



MEMORANDUM

on the

Draft Law on Access to Information of Vietnam

April 2009

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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 operates the Media Law Analysis Unit which publishes a number of 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 law 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>.

If you would like to discuss this Memorandum further, or if you have a matter you would like to bring to the attention of the ARTICLE 19 Law Programme, you can contact us by e-mail at law@article19.org.

SUMMARY OF RECOMMENDATIONS

Guarantee of the Right:

- Everyone should have the right to request information regardless of the purpose of their request.
- A wider set of principles on information disclosure should be included in the law.
- All bodies forming part of any level or branch of government, created by law or by the Constitution, or carrying out public functions should be covered by the law.

Routine Disclosure:

- The various provisions dealing with routine disclosure should be brought together.
- The law should provide for more extensive routine disclosure obligations.

Processing of Requests:

- The provisions on time limits should be brought together and simplified to make it clear that requests shall be responded to as quickly as possible and in any case within 15 days.
- Requesters should have the right to specify the form in which they would like to receive the information they have requested.
- Key charges, such as photocopying charges, should be set centrally to avoid a patchwork of fees across different public authorities.

Regime of Exceptions:

- The right to information law should override secrecy provisions in other laws, to the extent of any inconsistency.
- Security information and bodies should not be excluded entirely from the ambit of the law.
- The internal deliberations exception should be revised so as to list the specific interests being protected and to reflect a harm-based approach.
- The draft Law should include a rule to the effect that where only part of a document is confidential, the rest of the document will still be disclosed.
- There should be no third party veto against the release of information.
- Overall time limits on holding information confidential should be introduced.

Appeals:

- The law should make provision for appeals to be decided by an independent administrative oversight body. This body should have the power to investigate appeals properly and to remedy any failures to apply the law, including by ordering the release of information.

Promotional Measures:

- All public authorities should be required to appoint dedicated information officers to oversee implementation of the law.
- A central body should bear overall responsibility for oversight of implementation.
- Consideration should be given to allocating responsibility to a ministry to establish a binding code of practice containing minimum record management standards.
- Consideration should be given to putting in place a system for reporting on implementation.
- A system of sanctions and protections should be established.
- The law should come into force in one year instead of three.

1. INTRODUCTION

The Vietnamese government is in the process of preparing legislation to give effect to the right to access information held by public authorities (right to information legislation). As part of this process, the Vietnamese Ministry of Justice, which is leading on the effort, has asked for ARTICLE 19 input and support. First, the Ministry of Justice asked ARTICLE 19 to organise a study tour to the United Kingdom for key officials involved in the preparation of the right to information law; this took place in March 2009. Second, the Ministry of Justice has asked for technical legal assistance as it prepares the legislation and this Memorandum is part of that assistance.¹ In particular, this Memorandum provides a detailed analysis of the draft Law on Access to Information (draft Law) prepared by the Vietnamese authorities² in light of international standards in this area and comparative practice by other States.

ARTICLE 19 very much welcomes the decision by the Vietnamese authorities to adopt right to information legislation. The right to access information held by public authorities is a fundamental human right recognised in international human rights law, including the *International Covenant on Civil and Political Rights* (ICCPR),³ a legally binding treaty to which Vietnam acceded on 24 December 1982, and the *UN Convention Against Corruption*, which Vietnam has signed.⁴ Proper effect can be given to the right to information only through implementing legislation. The government of Vietnam is therefore under a positive international law duty to enact effective domestic legislation to protect the right to information.

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 too for promoting good governance and other social benefits.

The draft Law contains a number of positive features. For example, it contains a wide definition of public bodies, provides for proactive disclosure of information in the public interest, requires funds to be allocated for the development of websites, includes good procedures for making requests for information, provides for a harm test and public interest override for exceptions and contains a list of information which must be disclosed notwithstanding the exceptions. At the same time, it could still be improved. The main areas of concern include an overbroad regime of exceptions, the lack of an independent oversight body and the failure of the draft Law to include promotional measures.

Our analysis of the draft Law is based on international law and best practice in the field of access to information, as crystallised in two key ARTICLE 19 documents: *The Public's Right*

¹ The assistance will also include the participation by ARTICLE 19 at a conference in Hanoi in May 2009 to discuss the draft legislation.

² The Memorandum is based on an English translation of the draft Law provided to ARTICLE 19 by the Vietnamese government at the beginning of April 2009. ARTICLE 19 takes no responsibility for errors based on mistaken or confusing translation.

³ Adopted and opened for signature, ratification and accession by UN General Assembly Resolution 2200A (XXI), 16 December 1966, entered into force 23 March 1976.

⁴ Adopted by UN General Assembly Resolution 58/4, 31 October 2003, entered into force 14 December 2005.

to Know: Principles on Freedom of Information Legislation (ARTICLE 19 Principles)⁵ and *A Model Freedom of Information Law* (ARTICLE 19 Model Law).⁶ Both publications represent broad international consensus on best practice in this area.

2. ANALYSIS OF THE DRAFT

Most right to information laws contain five key operational elements, namely the guarantee of the right, including its scope of application, rules on routine or proactive disclosure of information, procedures for making and processing requests for information, the regime of exceptions to the right of access, and rules regarding the right to appeal against any refusal to disclose information. Most right to information laws also incorporate a number of promotional measures to promote fulsome implementation of the law in practice. This analysis of the draft Law is organised according to these five key operational elements (as opposed to following the structure of the draft Law itself).

2.1. Guarantee of the Right

Overview

Article 5 of the draft Law contains the main statement setting out the right to information. Article 5(1) states that individuals have the “right to information and the right to request information”. Pursuant to Article 5(2), foreigners and foreign organisations and legal persons residing or operating in Vietnam have the right to information to the extent that the information relates to them or their field of operation. Article 5(3) states that “agencies, organisations and individuals” have the right to request information if that information is necessary for the “fulfilment and/or protection of their rights and obligations”. Article 10 provides that agencies, organisations and individuals have the right to access information “necessary for safeguarding rights and interest and for purpose of livelihood, research, study, production, trading and other purposes”.

Article 4 defines the principles governing information disclosure as ensuring “transparency, accuracy and comprehensiveness” of information, ensuring equality of access to information, ensuring social order and national security and protecting privacy.

The scope of information covered by the draft Law is defined in Article 3 as data “prepared, owned and administered” by public authorities (the draft Law refers throughout to “agencies and organisations”), but only “during the performance of their duty”. It may be held in records, drawings, images, films, cassettes, slides and any ‘computerised’ medium. The same article defines documents or records as being prepared by public authorities or received by them from other agencies.

Article 1(1) defines the State ‘agencies’ covered by the law as ministries and their equivalents, “government subordinated agencies”, People’s Councils and Committees at all levels, and agencies and organisations established by the Prime Minister. Article 1(2) defines organisations covered by the law as State funded organisations, State owned enterprises and

⁵ (London: June 1999).

⁶ (London: July 2001).

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“national funds financed from state budget and local funds contributed by community” (Article 1(2)(b)).

Analysis

The definition of the right to information is somewhat confusing, particularly in respect of individuals. Pursuant to Article 5(1), individuals have the right to request information without restriction, but under Article 5(3), this right, for individuals, as well as agencies and organisations, extends only to cases where the information is needed for the fulfilment and/or protection of their rights and obligations. According to Article 10, individuals, agencies and organisations have the right, as far as it is necessary for a much longer list of purposes. Although this list is formally open-ended (due to the use of the phrase ‘and other purposes’), it may well be understood as imposing some limitations on the right to request information. Foreigners, for their part, may request information relating to their operations.

These rules are problematical not only due to the fact that they are inconsistent, indeed contradictory, but also because they are unduly restrictive. The right to information should not be conditioned by the use for which information is sought. The central idea of the right to information is that all information held by public authorities, unless it falls within the scope of the regime of exceptions, should be subject to disclosure. This is true of individuals, but also for legal bodies and organisations. Article 17(3) reflects this, providing that requesters are not required to present reasons for their requests. Better practice right to information laws do not distinguish between local and foreign requesters, giving all the same right to request information.

The list of principles governing information disclosure in Article 4 is welcome, but it is also rather limited. The positive principles in Articles 4(1) and (2) could be expanded, for example by referring to ideas like ease of access, facilitating requests, providing information rapidly and at low cost, and ensuring broad routine disclosure of information. The exceptions referred to in Articles 4(3) and (4) could be reformulated into a principle by indicating that the provision of information will not prejudice overriding public and private interests (of which social order, national security and privacy are just three examples). At the same time, the principle should make it clear that exceptions will be interpreted narrowly so as to ensure that they are not abused to promote secrecy. In particular, the principle should make it clear that exceptions apply only where disclosure would pose a risk of harm to an interest listed in the right to information law, and where that interest outweighs the overall public interest in openness.

In accordance with the general principles underlying the right to information, it should apply to all information held by a public authority, regardless of whether the authority prepared it, owns it, administers it or received it from another agency, or whether or not it is used or relates to the performance of their duties. It is also not clear why these definitions are restricted to information created by or received from a public authority, to the exclusion of information received from private parties. Furthermore, the right should apply to all recorded information, regardless of the form in which it has been recorded. By giving examples of forms of recording, Article 3 may give the impression that information recorded in other forms may not be included. It is also not clear why ‘documents’ and records’ are defined in Article 3, given that the right as set out in Articles 5 and 10 is to access information.

The definition of public authorities (agencies and organisations) in Article 1 is wide in scope, covering not only government bodies but also State-owned enterprises and, as we understand

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Article 1(2)(b), activities funded by public funds. At the same time, it is not clear why Article 1(1)(c) refers to bodies established by the Prime Minister, since bodies established by any minister or government body should be included. Indeed, any body forming part of any level or branch of government should be covered. The law should state specifically that all bodies created by the Constitution or by any law are included, in case this is unclear. Finally, bodies carrying out public functions, even if they are not part of, or funded by, the public sector should be included.

Recommendations:

- Individuals, agencies and organisations, whether local or foreign, should all have the right to request information regardless of the purpose of their request. Articles 5(2) and (3), and 10 should be amended to remove conditions on placing requests for information.
- Consideration should be given to reformulating the principles governing information disclosure in Article 4 so that they reflect a broader set of positive rules governing access, as well as a more principled approach to protecting overriding public and private interests, as described above.
- Article 3 should be amended to provide simply that information covers all recorded information held by a public authority, regardless of the form in which it is held. The definition of documents and records should either be removed, or cast in similarly broad terms.
- The definition of public authorities covered by the law should include any body forming any part of any level or branch of government, bodies created by law or by the Constitution and any body carrying out a public function.

2.2. Routine Disclosure

Overview

The main list of categories of information subject to routine or proactive disclosure is found in Article 7 of the draft Law. The list includes, among others, information on legal and regulatory documents, including in draft form, voluntary contributions by members of the public, development plans, implementation of national policies, public projects, macro-economic information and forecasts, land usage, emergency funds and responses, social benefits provided to individuals, and other information required to be disclosed by other laws. Public authorities are also required to disclose information where a failure to do so may negatively affect the public interest or the rights of an individual (Article 8(2)).

Article 26 adds to this a number of categories of information required to be published on the websites of public authorities, at the latest three months prior to the law becoming effective. This list includes information on their organisation, functions and legal framework, official events attended by staff, guidelines on administrative processes and forms, contact details of staff, website administrators and information officers, and such other information as may be deemed necessary. A staff member shall be identified who will be responsible for maintaining the website.

Article 25 provides more generally for the development of a website by all public authorities, in the care of ministries, within six months of the law coming into force, and for People's

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Councils and Committees, within one year. Budget allocations shall take this need into account.

In addition to dissemination over the Internet, Article 13 calls for information subject to routine disclosure to be made available in the official gazette, in widely circulated publications and via public notice. Where this information is not accessible to local populations, for whatever reason, Article 24 calls on public authorities to disseminate it to those local populations in an appropriate manner.

Analysis

The various provisions on proactive publication are scattered throughout the draft Law. It would be useful to bring these provisions together to make the law easier to read and understand, and to improve flow. It would particularly make sense to integrate the lists in Articles 7 and 26, given that a primary form of dissemination for the Article 7 list will be the website (i.e. these are not really different lists).

Taken together, the routine disclosure obligations set out in the draft Law are positive, but still relatively modest compared to many right to information laws. There is a clear trend among modern right to information laws to place increasingly onerous routine disclosure obligations on public authorities. In India, for example, the law requires public authorities to publish a description of all boards, councils, committees and other bodies, and whether their meetings or minutes are open; a directory of all employees and their wages; the budget allocated to each of its agencies and particulars of all plans, proposed expenditures and reports on disbursements made; information about the execution of subsidy programmes and the beneficiaries; and particulars of the recipients of concessions, permits or other authorisations. The Peruvian law places extremely onerous routine publication obligations on public authorities, particularly in relation to management of public finances, on which subject it includes some 14 articles.

Some right to information laws provide for in a system for leveraging up the amount of information subject to routine disclosure over time, as the capacity of public authorities in this area grows, and in line with the increasing information capacity of modern technologies. In the United Kingdom, for example, every public authority must develop, publish and implement a publication scheme, setting out the classes of information which it will publish, the manner in which it will publish them and whether or not it intends to charge for any particular publication. In adopting the scheme, the public authority must take account of the public interest in access to the information it holds and in the “publication of reasons for decisions made by the authority”. Importantly, the scheme must be approved by the Information Commissioner, who may put a time limit on his or her approval or, with six months notice, withdraw the approval. This allows for routine disclosure both to be adapted to the particular types of information held by different public bodies and for the scope of information covered to be increased over time.

Recommendations:

- Consideration should be given to bringing together in one place the various provisions dealing with routine disclosure. In particular, the lists of information subject to routine disclosure in Articles 7 and 26 should be integrated.
- Consideration should be given to providing for more extensive routine disclosure obligations, in line with modern trends in this area.

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- Consideration should be given to building a system into the law for leveraging up the amount of information subject to routine disclosure over time.

2.3. Processing of Requests

Overview

Pursuant to Article 17 of the draft Law, anyone may make a written or verbal request for information, although, confusingly, the article also refers to cases where the requester is not allowed to make a verbal request. Written requests must be in Vietnamese and lodged with the public authority which holds the information sought. Written requests may be sent by post or electronically. Requests must indicate the name, address, and workplace and identification number of the requester, as well as a description of the information sought. No reasons need to be given for a request, except where necessary to access information which is otherwise restricted. Where a request is ambiguous, a requester may be asked to clarify it, and be given 15 days to do so. In this case, the time limits for responding to the request (see below) only start to run from the point at which the requester clarifies the request (Article 22(2)).

Where a public authority does not hold the information requested, it must inform the requester of that fact within 15 working days of receiving the request (Article 18). Where a public authority needs to consult with another public authority in relation to a request, Article 20(1) appears to give the staff of that other public authority the power to determine whether or not to grant access.

Pursuant to Article 22(1), requests must be decided as soon as possible and in any case within 15 working days. However, Article 22(3) sets 30 days as the time limit for providing information, which appears to come into play only two years after the law comes into force. Article 23 allows for an extension of the time limit to a maximum of 30 days where the request is for a large quantity of information such that the public authority needs more time to gather it, or the request requires consultation with a third party. Where the time limit is extended, the public authority shall inform the requester of this fact, as well as the reason for it. Article 20 also appears to address the question of time limits, with Article 20(2) providing that officials shall decide as soon as possible whether or not to grant or refuse a request, or to grant instant access to the information, and Article 20(3) indicating that where 15 days have passed without a decision, the public authority must inform the requester in writing of the reasons for the delay, and the date on which a decision is expected.

Two provisions in the draft Law address the question of the form in which requesters may receive information. Article 3 provides that the right to access information means the right to inspect documents, or to transcribe, reproduce or record documents, on a floppy disk, memory device or in any other format. Article 14 supplements this by providing that information may be provided verbally, in writing, through inspection (and then transcription) of documents, or through conversion of a document into other formats. Public bodies shall provide information in the most convenient and least costly format, which is least disruptive to them, although persons with disabilities may request access in a form which takes into account their disability.

Pursuant to Article 15, a fee of 30,000 VND (approximately USD1.70), or as determined by the Minister of Finance, may be charged for making an application for access to information.

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Reasonable fees, set by each public authority, may also be charged for duplication and for searching for, researching and collecting documents, where this takes more than five person-hours. The Minister of Finance shall determine the cost of accessing information in electronic format. Information subject to routine disclosure is provided for free, although reproduction costs may be levied. Fees for “ordinary and standardised” services must be published, while other fees may be determined on a case-by-case basis, and the requester notified of them at the time his or her request is approved. The relevant public authority shall inform requesters of the fee and methods of payment, and may require fees to be paid before access is granted.

No fees may be charged for the provision of amended information, where a public authority previously provided insufficient or incorrect information. And no fees may be levied on the “poor, the handicapped and policy privileged” (Article 16).

According to Article 19, where a requester is granted access to information, in part or in whole, he or she shall be notified via regular mail or electronically. This notification shall set out the information or records to which access has been granted, the time limits within which the right must be exercised, the location where the access will be granted, the form in which the information will be communicated and any fees. Where a request is refused, either because the information is not held or based on the exceptions, notification will be sent by regular mail or electronically. In this case, the notification will state adequate reasons for the refusal, as well as the requester’s right to appeal against it, specifying the time limits and where an appeal may be lodged (Article 21(2)).

Analysis

These are generally progressive and comprehensive rules on the processing of requests. Article 17 should either provide simply that oral requests may be made or clarify the circumstances in which an oral request might be refused. It is not clear why requesters are required to provide their address and workplace, since neither of these are relevant to the processing of requests.

It is not clear why Article 20(1) provides for the staff of any public authority which needs to be consulted on a request to decide whether or not the information should be released. The decision should always rest with the public authority with which the request is lodged, as long as it holds the information, although where the information relates closely to the work of another public authority, the views of the staff of that authority should clearly be taken carefully into account.

The provisions on time limits in Articles 20 and 22 are confusing and should be brought together into one provision. In particular, Article 22(3), providing for time limits of 30 days and only two years after the law comes into force, appears to be inconsistent with the other provisions, and is unnecessary. The law should state simply that requests shall be responded to as quickly as possible and in any case within 15 days (as in current Article 22(1)), subject to extending the time limit, as provided for in Article 23.

As with other procedural rules, the fact that rules on form of access to information are spread among two different articles is confusing and could potentially result in limits to the form in which requesters are able in practice to access information. Instead of stipulating that information will be provided in the least costly, and most convenient, form, Article 14(2) should allow requesters to specify the form in which they would like to access the information. For example, it will normally be least costly to provide information

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electronically, but requesters may not be able to make use of this format. Where the form chosen by requests is more costly, they may be charged for those costs but the choice should be up to them.

The rules on fees are generally progressive and in line with good practice in other countries. At the same time, consideration should be given to setting “ordinary” fees – such as the cost of photocopying or the provision of staff time – centrally to avoid a patchwork of fees across different public authorities and to ensure that these fees are indeed ‘reasonable’, as required by the law. It is not clear what the phrase ‘policy privileged’ in Article 16 connotes. Regardless, consideration should be given to providing for fee waivers or reductions where the information is sought for public interest reasons, for example for purposes of dissemination to the wider public.

Recommendations:

- The right to make an oral request should either be unrestricted or the conditions in which it may be limited should be made clear. Requesters should not have to provide their address and workplace when making requests for information.
- The decision whether or not to release information should always be made by the public authority with which the request for information was lodged, as long as it holds the information in question.
- The provisions on time limits should be brought together and simplified to make it clear that requests shall be responded to as quickly as possible and in any case within 15 days, subject to the rules for extensions, which should be for a maximum of 30 days.
- The rules on form of accessing information should be brought together into one provision and requesters should have the right to specify the form in which they would like to receive the information they have requested.
- Consideration should be given to setting key charges, such as photocopying charges, centrally to avoid a patchwork of fees across different public authorities. Consideration should also be given to provided for a fee waiver for public interest requests.

2.4. The Regime of Exceptions

Overview

The main provisions on exceptions are found in Article 9, although a number of other relevant provisions are set out in different parts of the draft Law. A key issue regarding exceptions is the relationship between the right to information law and secrecy provisions in other laws. Article 2 provides that access to information shall be subject to the right to information law and that it shall take precedence over other laws which do not contain specific provisions on information disclosure. Article 9(1)(a) establishes as an exception to the right of access, information defined as secret by any other law or which any law requires the holder to keep secret. Article 28 provides that, within two years of the promulgation of the right to information law, the Ordinance on State Secrecy and “other legislation”, presumably other *secrecy* legislation, shall be amended, again presumably to bring them into line with the right to information law.

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Article 1(3) excludes information containing national security analyses and those organisations which are responsible for national security totally from the ambit of the law. This is supported by Article 2(1), which provides that State secrecy is not covered by the general obligation on public authorities to provide information pursuant to the law.

Article 9(1) provides for the following exceptions (i.e. categories of information that do not need to be provided):

- Confidential information received from foreign or local governments or organisations, or the disclosure of which would harm relations with other States or international organisations (Articles 9(b) and (d)).
- Information which is required to be kept confidential to protect public economic interests (Article 9(c)).
- Information the disclosure of which would threaten national security (Article 9(d)).
- Information the disclosure of which would undermine public order, criminal investigations, law enforcement or the prosecution of criminals (Article 9(d), second one).
- Annual or long term budget documents while under preparation (Article 9(e)).
- Information provided as part of a tender process or relating to a business operation, apart from the tender price (Article 9(g)).
- Personal information, except information required for purposes of investigation or that public authorities receive with a view to public disclosure, and except where disclosures is in the overall public interest (Article 9(h)).
- Certain personal information of witnesses or informants in criminal cases, where disclosure of the information may pose a threat to the safety, interests or rights of the witness, a victim or the individual supplying the information (Article 9(i)).
- Business and trade secrets, the disclosure of which may undermine the competitive advantage of a third party, except where it is in the overall public interest to disclose the information in order to safeguard health or life (Article 9(k)).
- Information under preparation for the 'adjuration' process and not related to economic status, unless disclosure is necessary for a court action to recover assets in bankruptcy cases (Article 9(l)).
- Information relating to internal discussions or the routine duties of public authorities, meeting records and documents containing personal views expressed as part of a policy process (Article 9(m)).
- Documents prepared for internal circulation or use, whether prepared by a public authority, advisors or special experts (Article 9(o)).
- Correspondence between or within public authorities and/or subordinated bodies (Article 9(p)).

These exceptions do not apply, pursuant to Article 9(3), where it is clear that disclosure of the information will not cause harm. Article 9(3) also authorises disclosure where necessary to protect a public interest and that interest overrides the harm from disclosure. This is supported by Article 11, which provides for the head of a public authority to authorise release where this is necessary in the public interest.

Pursuant to Article 9(3), information relating to a third party may be disclosed where that third party consents, or where the information is necessary for a court to arrive at the truth. Outside of the exceptions, individuals have a right to access their personal information (Article 9(6)).

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Access to information covered by Article 9(1) is subject to approval of the head of a public authority and a third party, where the information concerns that third party (Article 9(2)). This is supported by Article 23(1)(b), which states that disclosure of information relating to a third party requires the consent of that party and that, where such consent is not forthcoming, public authorities shall only disclose information which does not relate to the third party.

Individuals involved in legal cases also have a right to request confidential information from public authorities involved in the case, for use in a restricted manner (Article 9(4)). Individuals and public authorities requesting confidential information must present reasons for requiring access to it, and must also make a commitment not to further disseminate the information. Where they do disseminate it, they must compensate for any resulting harm (Article 9(5)).

Article 8 provides a list of categories of information that must be disclosed upon request without limit (i.e. without being subject to the exceptions in Article 9). This includes information on: their leaders; their programmes, objectives and budgets, including revenue, expenditure and audits, and budgets for ongoing projects; national and local socio-economic development statistics; large-scale public projects and projects of public interest; products and services that generate adverse public health and environmental impacts; indebtedness and debt servicing; and contracts and tendering with both State-owned and private companies.

Article 21(1) provides for an additional set of reasons for refusing a request for information, including where the information is confidential or already publicly available, in the context of repetitive requests, where the request is so large that satisfaction of it would interfere with the normal operation of the public authority, where the technical capacity of the public authority is insufficient to deal with the request, where satisfaction of the request would incur unreasonable costs, or where provision of the information would create an illegal advantage or breach copyright.

Article 12 provides that the Prime Minister decides on the declassification of documents on the basis that the grounds for confidentiality no longer pertain, or is no longer required. Where information is declassified, public authorities are required to publish it.

Analysis

It is clear from the various provisions referring to other laws that the draft Law preserves specific secrecy rules in other laws. It is welcome that Article 28 calls for the amendment of other laws within two years of the right to information law coming into force, although it would be preferable if it were made clear that such amendment aims to bring those laws into compliance with the right to information law.

At the same time, better practice right to information laws override pre-existing secrecy provisions in other laws, to the extent of any inconsistency. For example, the South African Promotion of Access to Information Act, 2000, specifically provides that it applies to the exclusion of any other legislation that prohibits or restricts disclosure of information and which is materially inconsistent with its objects or one of its specific provisions (section 5). The Indian Right to Information Act, 2005 explicitly overrides inconsistent provisions in other laws 'for the time being in force', and it specifically mentions the Official Secrets Act, 1923, as one such law (section 22).

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This is important because, in most countries, secrecy provisions were not adopted with a perspective of openness in mind and, as a result, they are inconsistent with the principles set out in the right to information law, in particular that restrictions should be narrowly drawn, harm-based and subject to a public interest override.

Similarly, Article 12 provides for Prime Minister to decide on declassification of information and that, when information has been declassified, it must be published. It is assumed that this means that the Prime Minister, or someone he or she designates for this purpose, will set general rules on declassification, since it does not seem practical for a central body to decide on the declassification of individual documents. Regardless, the draft Law fails to set out clearly the relationship between classification and the regime of exceptions. It should be clear that any request for information should be assessed against the exceptions in the right to information law, rather than being based on formal classification of a document. The classification of documents is based on an assessment by a civil servant, normally at the time the document is created. This should not be determinative of a request, which may be made years later.

The rules in Articles 1(3) and 2(1), totally excluding national security analysis and information held by security bodies from the ambit of the right to information law are unfortunate. Although some countries do exclude these bodies, the laws of many countries do not, and such exclusions run counter to the basic principles underpinning right to information laws, namely that public bodies hold information not for themselves but on behalf of the public. A better approach is for the law to cover all public bodies, but to provide for appropriate exceptions to protect legitimate interests, including security.

The list of specific exceptions set out in Article 9 of the draft law refer, for the most part, to legitimate interests and most include in-built harm tests. Some, however, are repetitive or unnecessary, while others do not include harm tests. Article 9(b), for example, protects all confidential information provided by other States or international organisations, while Article 9(d) protects the same interest, but in a more appropriately narrow manner, covering only information the disclosure of which would harm relations with other States or international organisations. Similarly, Article 9(e) provides blanket protection for the development of the annual or long-term budgets, but Article 9(c) already protects central economic interests against harm. Article 9(g) protects certain information provided by informants, but this exception is not found in other right to information laws and the interest it protects is already covered by the exceptions in favour of personal information (Article 9(h)) and criminal investigations (Article 9(d)). Finally, Article 9(g) provides blanket protection for tender and business operation information, but competitive advantage is more narrowly but adequately protected by Article 9(k).

Articles 9(m)-(p) all relate to internal discussions and communications. They are not harm-based and, taken together, they cover a vast range of information, only some of which needs to be kept confidential. An exception generally along these lines is found in most right to information laws and this reflects the need to allow government to develop policy in an effective manner, based on the free and frank provision of advice from civil servants. The latter need to feel secure enough to be able to provide their views on policy matters freely. At the same time, these exceptions can easily be abused by civil servants used to operating in secrecy and who are concerned that any degree of openness will interfere with their work. Indeed, the experience in other countries has been that this is one of the most problematical exceptions from an openness perspective.

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Balancing these interests is not easy and it is difficult to prevent abuse entirely. In some countries, care has been taken to elaborate as clearly and precisely on the specific interests to be protected so as to limit unduly broad interpretation. Two interests that are commonly protected are the success of a policy, where this would be defeated by premature disclosure of the policy, and the free and frank provision of advice within public bodies. Protection is also provided in some laws for the successful development of policy and/or for the effectiveness of a testing or auditing procedure. However, in many laws, background factual or statistical information is excluded from the scope of this exception.

Article 21(1)(g) adds to the list of exceptions found in Article 9 cases where access to the information would create an illegal advantage for someone or breach copyright. The former is wide and undefined, and does not find protection in most right to information laws, which simply protect competitive advantage. Regarding the latter, a more common approach, where this is directly addressed, is to provide for copyright to be taken into account when deciding upon the form of access. Where provision of a copy of a document would breach copyright, for example, a requester would still be allowed to inspect the document (which would not breach copyright).

The public interest overrides found in Articles 9(3) and 11 are welcome. At the same time, it would be preferable if they were merged into one provision, to avoid any risk of confusion or of inconsistent interpretation of this important rule. Furthermore, Article 11 provides for the head of a public authority to authorise disclosure where this would serve the overall public interest, while Article 9(3) provides for a stronger rule, whereby public authorities generally may release information in the public interest. An even stronger public interest rule would *require* public authorities to release information where this was in the overall public interest.

The draft Law fails to include a rule on severability, whereby if only part of a document is confidential, the rest of the document will still be disclosed.

The rule in Article 9(2) that that access to information covered by the exceptions in Article 9(1) shall be decided by the head of the public authority is unfortunate. It is assumed that this means that where a question arises as to the application of the Article 9(1) exceptions, it will be decided by the head. Minor questions about the possible application of an exception will often arise, particularly in the early phases and as civil servants get used to the way the law works. Experience in other countries shows that more successful implementation is more likely when access decisions are made at the lowest practical level, and that unduly hierarchical decision-making leads to delays and bottlenecks. Each public authority should put in place an internal system for processing information requests. In most cases, the information officer should be able to make a decision, perhaps in consultation with other staff, about the application of the exceptions. Only in very rare cases should reference to the head of the public authority be necessary.

Article 9(2), supported by Article 23(1)(b), provides that the approval of a third party is required for release of information relating to that third party. This third party veto approach is not consistent with international right to information principles and is not found in other democratic laws. The regime of exceptions protects various third party interests – such as privacy or commercial advantage – on a harm-based standard. The question of whether or not information is disclosed should be based exclusively on the application of that regime of exceptions. The views of third parties as to the confidentiality of information they have

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provided are certainly a relevant factor to be taken into account, but they should not serve as a veto against release of information.

It is reasonable to refuse to process requests for information where this would require excessive effort on the part of a public authority, as provided for in Articles 21(1)(d)-(g). At the same time, these rules are unduly broad. For example, they allow public authorities to refuse to disclose information where their 'technical capacity' is not enough, but this could be abused to refuse many requests. Article 14(2) of the ARTICLE 19 Model Law states simply: "A public or private body is not required to comply with a request for information where to do so would unreasonably divert its resources."

Many right to information laws include overall time limits on holding information confidential, particularly where this is to protect public interests. This can help ensure that information does not remain secret indefinitely. In appropriate cases, information may still be held confidential after this time, but only where clear reasons for this apply.

Recommendations:

- The right to information law should override secrecy provisions in other laws, to the extent of any inconsistency. Otherwise, it should be made clear that the process of amending secrecy laws will aim to bring them into line with the right to information law.
- The draft Law should make it clear that requests for information will be assessed against the regime of exceptions in the law, and not on whether or not a document is classified.
- Security information and bodies should not be excluded entirely from the ambit of the law. Instead, there should be an exception to protect national security interests.
- Articles 9(b), 9(e), 9(g) and 9(i) should be removed from the law on the basis that the interests they protect are already, and more appropriately, protected by other exceptions.
- The internal deliberations exception protected by Articles 9(m)-(p) should be revised so as to list the specific interests being protected and to reflect a harm-based approach. Background factual or statistical information should not be covered by the exception.
- The exception to prevent against illegal advantage in Article 21(1)(g) should be removed and protection of copyright should be reflected in the form of access, rather than as an exception.
- The public interest overrides found in Articles 9(3) and 11 should be merged into one provision. Consideration should be given to requiring public authorities to release information where this is in the overall public interest, rather than just allowing them to.
- The draft Law should include a rule to the effect that where only part of a document is confidential, the rest of the document will still be disclosed.
- Each public authority should put in place a process for deciding on requests for information which should allow decisions to be made at the lowest practical level, and rarely if ever require reference to be made to the head of the public authority.
- The third party veto against the release of information relating to that third party, found in Articles 9(2) and 23(1)(b), should be removed. Instead, third parties should be consulted and, where they object to disclosure, their objections should

be taken into account, among other things, in the disclosure decision.

- The conditions under which a public authority may refuse to process a request on the basis that this will require excessive effort on the part of a public authority, as set out in Articles 21(1)(d)-(g), should be simplified and refer simply to the idea of unreasonably diverting the resources of a public authority.
- Consideration should be given to introducing overall time limits on holding information confidential.

2.5. Appeals

Overview

Article 21(3) provides generally that anyone whose request for information has been refused shall have the right to appeal against this to “the higher administrative agency”. Pursuant to Article 27, appeals may be lodged where a request has been refused in part or in whole, for breach of the time limits set out in the law, or where excessive fees are charged. The same article provides that requesters may also appeal to the courts.

Analysis

It is assumed that both Article 21(3) and 27 refer to internal appeals, although it is not entirely clear what the reference to a “higher administrative agency” in Article 21(3) means. Such internal appeals can be a useful way of resolving information disputes without needing to engage external bodies. In particular, more senior officers often have the confidence to disclose information that, particularly in the early stages of implementation of a right to information law, lower-ranking officers lack. Internal appeals can also help clarify for more junior staff what the scope of disclosure is. It may be noted that the grounds for appeal in Article 27 are much wider than in Article 21(3) and that, to the extent that these provisions overlap, they should be merged.

Most right to information laws provide for court appeals, as a final level of appeal, as is the case with the draft Law. While internal appeals can help resolve many issues, independent oversight is necessary to ensure proper interpretation and application of the rules. The courts can theoretically provide such independent oversight, but they are too expensive and time-consuming to be used by the vast majority of information requesters.

To address this problem, most better practice right to information laws provide for appeals to be lodged with an independent administrative oversight body, such as an information commission. Thus, under the Mexican 2002 Federal Transparency and Access to Public Government Information Act, appeals from any refusal to provide information go first to the Federal Institute of Access to Information, established under the Act, and from there to the courts. The five commissioners are nominated by the executive branch, but nominations may be vetoed by a majority vote of either the Senate or the Permanent Commission. Under the Indian Right to Information Act 2005, a system of Central and State Information Commissions is established with the power to hear appeals regarding failures to implement the law. Central Information Commissioners are appointed by the President upon nomination by a committee consisting of the Prime Minister, the leader of the opposition and a Cabinet Minister nominated by the Prime Minister.

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Experience in other countries has demonstrated that a right to appeal to an independent administrative oversight body is essential to successful implementation of the right to information. Indeed, it is possible to go so far as to say that one of the more important dividing lines between more and less successful implementation of right to information laws is whether or not they provide for this.

The failure to provide for an independent administrative oversight body is, therefore, one of the more serious shortcomings of the draft Law. Such bodies should have their independence guaranteed. They should also have all necessary powers to investigate properly claims of a failure to implement the right to information law, including by reviewing any information claimed to be confidential, as well as to remedy any such failures where appeals are upheld.

Recommendations:

- Articles 21(3) and 27, to the extent that both refer to an internal appeal, should be merged and the broader grounds for appeals found in Article 27 should be adopted.
- The law should make provision for appeals to be decided by an independent administrative oversight body. This body should have the power to investigate appeals properly and to remedy any failures to apply the law, including by ordering the release of information.

2.6. Promotional Measures

Overview

The draft Law does not really include any promotional measures, apart from the obligation, set out in Article 25, on public bodies to establish websites to facilitate access to information.

Article 30 of the draft Law provides for the law to enter into force only on 1 June 2012.

Analysis

Better practice right to information laws contain a range of measures designed to promote their implementation. In most countries, public authorities are required to appoint dedicated officials, often known as information officers, to serve as a central point of contact for lodging requests for information, as well as a locus of responsibility for ensuring that the public authority takes all necessary steps to implement the law properly.

Many laws also identify a central body – often the same one that serves as an external appeals body – with responsibility for undertaking a range of promotional functions. One such function is to raise awareness among the public about the right to information, including by publishing and disseminating widely a guide for the public on how to use the law. Another is to help coordinate training of public officials, for example by developing best practice training courses. This should be supported by an obligation on all public authorities to ensure the provision of appropriate training to their staff.

Another key promotional measure included in many right to information laws, and one which has benefits far beyond the right to information, is a system to promote better information or record management practices by public authorities. A simple system for achieving this is established in many laws whereby authority for setting and implementing minimum record

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management standards, for example in the form of a binding code of practice, is allocated to a central body, such as the minister of justice or finance. These should be levered up over time as the capacities of public authorities in this area increase.

Reporting on implementation is another promotional measure contained in many right to information laws. Often, each public authority is required to report annually to a central body – often the external appeals body – on measures taken to implement the right to information law, including on how many requests have been received and how they have been handled. That central body is then required to produce a consolidated overview of implementation efforts, in the form of an annual report, which is tabled before the legislature. This provides an opportunity for regular review of progress and to make changes and improvements where necessary.

In many countries, a system of sanctions and protections is established to promote implementation of the law. Individuals who wilfully obstruct access to information, or implementation of the law, are subjected to a regime of sanctions, while those who implement the law in good faith, or who disclose information about wrongdoing, are protected.

As noted, the draft Law envisages a three-year gap between its adoption and its coming into force. This is unnecessarily long. Although some countries have allocated longer time periods to prepare for implementation, in most cases this simply delays implementation, and all of the preparation takes place towards the end of the time period. One year is long enough for public bodies to put in place the necessary systems to implement the law.

Recommendations:

- All public authorities should be required to appoint dedicated information officers to receive requests for information and to ensure that the public authority is implementing the law properly.
- A central body, possibly the independent administrative oversight body recommended in the previous section, should bear overall responsibility for oversight of implementation of the law.
- Consideration should be given to allocating responsibility to a ministry for establishing a binding code of practice containing minimum record management standards.
- Consideration should be given to putting in place a system for reporting on implementation of the right to information law.
- A system of sanctions and protections should be established to facilitate implementation of the right to information law.
- The gap between the adoption and coming into force of the law should be reduced from three years to one year.