MEMORANDUM

on

the Ugandan Access to Information Bill, 2004 (Bill No. 7)

by

ARTICLE 19
Global Campaign for Free Expression

London
May 2004

I. Introduction

This Memorandum provides an analysis of Uganda's Access to Information Bill, 2004 (the Bill), as published by the Ugandan Minister of State for Information and Broadcasting in April 2004. The Bill, which aims to operationalise the constitutional guarantee of access to information, follows an earlier private member's initiative tabled by Hon. Abdu Katuntu MP under the same title, on which we commented in some detail in March of this year.

ARTICLE 19 welcomes the fact that the government has taken over the initiative and now sponsors the Freedom of Information Bill, 2004. This is a sign of commitment to the principle of freedom of information and provides an indication that the government will take the necessary steps to ensure that the Bill, once adopted, will be implemented effectively.

While there are some important areas where there is scope for improvement, on the whole the Bill represents a positive effort to operationalise the constitutional guarantee of freedom of information. We particularly welcome the new provisions on the public interest override, whistleblower protection and the duty to publish, which all represent a

real improvement on the previous initiative. At the same time, as presently drafted, the Bill still fails to conform fully to international standards on freedom of information. Many of the concerns expressed in our March 2004 Memorandum remain valid. For example, only citizens, not everyone, enjoy the right of access, and the exceptions regime remains unsatisfactory in its vague definitions and lack of a proper harm test. We are also still concerned that the Bill fails adequately to regulate the fees that may be charged for access, and that there is no provision for training, education or public awareness raising on freedom of information issues. Our concerns about these and some other matters are outlined in detail below. Where appropriate, reference is made to criticism expressed in our March 2004 Memorandum.

Section II of this Memorandum contains a brief restatement of the applicable international law, drawing on the *International Covenant on Civil and Political Rights* and the *African Charter on Human and Peoples' Rights*. Section III of this Memorandum contains our principal analysis, as well as our recommendations and suggestions for further improvement. In addition to drawing on principles found in the international instruments, the analysis draws on ARTICLE 19's *The Public's Right to Know: Principles on Freedom of Information Legislation* (the ARTICLE 19 Principles),[1] as well as on ARTICLE 19's *A Model Freedom of Information Law* (the ARTICLE 19 Model Law).[2] The ARTICLE 19 Principles have been endorsed by, among others, the UN Special Rapporteur on Freedom of Opinion and Expression.[3]

II. International and Constitutional Obligations

The *Universal Declaration of Human Rights* (UDHR)[4] is generally considered to be the flagship statement of international human rights. Article 19 of the UDHR, binding on all States as a matter of customary international law, guarantees not only the right to freedom of expression, but also the right to information, in the following terms:

> Everyone has the right to freedom of 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.…[emphasis added]

The *International Covenant on Civil and Political Rights* (ICCPR),[5] which Uganda ratified in 1995, guarantees the right to information in similar terms, providing:

> 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... [emphasis added]

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[1] (London: 1999). Available at http://www.article19.org/docimages/512.htm. This is a standard-setting document based on international human rights standards, as well as best comparative practice.
[2] (London: 2001). Available at http://www.article19.org/docimages/111..htm.
[3] See UN Doc. E/CN.4/2000/63, 5 April 2000.
[4] UN General Assembly Resolution 217A(III), 10 December 1948.
[5] Adopted and opened for signature, ratification and accession by UN General Assembly Resolution 2200A (XXI), 16 December 1966, entered into force 3 January 1976.

Article 9 of the *African Charter on Human and Peoples' Rights*, which Uganda ratified in May 1986,[6] provides general protection for freedom of expression, as do the *American Convention on Human Rights*[7] and the *European Convention on Human Rights*.[8]

In these international human rights instruments, freedom of information was not set out separately but was instead included as part of the fundamental right to freedom of expression. Freedom of expression, as noted above, includes the right to seek, receive and impart information. Freedom of information, including the right to access information held by public authorities, is a core element of the broader right to freedom of expression.

There is little doubt as to the importance of freedom of information. The right to freedom of information as an aspect of freedom of expression has repeatedly been recognised by the UN. The United Nations General Assembly, at its very first session in 1946, adopted Resolution 59(I), which states:

> Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the UN is consecrated.[9]

The UN Special Rapporteur on Freedom of Opinion and Expression has provided extensive commentary on this right in his Annual Reports to the UN Commission on Human Rights. In 1997, he stated: "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."[10] His commentary on this subject was 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".[11] In his 1998 Annual Report, the Special Rapporteur declared that freedom of 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…."[12]

In 2000, the Special Rapporteur provided extensive commentary on the content of the right to information as follows:

> - Public bodies have an obligation to disclose information and every member of the public has a corresponding right to receive information; "information"

[6] Adopted at Nairobi, Kenya, 26 June 1981, entered into force 21 October 1986.
[7] Adopted at San José, Costa Rica, 22 November 1969, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force 18 July 1978.
[8] Adopted 4 November 1950, E.T.S. No. 5, entered into force 3 September 1953
[9] Adopted 14 December 1946.
[10] 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.
[11] Resolution 1997/27, 11 April 1997, para. 12(d).
[12] 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, para. 14.

includes all records held by a public body, regardless of the form in which it is stored;

- Freedom of information implies that public bodies publish and disseminate widely documents of significant public interest, for example, operational information about how the public body functions and the content of any decision or policy affecting the public;

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

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

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

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

- 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.[13]

Once again, his views were welcomed by the Commission on Human Rights.[14]

In November 1999, the three special mandates on freedom of expression – the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression – came together for the first time in November 1999 under the auspices of ARTICLE 19. They adopted a Joint Declaration which included the following statement:

Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/2000/63, para. 44.

[14] Resolution 2000/38, 20 April 2000, para. 2.

> Implicit in freedom of expression is the public's right to open access to information and to know what governments are doing on their behalf, without which truth would languish and people's participation in government would remain fragmented.[15]

The right to freedom of information has also explicitly been recognised in all three regional systems for the protection of human rights.

The African Commission on Human and Peoples' Rights recently adopted a *Declaration of Principles on Freedom of Expression in Africa*,[16] 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;
>   - 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 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.[17] The Principles unequivocally recognise freedom of information, including the right to access information held by the State, as both an aspect of freedom of expression and as 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.
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> 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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[15] 26 November 1999.
[16] Adopted at the 32nd Session, 17-23 October 2002.
[17] 108th Regular Session, 19 October 2000.

Within Europe, the Committee of Ministers of the Council of Europe adopted a Recommendation on Access to Official Documents in 2002.[18] 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. Of particular interest is Principle IV, which states:

> **IV. Possible limitations to access to official documents**
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> 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.[19]

The Commonwealth, of which Uganda is a member, has recognised the fundamental importance freedom of information on a number of occasions. As far back as 1980, the Commonwealth Law Ministers declared in the Barbados Communiqué that, "public participation in the democratic and governmental process was at its most meaningful when citizens had adequate access to official information."[20]

More recently, the Commonwealth has taken a number of significant steps to elaborate on the content of that right. In March 1999, the Commonwealth Secretariat brought together a Commonwealth Expert Group to discuss the issue of freedom of information. The Expert Group adopted a document setting out a number of principles and guidelines on the right to know and freedom of information as a human right, including the following:

> Freedom of information should be guaranteed as a legal and enforceable right permitting every individual to obtain records and information held by the executive,

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[18] Recommendation No. R(2002)2, adopted 21 February 2002.
[19] *Ibid.*
[20] See:
http://www.humanrightsinitiative.org/programs/ai/rti/international/cw_standards/communique/default.htm.

> the legislative and the judicial arms of the state, as well as any government owned corporation and any other body carrying out public functions.[21]

These principles and guidelines were adopted by the Commonwealth Law Ministers at their May 1999 Meeting in Port of Spain, Trinidad and Tobago. The Ministers formulated the following principles on freedom of information:

> 1. Member countries should be encouraged to regard freedom of information as a legal and enforceable right.
> 2. There should be a presumption in favour of disclosure and Governments should promote a culture of openness.
> 3. The right of access to information may be subject to limited exemptions but these should be narrowly drawn.
> 4. Governments should maintain and preserve records.
> 5. In principle, decisions to refuse access to records and information should be subject to independent review.[22]

The Law Ministers also called on the Commonwealth Secretariat to take steps to promote these principles, including by assisting governments through technical assistance and sharing of experiences.

The Law Ministers' Communiqué was considered by the Committee of the Whole on Commonwealth Functional Co-operation whose report, later approved by the Heads of Government,[23] stated:

> The Committee took note of the Commonwealth Freedom of Information Principles endorsed by Commonwealth Law Ministers and forwarded to Heads of Government. It recognized the importance of public access to official information, both in promoting transparency and accountable governance and in encouraging the full participation of citizens in the democratic process.[24]

The Ugandan Constitution guarantees the right to access information at Article 41, which provides:

> (1) Every citizen has a right of access to information in the possession of the State or any other organ or agency of the State except where the release of the information is likely to prejudice the security or sovereignty of the State or interfere with the right to the privacy of any other person.

While international law recognises that the right to information is not absolute, it is well established that any restriction on this right must meet a strict three-part test. This test

[21] 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).
[22] *Communiqué*, Meeting of Commonwealth Law Ministers (Port of Spain: 10 May 1999).
[23] The *Durban Communiqué* (Durban: Commonwealth Heads of Government Meeting, 15 November 1999), para. 57.
[24] *Communiqué*, Commonwealth Functional Co-operation Report of the Committee of the Whole (Durban: Commonwealth Heads of Government Meeting, 15 November 1999), para. 20.

requires that any restriction must be (1) provided by law, (2) for the purpose of safeguarding a clearly defined legitimate interest, and (3) necessary to secure the interest.

Critical to an understanding of this test is the meaning of "necessary". At a minimum, a restriction on access to information is "necessary" for securing a legitimate interest only if (1) disclosure of the information sought would cause substantial harm to the interest (in short, if the disclosures satisfies the harm test) and (2) the harm to the interest caused by disclosure is greater than the public interest in disclosure.[25]

III. Analysis of the Bill

III.1 Scope of Application

Section 2 provides: "This Act applies to all information and records of Government ministries, departments, statutory corporations and bodies, commissions and other Government organs and agencies, unless specifically exempted by this Act." Section 2(2) provides: "Cabinet records and those of its committees … records of court proceedings before the conclusion of the case [and] personal information relating to a judicial officer hearing a particular case or involved in a special tribunal or commission of inquiry" are excluded from the Act's scope of application. Section 5 grants the right of access to every citizen.

<u>Analysis</u>

The Bill's proposed scope of application is virtually identical to that of the previous draft. In our March 2004 Memorandum, we expressed concern about the Bill's failure to grant a right of access to non-citizens, as well as about the limitations on its scope of application:

> While some laws do restrict the right [of access] to citizens in the way that the draft Law does, others do not and ARTICLE 19 is of the view that such a restriction is unnecessary and may unduly limit the right of access, including to people who fall between the cracks, as it were, such as refugees and stateless persons. In practice, there will be very few requests by non-residents/citizens, so there is no real cost-related rationale for restricting access in this way. Furthermore, broader access may well assist, for example, researchers from abroad, to the overall benefit of the people of Uganda.
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> In addition, while the draft Law, particularly by its reference to "any other public body", would appear to impose on all public bodies the obligation to provide access to information of which they have control, the draft Law does not explicitly include within its scope private bodies which carry out public functions (such as maintaining roads or operating rail lines). In recognition of the increasing utilisation of such private bodies by governments, however, the ARTICLE 19 Principles state that the duty to disclose information should extend to any such private body and we recommend that the draft Law reflect this as well. Ideally, in addition, private bodies should be subject exercise or protection of a right.

[25] See ARTICLE 19 Principles, Note 1, Principle 4.

> Finally, the … exclusions from the draft Law's coverage of certain entities and persons is inappropriate. It is true that international law permits a public body to refuse to disclose information under certain circumstances, namely to protect a legitimate aim, where disclosure would significantly prejudice that aim and such prejudice is greater than the public interest in disclosure. But this is obviously a matter which requires a case by case assessment, based on the particular facts presented and which should be dealt with as part of the regime of exceptions rather than by simply excluding this information from the ambit of the law. The wholesale exclusion of certain entities from any obligation whatsoever to disclose information is, therefore, not consistent with international law. To take just one example, it would be of paramount public interest to know that a judicial officer hearing a particular case were not able to pass objective judgment in that case because, for example, he or she was a relative of the accused, or stood in debt to the accused. By excluding wholesale such information from the ambit of the freedom of information law, the judicial process may be open to just the kind of "abuse of power" which the draft Law's preamble states it is intended to curtail.

We note that these concerns remain valid, and we urge that the Bill be amended to address them.

Recommendations:

- Consideration should be given to extending the right of access to everyone, rather than just to citizens.
- The Bill should apply to private bodies that perform public functions as well as to public bodies. Consideration should also be given to subjecting private bodies that hold information necessary for the exercise or protection of a right to a duty of disclosure.
- There should be no wholesale exclusion of certain classes of information and persons from the ambit of the Bill.

III.2 Access Procedures

Access procedures in the Bill are virtually identical to those proposed in the previous initiative.

Section 10 establishes that every public body must appoint an information officer as well as sufficient deputy information officers to ensure that the public body will be able to handle all access requests. Section 11 requires that all access requests be made in writing, except where the requester cannot make a written request due to illiteracy or a disability. Requests must provide enough detail to identify the information sought but information officers must render such assistance as may be necessary for that purpose. Section 6(3) makes it clear that a request "may not be affected" by any reason given for the need for such information or by any conclusion that the relevant information officer may come to as to what the reason for the request might be.

Section 16 provides that public bodies must respond to information requests within 30 days of their receipt, in writing, indicating whether or not the request has been granted, and they must provide access within that period where requests have been approved. This period may be extended for a period of 30 days under generally reasonable conditions (section 17). Refusals of information requests must be accompanied by adequate reasons

(section 16(3)). If an information officer fails to respond within the set time period, the request is deemed to have been refused (section18).

As in the previous private member's initiative, various sections, principally uncontroversial and in many cases quite positive, govern the manner of access. For example, section 20 provides that access should be granted to a document or record in the form in which it was requested or in which it is held by the public body; where necessary to accommodate a person with a disability, alternative formats for the requested information should be provided. Unfortunately, a provision in the private members initiative which would have provided for the provision of translation, where this would be in the public interest, has been deleted.

Analysis
As indicated in our March 2004 Memorandum, while the access provisions are largely in line with international standards they could be improved upon. First, the requirement that all requests be in writing – except certain requests from illiterate or disabled persons – may be too formalistic and inefficient in practice. As recommended in our March 2004 Memorandum, the Bill should allow for access requests to be made orally, by the requester turning up at the relevant office and asking for the material. This can ensure a quick, informal system for release of information where the information is readily accessible and there is no question of it falling within the scope of the regime of exceptions.

Second, we note that all requesters need to supply their address. While in many cases this will be necessary in order to enable the public body to supply the information, in some cases this may not be so – for example, where a request is made orally and can be fulfilled on the spot. The Bill should require only such particulars to be supplied as are necessary to fulfil the request. This should allow for the possibility of supplying an email address as well as, or instead of, a physical address.

Third, under section 13, a public body may transfer a request to another public body if "the subject matter of the record is more closely connected with the functions of another public body". While we understand the motivation for this rule, we note that the concept of a 'close connection' is an inherently flexible one and may be used to transfer requests unnecessarily, resulting in undue delay in the processing of requests for information. It is always open to the body that receives the request to consult fully with any other body that has an interest in the information. This is a more appropriate way of addressing this issue than transferring the request.

Fourth, we regret that the provision dealing with translation of information where this is in the public interest has been removed. As this would only have required translations of documents when necessary in the public interest, the cost implications would have been limited. We urge that the provision be re-introduced.

Recommendations:

- Provision should be made for oral requests on a broader basis than currently

provided for in the Bill.

- The Bill should specify that no more personal information should be required of the requester than is necessary to allow for communication with him or her regarding the information request.
- Section 13 should be amended to place the onus on the body receiving a request to consult with other affected public bodies rather than allowing for the transfer of such requests.
- The provisions allowing for the translation of information in the pubic interest should be re-introduced.

III.3 Fees

Under section 49, the Minister "may make regulations for … any matter relating to the fees including the procedures and guidelines for determining when such fees should be waived or reduced". The Bill does not provide any guidance in relation to the level of fees.[26]

We are concerned at the discretion left to the Minister in setting the fees – even to the point of determining whether or not a centralised fee schedule should be provided at all. We recommend that the Bill include some basic guiding rules relating to fees. It should specify that in no case should fees exceed the amount actually required for searching for and providing copies of the requested records or documents, and in no event should the fees for coping exceed those charged in the commercial sector. Consideration should be given to explicitly providing for lower fees or free access for certain types of requests, particularly requests in the public interest or for personal information. Finally, consideration should be given to providing either that searching for documents be free or for a fee structure whereby a set initial amount of time, for example two hours, is allocated free to requesters, who then only have to pay for additional time.

Recommendations:

- The Bill should provide basic guidance on the basis of which fee schedules should be set. This should be based on the following principles:
  - Fees should not be allowed to exceed the actual cost of searching for and providing copies of the records or documents requested.
  - Requests in the pubic interest or for personal information should be subject to lower fee structures, or should be free.
  - Time spent searching for records should either be free or be limited; perhaps with an initial period available to requesters free of charge.

III.4 The Regime of Exceptions

The exceptions regime is at the heart of any access to information law. It is well established that the right to information requires that all individual requests for information from public bodies must be met unless the public body can demonstrate that the information requested falls within the scope of a limited regime of exceptions. One of

[26] It should, however, be noted that sections 20(4) and 20(7) do ensure that excessive fees are not charged where information is provided in an alternative format.

the most problematic issues for any freedom of information law is how to balance the need for exceptions and yet prevent those exceptions from undermining the very purpose of the legislation.

Under international law, freedom of information, like freedom of expression, may be subject to restrictions, but only where these restrictions can be justified on the basis of strict tests of legitimacy and necessity. International and comparative standards, including the ARTICLE 19 Principles, have established that a public authority may not refuse to disclose information unless it can show that the information meets the following strict three-part test:

- the information must relate to a legitimate aim listed in the law;
- 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.[27]

The first part of this test requires that a complete list of the legitimate aims that may justify non-disclosure be provided in the access to information law; no other aims may be relied on to deny access. The second part of this test requires that the public authority demonstrate that disclosure would cause substantial harm to the legitimate aim. It is not enough for the information simply to fall within the scope of the legitimate aim, for example, by being related to national security. Instead, the public authority must also show that disclosure of the information would harm that aim. Otherwise, there is no reason not to disclose it. The third part of the test requires a balancing exercise to assess whether the risk of harm to the legitimate aim from disclosure is greater than the public interest in accessing the information (this is often called the public interest override). If, taking into account all the circumstances, the risk of harm from disclosure is greater than the public interest in accessing the information, then the information may legitimately be withheld. This might not, however, be the case, for example where the information, while representing an invasion of privacy, also reveals serious corruption. It is implicit in the three-part test that exceptions to the right to information always be considered on a case-by-case basis.

Our March 2004 Memorandum included extensive and important criticism of the exceptions regime as proposed in the private member's initiative. In particular, we commented that while many of the *aims* sought to be protected were in themselves legitimate, the exceptions were phrased in broad and/or vague terms, and a number were not subject to a real harm requirement. We are concerned to note that the present Bill suffers from similar defects as the private member's initiative.

Vagueness and Overbreadth

In common with the private member's initiative, the Bill provides for a number of categories of exceptions, all with substantial sub-categories, which include information obtained in confidence from foreign States, information related to defence or the conduct

[27] Note 1, Principle 4.

of international affairs (including intelligence), information relating to the detection and prevention of crime, personal information, commercial information, information involving confidence of third parties, information relating to the safety of individuals, information privileged in legal proceedings, information relating to the economic interests or financial welfare of the State, information relating to certain research by a third party, information relating to opinions or advice regarding policies or decisions, and requests which are vexatious in nature.

In our March 2004 Memorandum, we commented on the vagueness of many of these exceptions:

> As noted above, all of these are recognised generally as legitimate aims to be protected by exempting them from information disclosure. However, as set out in the draft Law, and in particular in the various sub-categories provided, many of them are either unduly vague or excessively broad.
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> It is not practicable, and we do not think it would be useful, to go through in detail each sub-provision in each section which provides a ground for refusal to disclose requested information. In some cases, the provisions are either vague or overbroad (or both) and they therefore leave the door open for abuse. Information officers, if they are so minded, will be able to take advantage of the breadth of these exceptions to deny information requests. Accordingly, as a general matter, we recommend review of all of the exceptions with a view to ensuring that they are drafted in the narrowest terms possible, always with an eye to avoiding the potential for abuse.
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> Three examples of problematical exceptions are listed below:
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> - Section 26(1)(c) [now section 30(3)(c)(ii)] exempts, among other things, "information relating to the performance … or role of any … personnel or … person … responsible for the detection, prevention or suppression of subversive or hostile activities". This category is far too broad, potentially exempting from disclosure any information about a person working in the area of detection even if such information relates to the person's theft of public moneys or other corruption, or his or her salary as a public servant.
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> - Section 26(1)(g) [now section 30(3)(e)] exempts, among other things, "information on methods of … collecting … or handling information [relating to defence and intelligence]". While some information falling within this category may legitimately be withheld, other information should be disclosed. For example, abusive information-collection techniques, such as illegal wiretapping and physical abuse of detainees, are subjects of high public interest and should be subject to disclosure.
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> - Section 26(1)(c) [very similar exceptions are now found at sections 30(3)(b) and (c)] exempts "information relating to the characteristics, capabilities, performance, potential, deployment, functions or role of any defence establishment". Once again, this is unduly broad and could be understood as including, for example, information about the number of armed personnel, information about a failure of the armed forces to meet certain basic minimum standards and so on. The idea that this information in any way protects national security is based on an outmoded and secretive view of government. An essential element in an effective military force is close public oversight leading to the rooting out of waste, inefficiency and corruption.

The current Bill is similarly flawed, containing numerous vaguely drawn and overly broad exemptions. We restate our concern and urge that the exceptions regime be amended accordingly.

Lack of a General Harm Test

As was the case with the private members initiative, the current Bill fails to subject a wide range of exceptions to a harm test. In effect, therefore, these exceptions are blanket or class exceptions, in clear breach of the standards outlined above.

Section 21, for example, states: “An information officer shall refuse access to personnel, physical or mental health medical files, the disclosure of which would constitute an invasion of personal privacy”; section 24 fails to require a harm test for the ‘unreasonable’ disclosure of personal information; section 28 fails to require a harm test for the release of information relating to law enforcement procedures or methods; and section 31 fails to set a harm test for the disclosure of internal reports, recommendations or advice. While these exceptions all pursue legitimate aims, disclosure of information falling within the scope of these provisions can legitimately be refused only if it would threaten to cause substantial harm to the protected interest.

In addition, while some subsections do contain harm tests, they are phrased weakly and may, therefore, be relied on to refuse disclosure in inappropriate circumstances. For example, section 25(2) allows for the refusal of disclosure if the information in question would respectively “be likely to cause harm to” or “could reasonably be expected to prejudice” a legitimate interest. Under section 27, disclosure may be refused if the information would be “likely to prejudice or impair” a protected interest; section 28(b) uses the terms “impede” and “prejudice”; and section 30 allows for the refusal of disclosure if that would be “likely to prejudice” the protected interest.

As we noted in our March 2004 Memorandum, the regime of exceptions should subject each exception to a strong harm requirement. The Bill should adopt a consistent approach by allowing information to be withheld only where disclosure would be likely to cause serious harm to a legitimate interest.[28]

Recommendations:

- The exceptions should be reviewed to ensure that they are drafted in clear and narrow terms, protecting only specific and legitimate public and private interests.
- Each exception should be subject to a harm test, cast in terms of a likelihood of serious harm to a legitimate interest.

III.5 Oversight and appeals

The Bill proposes that the Inspector General of Government (IGG) handle complaints relating to access refusals. Under Part V of the Act, a complaint may be lodged within thirty days of a refusal decision or another decision that adversely affects the interests of

[28] For various formulations of an acceptably strong harm test, see the *Model Law*, Articles 25-32.

the complainant. Upon receipt of a complaint, the IGG gives notice to other concerned parties – presumably, the public body(ies) concerned and any third party(ies) whose interests may be affected – and, within thirty days, decides on the substance of the complaint. The IGG's decisions may appealed to the High Court.

Under section 36, the complainant may also request the IGG to conduct a broader investigation into the complaint. It is not clear from the Bill whether this investigation would be conducted separately from the complaint or what the parameters of the investigation would be. Section 36 does state, explicitly, that this investigation may involve hearings – not provided for under the 'ordinary' complaints regime – and that the investigation will be conducted in private.

Finally, the IGG is required to present an annual report to Parliament on all complaints handled by it and any appeals to the court. Each of the information officers is required to ensure that each public bodies includes, within its own annual report, information on access requests made, whether or not access was given and, if not, for what reason.

Analysis

The complaints and appeals process as drafted is broadly in line with international standards. We note that the Inspector General's independence is guaranteed by the Constitution and, while formally appointed by the President, Parliament must approve his or her appointment. The appeal from the IGG to the High Court is similarly welcome.

However, the draft Bill should be amended to clarify the investigation procedure. In particular, it should be made clear whether section 36 provides for a separate investigations procedure and, if so, what its parameters are. In addition, we are concerned that section 36 states that investigations by the IGG be conducted in private. We consider that this would generally be inconsistent with the concept of transparency that the Bill itself seeks to establish in public administration. Hearings should only be conducted in private when this would be necessary to protect a legitimate secrecy interest, for example when a complaint relates to defence intelligence material that could not be disclosed in open court.[29] We also note that section 36 requires a fee to be paid for complaints lodged with the IGG. We are concerned that the level of this fee should not be such as to effectively deter complainants.

In addition to the investigation of complaints, and to the extent that he or she does not already have sufficient powers of inspection and investigation under the Constitution and relevant other legislation, we recommend that the IGG should be given the power to conduct investigations *ex officio*, in the absence of a complaint. This would be a logical extension of the IGG's constitutional functions[30] and would provide for a more powerful and effective supervisory mechanism.

Finally, while we welcome the principle that every information officer should draw up access statistics to be included in the annual report of the public body concerned, we

[29] Analogous to what is stipulated in relation to court proceedings under section 42.

[30] See Article 225 of the Constitution.

believe it would be more effective if the IGG then compiled this information from all public bodies in its own annual report, accompanied, where appropriate, by some analysis, for example to highlight different access practices by different public bodies. This would provide far more transparency than the submission of numerous separate reports and statistics and give Parliament the opportunity, once a year, to consider and discuss all access figures.

Recommendations:
- Complaints hearings should be conducted in private only where this can be justified as necessary to protect a legitimate secrecy interest.
- The "prescribed fee" for appeals to the IGG should either be eliminated or at least be subject to explicit guidelines to ensure that it does not pose a barrier to access to information.
- To the extent that the IGG does not already have sufficient powers of inspection, it should be given the power to conduct investigations *ex officio*, even in the absence of a specific complaint.
- The IGG should include in its annual report to Parliament a compilation of the access statistics of every public body.

III.6 Preservation of Records

Section 22 requires information officers to "ensure that the records or information concerned [in particular requests] are properly preserved until the request is met and where there is an appeal, until all the procedures for appeal are exhausted".

This provision is welcome but it does not go far enough. As we commented in our March 2004 Memorandum:

> [P]ublic bodies have an obligation to maintain all their records in a form that makes access as easy and efficient as possible. The draft Law should, therefore, provide for a comprehensive regime of record maintenance, including clear rules on the archiving and destruction of public records. A good example in this regard in the UK freedom of information law, which requires the equivalent of the minister of justice to set central standards relating to record keeping to which all public bodies are required to conform.

We note that this concern has not been addressed in the current Bill.

Recommendation:
- Section 22 should be supplemented by a full regime for maintaining records.

III.7 Training, education and promotional measures

As we commented in our March 2004 Memorandum:

> Proper implementation of an access to information law requires measures to be taken both to ensure that the public are aware of their rights under the law and to address the prevailing culture of secrecy within public authorities. It is desirable that the independent administrative body mentioned above (in the event that the draft Law creates one), or some other appropriate public body, be allocated responsibility for

> both functions. The administrative or other public body should be required to produce and disseminate widely a guide to using the law, which is accessible to members of the general public. It should also be given a broader public educational role.
>
> The draft Law creates a freedom of information regime which is in many ways complex – witness the complicated system of exceptions – and which imposes potentially demanding responsibilities on information officers and their appointees. It is not unlike, in this respect, freedom of information regimes in a wide range of other countries. Experience in these countries has shown that, in light of these complexities and responsibilities, it is essential that the officials charged with the day-to-day operation of the freedom of information system be given training in how to carry out their duties, including instruction in how to employ the exception regime with due regard to the presumed right of access, how to locate requested information efficiently, and so on. We recommend, therefore, that the draft Law promote such training by requiring public bodies to ensure appropriate training for those officials responsible for its implementation and by allocating an oversight role for training to an independent administrative body.

The current Bill fails to provide for any training or promotional activities to be undertaken to help ensure proper implementation of the Bill. We believe that this is a serious oversight that must be remedied if the Bill is to be effective in practice. Given the role of the Inspector General of Government in relation to handling complaints regarding access to information, and its generic powers in relation to general matters of public administration, we recommend that it be allocated the necessary powers and responsibilities to conduct such public awareness raising. It should also coordinate the internal training and education activities of public bodies.

Recommendations:

- The Bill should require the Inspector General to undertake a public education campaign to ensure full understanding of the new law.
- The Bill should require all public bodies to train officials who are responsible for its implementation and allocate an oversight role in this regard to an independent administrative body.

III.8 Entry into force

Under section 1 of the Bill, the government will decide when the Act will come into force; no deadline is set. We are concerned that this may lead to delay in the implementation of the Bill. This would be regrettable, particularly in view of the fact that the Bill itself is a delayed measure to implement the right of access to information, mandated by the Constitution, adopted in 1995.

Recommendation:

- The Bill should set a deadline by which it should come into force.