal and enforceable right … There should be a presumption in favour of disclosure and Governments should promote a culture of openness."[12]

---

[7] See Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/1995/31, 14 December 1995, para. 35; and the corresponding 1998 Report UN Doc. E/CN.4/1998/40, 28 January 1998, para. 14.
[8] Sierra Leone ratified the ACHPR on 21 September 1983.
[9] The body established to monitor implementation of the Charter.
[10] Adopted at the 32nd Ordinary Session of the African Commission on Human and Peoples' Rights, 17-23 October 2002, Banjul, The Gambia.
[11] Quoted in "Promoting Open Government: Commonwealth Principles and Guidelines on the Right to Know", background paper for the Commonwealth Expert Group Meeting on the Right to Know and the Promotion of Democracy and Development (London: 30-31 March 1999).
[12] *Communiqué*, Meeting of Commonwealth Law Ministers (Port of Spain: 10 May 1999).

Reflecting global recognition of the right, freedom of information has also been recognised in other regions and by international organisations, including the Council of Europe[13] and the Organisation of American States.[14]

A number of specific anti-corruption and environmental treaties also require States to introduce freedom of information laws. Prominent among these is the UN Convention against Corruption, ratified by Sierra Leone on 30 September 2004. Article 13 of this Convention requires States to ensure "that the public has effective access to information".[15] Further information-related obligations are included in the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention, after the town where it was signed).[16] This Convention requires State Parties to take legal measures to implement its provisions on access to environmental information.[17] While originally conceived as a European Convention, it is open for worldwide signature.

III. KEY PARTS OF THE DRAFT RIGHT TO ACCESS INFORMATION BILL

The right to freedom of information can only be effective if it is guaranteed by law and if the modalities by which it is to be exercised are set out clearly in legislation. Over time, authoritative statements, court decisions and national practices have elaborated certain minimum standards which such laws must meet.[18] These include, among other things:

- a strong presumption in favour of disclosure (the principle of maximum disclosure);
- broad definitions of information and bodies subject to FOI obligations;
- a positive obligation to publish key categories of information;
- clear and narrowly drawn exceptions, subject to a harm test and a public interest override; and
- effective oversight of the implementation of the right by an independent administrative body.

The Bill developed by the Society for Democratic Initiatives includes all these elements, which we will briefly comment on in the following paragraphs.

[13] See Recommendation (2002)2 of the Committee of Ministers of the Council of Europe on access to official documents.
[14] OAS General Assembly Resolution AG/RES. 1932 (XXXIII-O/03): Access to public information: strengthening democracy. See also the Inter-American Declaration of Principles on Freedom of Expression, agreed by the Inter-American Commission on Human Rights at its 108th Regular Session, 19 October 2000, Principles 3 and 4.
[15] Adopted by General Assembly 58/4 of 31 October 2003. See also Article 10.
[16] UN Doc. ECE/CEP/43, adopted at the Fourth Ministerial Conference in the "Environment for Europe" process, 25 June 1998, entered into force 30 October 2001.
[17] *Ibid.*, Article 3(1).
[18] For a concise summary of these standards, see the 1999 Report of the UN Special Rapporteur on Freedom Opinion and Expression, 18 January 2000, UN Doc. E/CN.4/2000/63, paras. 42-44.

III.1. THE PRINCIPLE OF MAXIMUM DISCLOSURE

The principle of maximum disclosure recognises that public bodies do not hold information for themselves, but for the public good. This implies that all information held by them should in principle be disclosable, subject only to narrow exceptions to protect certain overriding interests. Individuals requesting access to information should not be required to demonstrate a specific interest in the information; instead, a public body that receives a request is required to justify why, if it refuses disclosure, it does so.

The draft Bill fully incorporates this important principle. Clause 3 of the Bill states that "[e]veryone shall have the right to access information from public authorities…"; and Part IV of the Act clearly states the narrow circumstances in which access may be refused. To further stress the principle of maximum disclosure, Clause 2 explicitly recognises the importance of access to information, stating the fourfold purpose of the Act as:

1. to actively promote a society in which the people of Sierra Leone have effective access to information to enable them to more fully exercise and protect all their rights;
2. to give effect to the fundamental right to information, which will contribute to strengthening democracy, improving governance, increasing public participation, promoting transparency and accountability and reducing corruption;
3. to promote transparency, accountability and effective governance of all public authorities and private bodies; and
4. to establish procedures to enable the right of access to information.

These are key sections of the Bill that should not be lost in any subsequent drafts.

III.2. BROAD DEFINITIONS OF 'INFORMATION' AND BODIES SUBJECT TO FOI OBLIGATIONS

In order to achieve the goal of maximum openness, it is imperative that freedom of information legislation includes broad definitions both of the term 'information', and of the bodies that are subject to transparency obligations.

The term 'information' should include all records held by a public body, regardless of the form in which the information is stored (document, tape, electronic recording and so on), its source (whether it was produced by the public body or some other body) and the date of production. The legislation should also apply to records which have been classified, subjecting them to the same test as all other records.

The bodies subject to FOI obligations should fall in two categories: public bodies, who should be fully subject to FOI obligations, and private bodies who are subject to FOI obligations whenever necessary to protect a right. The definition of 'public body' should focus on the type of service provided rather than on formal designations. To this end, it should include 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 (quasi non-governmental organisations), judicial bodies, and private bodies which carry out public functions (such as maintaining roads). Private bodies

themselves should also be included if they hold information whose disclosure is necessary to protect or fulfil a right, including an economic or social right such as the right to housing, and to protect key public interests, such as the environment and health.

The draft Bill fully complies with these principles. Clause 1 of the draft Bill includes the following definition of 'information':

> [I]nformation means any material in any form, including records, documents, file notings, memos, emails, opinions, advices, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models, data, material held in any electronic form and any information relating to a private body which can be accessed by a public authority under any law.

This is a very broad definition which will help fulfil the principle of maximum disclosure.

Clause 6 of the draft Bill provides similarly broad definitions of public and private bodies. Public bodies are defined as follows:

> [A] public body includes any body: –
> (a) established by or under the Constitution;
> (b) established by statute;
> (c) which forms part of any level or branch of Government;
> (d) owned, controlled or substantially financed by funds provided by Government or the State; or
> (e) carrying out a statutory or public function,
> provided that the bodies indicated in sub-section (1)(e) are public bodies only to the extent of their statutory or public functions.

It should be noted that pursuant to this definition, private bodies are to be regarded as a 'public body' whenever they carry out a public function. For example, a private security firm that guards prisons carries out a public function and is therefore to be regarded a 'public body', to the extent of its public functions. This means that anyone can submit an information request that is related to its public activity without having to show that the information is needed to enforce a right (as is the case in relation to information requests submitted to an 'ordinary' private body; see below).

'Private body' is defined in Clause 6 as any body that "(a) carries on any trade, business or profession, but only in that capacity; or (b) has legal personality." This is a broad definition that ensures that access can be gained to information held by a corporate body or any business undertaking whenever this is necessary to enforce a right. This may be used, for example, to obtain access to information from factory concerning dangerous substances it emits into a river from which drinking water is taken.

III.3. POSITIVE OBLIGATION TO PUBLISH PROACTIVELY

Freedom of information implies not only that public bodies accede to requests for information but also that they publish and disseminate widely documents of significant public interest, subject only to reasonable limits based on resources and capacity. The law should establish both a general obligation to publish and key categories of information that must be published. Which information should be published will depend on the public body concerned, but at the very minimum, every public body should be under an obligation to publish the following:

- operational information about how the public body functions, including costs, objectives, audited accounts, standards, achievements and so on, particularly where the body provides direct services to the public;
- information on any requests, complaints or 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 of importance in framing the decision.

The draft Bill requires publication of all this and more. Clause 17 requires every public body to publish a wide range of information, including, in addition to the above, certain details of contracts it is engaged in; budget details; reasons for any administrative or quasi-judicial decisions that affect individuals; and facts and other information it holds in regard to important policies or decisions that affect the public. In this, it resembles the recently enacted Indian Right to Information Act[19] and stands among the most progressive access to information laws in the world.

III.4. CLEAR AND NARROW EXCEPTIONS

The regime of exceptions is one of the most important aspects of any freedom of information regime, determining what information must be released and what may be withheld. The guiding principle is that all exceptions must be narrowly drafted to protect a legitimate public or private interest. This requires a careful balance to be struck: while it is legitimate that a public body such as the ministry of the defence refuses to disclose information that could seriously harm national defence, at the same time it should not be allowed to rely on the 'national security exception' to conceal maladministration or corruption.

International law requires that any information request must be met unless the public body to which the request is directed can show three things:

a. that the information relates to a legitimate protected interest, such as law enforcement or national security;
b. that releasing the information would do serious harm to that interest; and
c. that the harm caused by disclosure is greater than the public interest in disclosure.[20]

This test is a cumulative one, meaning that a public body must demonstrate all three elements. The test also implies that no public body or type of information should be outside the scope of the law altogether. Every request must be judged on its own merits, and any access refusal must be justified by this 'three-part test'.

The first part of the test requires that information may be withheld only to protect a 'legitimate aim'. A complete list of the legitimate aims which may justify non-disclosure should be provided in the law. This list should include only those interests which constitute

[19] No. 22 of 2005.
[20] This test is based on Article 19(3) of the ICCPR and has been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression in his 1999 Annual Report, n. 18, para. 44 and Annex II.

legitimate grounds for refusing to disclose documents and should be limited to matters such as law enforcement, privacy, national security, commercial and other confidentiality, public or individual safety, and the effectiveness and integrity of government decision-making processes.

The second part of the test requires that exceptions are narrowly drawn, and that access may be refused only when disclosure truly does substantial harm to a protected interest – not when the information merely relates to that interest. In some cases, disclosure may benefit as well as harm the protected interest. For example, the exposure of corruption in the military may at first sight appear to weaken national defence but actually, over time, help to eliminate the corruption and strengthen the armed forces. For non-disclosure to be legitimate in such cases, the net effect of disclosure must be to cause substantial harm to the aim. Exceptions should also, where relevant, be time-limited. For example, the justification for classifying information on the basis of national security may well disappear after a specific national security threat subsides.

The third part of the test requires that even if it can be shown that disclosure of the information would cause substantial harm to a legitimate aim, the information should still be disclosed if the benefits of disclosure outweigh the harm. For example, certain information may be private in nature but at the same time expose high-level corruption within government. The harm to the legitimate aim must 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.

The Bill developed by the Society for Democratic Initiatives includes all these important elements. Part IV of the draft Bill sets out a carefully crafted regime of exceptions, protecting appropriately narrow protection for personal information, while Clause 21 incorporates the 'public interest override', requiring that no information be withheld unless the harm caused is greater than the public interest in having it.

III.5. EFFECTIVE OVERSIGHT BY AN INDEPENDENT BODY

Experience over the last decade has shown that new freedom of information regimes are most effective when their implementation is monitored by an independent administrative body, such as a freedom of information commissioner or 'ombudsman'. This body should have the power to receive complaints about violations of the right to access to information, as well as a mandate to carry out awareness raising activities, education and training – both for public officials and for the wider public. This is crucial in the fight to turn the 'culture of secrecy' that prevails in so many public bodies. The Commissioner also provides low-threshold access to members of the public who have a complaint regarding a violation of their right to access information.

Part V of the draft Bill establishes an independent Information Commissioner with a mandate to monitor and report on compliance with the law by public bodies; to make recommendations for reform; to undertake training activities for public officials; to refer criminal offences under the Act to the appropriate authorities and to raise awareness of freedom of information among the wider public. As part of its functions, it may hear complaints, has powers of investigation and its decisions are binding. The establishment of an information commissioner along these

lines is crucial to the effective implementation of the access to information law and should not be lost in subsequent drafts.