



COMMENT

on

**THE DRAFT LAW CONCERNING
THE INFORMATION OF YEMEN**

October 2009

ARTICLE 19 · Free Word Centre · 60 Farringdon Road · London EC1R 3GA · United Kingdom
Tel +44 207 324 2500 · Fax +44 207 490 0566 · info@article19.org · <http://www.article19.org>

ARTICLE 19

GLOBAL CAMPAIGN FOR FREE EXPRESSION

I. Introduction

This Comment provides an analysis of the draft Law Concerning the Information of the Republic of Yemen, 2009 (*hereinafter* “Draft Law”) which was prepared by the Media and Culture Committee of the Yemeni Parliament.¹ The Draft Law follows a number of earlier proposals of laws on access to information in Yemen, including the proposal by the Yemeni Journalists Against Corruption (that ARTICLE 19 analyzed in November 2008²) and the proposal of the Yemeni Government (that ARTICLE 19 analyzed in May 2009³). The Comment is intended to assist the Yemeni Parliament to ensure that the freedom of information law finally adopted is, as far as possible, in accordance with international standards and comparative national best practice.

ARTICLE 19 welcomes the continuous efforts of the Yemen Parliament to adopt a freedom of information law, following the global trend towards legal recognition and reinforcement of this right. Such legislation is central to moves to bolster democracy in the country, as well as to wider issues of good governance, controlling corruption and building participation.

From the most part, this Draft Law represents a very progressive piece of legislation that is based on international standards on freedom of information and comparative practice. It contains a number of positive elements, including a general right to information held by public bodies, definition of bodies that have to provide information under the Draft Law, definition of information, obligation to proactively publish and disseminate key information, establishment of an oversight body of the Public Information Commissioner, obligation of bodies to appoint responsible officers charged with provision of information, obligations related to record maintenance and training of officials on provision of information, accessible appeals system and sanctions for those who obstruct access to information. At the same time, the Draft Law can still be further improved and recommendations for such improvements are outlined below. In particular, the area that needs significant improvement is the regime of exception.

The ARTICLE 19’s analysis of the Draft Law is based on international standards outlining best practice for access to information laws. We refer specifically to two of our key publications – A Model Freedom of Information Law (*hereinafter* “Model FOI Law”)⁴ and The Public’s Right to Know: Principles on Freedom of Information Legislation (*hereinafter* “Public’s Right to Know”)⁵ – which encapsulate the accepted international standards.

This Comment follows the structure of the Draft Law. Given the fact that ARTICLE 19 extensively analyzed two previous drafts of the freedom of information legislation and repeatedly provided comprehensive recommendations of the necessary legal framework, this Comment focuses on the shortcomings of the present draft and provides recommendations for the improvement of the proposed legislation.

¹ A copy of the Draft Law is attached in the Appendix 1 to this Comment

² Available at <http://www.article19.org/pdfs/analysis/memorandum-on-the-draft-law-on-the-right-of-access-to-information.pdf>.

³ Available at <http://www.article19.org/pdfs/analysis/yemen-memorandum-on-freedom-of-information-draft-law.pdf>.

⁴ Available at www.article19.org/pdfs/standards/modelfoilaw.pdf.

⁵ Available at www.article19.org/pdfs/standards/righttoknow.pdf.

ARTICLE 19

GLOBAL CAMPAIGN FOR FREE EXPRESSION

II. Analysis of the Draft Law

1. Denomination and Definitions

a) *Title*

The Draft Law indicates that, once it is enacted, it shall be called “Law Concerning the Information”. Article 1 further states that the law “shall be known as the law of guarantee of the right of access to information”, that is in line with international trends in the field. Hence, it would be appropriate to clarify this discrepancy between the aim of the law and the title and call the legislation “Law on Access to Information”.

b) *Bodies obliged to provide access to information*

Overview

Article 2 of the Draft Law provides the list of bodies that are obliged to provide access to information under the Law. The definition covers a broad range of state institutions (including legislative, executive and judicial), public bodies as well as non-governmental organizations that are funded in whole or in part from the public budget. The Public Commissioner can extend the list of institutions under the ambit of the Draft Law if he/she “finds it necessary”. The definition of bodies in Article 2 of the Draft Law clearly seeks to ensure that all public bodies, whatever their nature, are covered by the Draft Law. This is important, since public bodies should be accountable to the public for how they perform their responsibilities.

Analysis

However, it is not clear from the definition in what extent the Draft Law applies to private companies (those are not mentioned at all) and to non-governmental organizations. Since the right to information is based on the idea that the state is established by the people to serve them, the institutions of the state should be subject to a duty of accountability to the public. This reasoning does not apply to private companies and civil society organizations, unless they have assumed part of the responsibilities of the state. Concretely, contemporary freedom of information laws generally apply to private bodies primarily in the following cases:

- the body is owned or controlled by the State: for example a state corporation established under civil law;
- the body carries out a statutory function: for example a bar association or medical board established under civil law, but vested with the responsibility to ensure professional discipline by a law or regulation;
- the body performs a public function: for example a private utility company providing water or electricity, or a company implementing a government contract to build roads or schools;
- the body is substantially financed by the State: for example a privately-owned museum or archive which depends on public subsidies, or a charity implementing projects with government funds.

The fact that non-governmental organizations fall within the scope of the Draft Law, even if they only receive partial funding from the state, is unusual. Although NGOs work for the public good or seek to influence public policy, they do not necessarily perform explicitly public responsibilities (although their members may do so) and for this reason are usually not covered by laws on access to information, except in the four situations described above. At the same time, since their purpose is to advance

ARTICLE 19

GLOBAL CAMPAIGN FOR FREE EXPRESSION

the public interest, civil society organizations may have little reason to object to a duty to provide information to the public.

On the base of foregoing, we are concerned that the Draft Law would not apply to many institutions that are owned or controlled by the state, carry public functions or are substantially financed by the state unless the Public Commissioner decides otherwise. Hence, we recommend replacing the sentence “any body that the Public Commissioner finds necessary [to fall under] this Law” by “any institution that is owned or controlled by the State, that is carrying out a statutory or public function or is substantially financed by the State, provided the institution is a public authority only to the extent of their statutory or public functions”. Such specification sentence would complete otherwise comprehensive definition of institutions covered by the Draft Law.

c) *Definition of information*

Overview

Article 2 of the Draft Law provides broad definition of information, listing various forms and sources as well as devices on which information can be stored.

Analysis

Although the definition of information in the Draft Law is reasonably broad, we are concerned that the last section of the definition is confusing. It stipulates that materials in questions are those “reviewed by or submitted to the Body” [obliged to provide information], following with a statement on types of storage of information. This wording suggests that the Draft Law covers only those materials that the respective body received from elsewhere or that were subject of its oversight activity.

We point out that progressive freedom of information laws generally apply to any record held by a public body, whatever its contents or purpose, in accordance with the principle of maximum disclosure. It is true that a public body may hold documents which do not relate to a public function, such as a notebook or videocassette in the lost and found department of a state institution. However, access to such documents can in appropriate cases be refused under ordinary exceptions, such as the privacy exception.

The ARTICLE 19’s Model Law (Article 7 para 1) provides the following broad definition of “records”:

A record includes any recorded information, regardless of its form, source, date of creation, or official status, whether or not it was created by the body that holds it and whether or not it is classified.

Hence, we recommend broadening the definition of “information”, as including any recorded information held by a public body, regardless of its form, source, date of creation, or official status, and whether or not it was created by the body that holds it.

Recommendations:

- Title of the Law should state that the Draft Law should be known as the “Law on Access to Information” once adopted.
- Definition of “bodies” covered by the Draft Law in Article 2 should be amended to ensure that private persons providing public services are covered by the law. In particular, the sentence “any body that the Public Commissioner finds necessary

ARTICLE 19

GLOBAL CAMPAIGN FOR FREE EXPRESSION

[to fall under] this Law” should be replaced by “any institution that is owned or controlled by the State, that is carrying out a statutory or public function or is substantially financed by the State, provided the institution is a public authority only to the extent of their statutory or public functions”.

- Definition of “information“ should be broadened in order to ensure that it covers “any recorded information held by a public body, regardless of its form, source, date of creation, or official status, and whether or not it was created by the body that holds it”.

2. Goals and Principles of the Right to Access to Information

a) *Persons with the right to access to information*

Overview

Article 3 para a) of the Draft Law states that the aim of the Law is, *inter alia*, to “ensure and facilitate the *citizen’s right* to have access to information”. Article 4 further states that the access to information is one of “*the citizen’s* fundamental rights and citizens and foreigners are entitled to exercise such a right within the limits of the Law” (emphases added). From the wording of these two Articles, it is unclear who the persons with the right to access to information are – whether those are only citizens or also foreigners. However, further provisions of the Draft Law seem to indicate that the right belongs to “every person and legal entity” (Article 7 of the Draft Law) or that “the foreigner or foreign official body may submit a request for information” under the Law (Article 17 of the Draft Law).

Analysis

We note that under international human rights standards, in line with Article 19 of the UDHR and Article 19 of the ICCPR, the right to seek and receive information belongs to everyone, without discrimination on any grounds, including on the basis of nationality. Thus, limiting the scope of the Draft Law to citizens would deprive non-citizens, including residents, foreign journalists or foreign investors, the right of access. In this respect we also note that permitting requests from non-citizens may provide indirect financial benefits, by making Yemen an easier place to do business for foreigners and hence a more attractive destination for investment.

Hence, in order to avoid confusion, we recommend to omit references to “citizen’s right” throughout the Draft Law and to explicitly state that the right belongs to *everyone*, including foreign nationals.

b) *Legal accountability for the request for information*

Overview

Similar to the previous draft legislations on freedom of information in Yemen, Article 7 of the Draft Law stipulates that “[e]very person and legal entity has the right to submit a request for information and such request submittal shall not result in any legal accountability”.

Analysis

ARTICLE 19 has previously commented on such provisions in earlier drafts and objected against a certain lack of clarity with the notion of “legal accountability”. It is unclear whether the provision means that any applicant of information would not be

ARTICLE 19

GLOBAL CAMPAIGN FOR FREE EXPRESSION

subject to any sanctions for simply making a request, or whether it implies that any information or procedural irregularity that might be the result of request should not lead to any legal liability. If the intended meaning is the former, it is acceptable; however, latter option would fundamentally undermine the purposes and the implementation of the entire legislation.

c) *Duty to publish*

Overview

Article 11 of the Draft Law requires responsible bodies to proactively disclose certain types of information. These range from administrative information about the functions and mechanisms of the respective body and information related to their official duties; instructions on how to submit the requests for information; types of information held by the body; to statistics on the requests (including those received, processed and denied) and other information specified by the Public Commissioner.

Analysis

Although this provision's recognition of the importance of publishing key information is clearly positive, it is by no means comprehensive in terms of the key categories of information that should be published. The provision should explicitly also encompass: financial information of public bodies regarding their accounts, budgets and costs spending (not only a general obligation to publish "final accounts"); guidance on processes by which members of the public may provide input into major policy or legislative proposals; the types of information which the body holds and the form in which this information is held; and the content of any decision or policy affecting the public, along with reasons for the decision and background material.⁶

d) *Whistleblowers*

Overview

Article 13 and 14 of the Draft Law provide protection against retaliation towards those officials who "disclose information about violation or infringement of this law or otherwise assist in any investigation about violations or infringements of this law" and possibility to turn to court for protection in case of actual retaliation.

Analysis

It is certainly positive that the Draft Law attempts to provide protection to those officials working for respective bodies who would promote openness and transparency of public institution. These provisions also indicate that the authors of the Draft Law are aware of the need to provide protection to whistleblowers – persons who release information on wrongdoing ("blow the whistle").

However, we would like to clarify that protection of whistleblowers in modern freedom of information legislation has very specific meaning. It provides protection against any legal, administrative or employment related sanctions for individuals who release information on wrongdoing, or which would disclose a serious threat to health, safety or the environment. This protection should apply where the individual acted in good faith and in the reasonable belief that the information was substantially true and

⁶ The Public's Right to Know, Principle 2.

ARTICLE 19

GLOBAL CAMPAIGN FOR FREE EXPRESSION

disclosed evidence of wrongdoing or a serious threat to health, safety or the environment. Wrongdoing in this context includes the commission of a criminal offence, failure to comply with a legal obligation, a miscarriage of justice, corruption or dishonesty or serious maladministration regarding a public body.⁷ Public bodies should also be required to provide training programs for their employees that address the scope of whistleblower protection and what sort of information a body is required to publish.⁸

The Draft Law falls short to encompass this concept of the whistleblowers' protection and should be amended accordingly.

Recommendations:

- Provisions of the Draft Law indicating that the right to information is the right of "citizens" (Articles 3 and 4 of the Draft Law) should be amended and it should be explicitly stipulated that every person, regardless of nationality, residence or other status enjoys the right to information, subject only to the provisions of this law.
- Article 7 of the Draft law should be amended to clearly indicate that there should be no legal liability on any applicant for making a request for information.
- The list of key categories that should be published, contained in Article 11 of the Draft Law should be broaden and the law should explicitly encompass that bodies should publish financial information regarding accounts, budgets and costs spending of public institutions; guidance on processes by which members of the public may provide input into major policy or legislative proposals; the types of information which the body holds and the form in which this information is held; and the content of any decision or policy affecting the public, along with reasons for the decision and background material.
- The Draft Law should include provisions on protection of individuals who release information on wrongdoing from any legal, administrative or employment related sanctions.

3. Procedural rules

Overview

Articles 15 - 24 of the Draft Law deal in detail with the procedures for requesting the access to information. These provisions provide details on how to submit the request for information, including different means of communication and presume availability of forms produced by respective bodies. Special assistance is envisioned for illiterate applicants or for those with special needs. They also set detailed procedures that competent official (information officer) should follow, time-limits in which the request should be responded to, with special consideration for those applicants (journalists and news agencies) that might need information earlier than prescribed deadlines. The provisions also outline instances under which the request for information can be denied and procedures on the transfer the request to other public bodies if information is not held by the body to which the request was submitted.

Analysis

⁷ See The Public Right to Know, Principle 9, and Model FOI Law, Part VII.

⁸ See The Public Right to Know, Principle 3.

ARTICLE 19

GLOBAL CAMPAIGN FOR FREE EXPRESSION

We find the procedures for requesting access to information as comprehensive and well-designed. Our suggestions in this respect concern following issues:

- *Manner of submitting the request*
Article 15 of the Draft Law stipulates that the request for information shall be submitted “in writing” on the form set for this purpose by the relevant body. We acknowledge that written requests offer some obvious advantages over oral ones, such as being easier to store, replicate and forward to other departments. Nonetheless, a requirement to submit a written request makes the procedure difficult to use for those who are unable to write. It can also be an unnecessary formality if the request is a simple one which can be answered straight away. For these reasons, most modern right to information laws either allow requests to be filed orally, or state that if the requester is unable to submit a written request, the official who receives the request will reduce it to writing, providing a copy to the requester. Further, obliging the applicant to submit the request on the prescribed form appears to be an unnecessary bureaucracy. We believe that the request should be of such nature that would “enable an experienced official to identify, with reasonable effort, whether or not the body holds a record with that information;”⁹ without the need to submit such request on specific form.
- *Identification of the applicant*
Article 15 of the Draft Law stipulates that the request for access to information shall, *inter alia*, indicate “applicant’s name, his/her address and his/her workplace.” We believe that the purpose of information on the applicant is to ensure that the body would be able to deliver the response to concrete individual and to the specified address. The information about the workplace of the applicant is irrelevant in this respect.
- *Transfer of the request:*
Article 22 of the Draft Law provides for the possibility of the request for information to be transferred to another body than to that who received the request, in case “it is demonstrable ... that the transferred-to Body is more concerned in the information, in which case, the request shall be considered as if submitted to the Body to which it is transferred at the time it was submitted to the other body” for the purposes of time-limits for response to the request. We believe that the provisions on the transfer can be further improved by explicitly stipulating that the body transferring the request should inform the applicant about the transfer or should indicate to the applicant which body hold the relevant information; while the choice between these two options should be based on ensuring more rapid access to the information by the applicant.

Recommendations:

- The Draft Law should provide for the possibility to make request for information orally or state that if the requester is unable to submit a written request, the official who receives the request should reduce it to writing, providing a copy to the requester. The Draft Law should also allow the request to be submitted in a format that would enable an experienced official to identify, with reasonable effort, whether or not the body holds a record with that information.

⁹ Model FOI Law, Article 8 para 1.

ARTICLE 19

GLOBAL CAMPAIGN FOR FREE EXPRESSION

- The Draft Law should also omit unnecessary requirement on identification of the applicant through his/her workplace.
- The Draft Law should also specify the obligations of the information officers in case of transferring requests for institution to other bodies towards the applicants.

4. Exceptions

Overview

The exceptions are provided in Article 25 of the Draft Law. Broadly, the exceptions fall into six main categories: (1) information related to military and defense of the country (“details of secret military weapons, defense tactics, strategies and forces, or military operations for the defense of the country”, Article 25 para a); and “secret and confidential matters of foreign policy related to defense and military alliances”, Article 25 para b)); (2) information related to bilateral relations with other states (“information provided to, or received from, another state with whom it was agreed to keep the Information confidential before such information was provided or received”, Article 25 para c)); (3) information related to criminal, civil and certain administrative proceedings (“the prevention or detection of crime; the apprehension or prosecution of offenders; the administration of justice; the assessment or collection of any lawful tax or duty; or the assessment by a public body of whether civil or criminal proceedings, or regulatory action pursuant to any enactment, would be justified” – Article 25 para d)); (4) confidential and commercial information (“information whose disclosure would lead to disclosure of the identity of a confidential source of information to which law enforcement personnel have promised confidentiality” – Article 25 para e); “the electronic information whose disclosure causes the penetration into the protected networks and equipment and expose them to deletion and theft” – Article 25 para f); “information of commercial, financial, economic or industrial nature, the scientific or technical research whose disclosure leads to a prejudice to the copyright, intellectual property, or to the legitimate and fair competition or which leads to an illegitimate profit or loss to any person or company” – Article 25 para g)); (5) information related to health and safety (“information that, if disclosed, would be expected to endanger the life or physical safety of an individual” – Article 26 para a)); and (6) personal data (“personal data, the disclosure of which would be an unreasonable invasion of privacy of such individual, unless that personal data is relevant to a public duty, function, or position held by that individual” – Article 26 para b)).

Analysis

We find the exceptions regime in the Draft Law to be one of its weakest points of the law as it fails to strike a careful balance between the right of the public to know and the need to protect other important individual and social interests.

As we indicated in the previous analysis of the Yemeni access to information legislation, according to international standards, the right to information should be denied only if three conditions are met:

- The information affects a legitimate interest protected by law;
- Release of the information would cause actual harm to that interest (so called “harm test”);
- This harm would be greater than the harm caused to the public interest by non-disclosure (so called “public interest override.”)

The Draft Law falls short to these requirements for several reasons.

ARTICLE 19

GLOBAL CAMPAIGN FOR FREE EXPRESSION

- The Draft Law makes no mention at all of a “public interest override”. This means that even if it can be shown that disclosure of information would cause substantial harm to a legitimate and narrowly drawn objective, the information should still be disclosed if the benefits of disclosure outweigh the harm. For example, certain information may be contained in “an official document which the law prevents from being published or made accessible” but may well expose high-level corruption or maladministration within government. The harm to the legitimate aim should be weighed against the public interest in having the information made public. Where the latter is greater, the law should provide for disclosure of the information. To this end, we strongly encourage the inclusion of an overarching provision indicating the public interest override to give effect to the fundamental principle of maximum disclosure. More specifically, we recommend a clear formulation of the public interest override at the very beginning of the section on exceptions.¹⁰
- Relevant bodies should be required to show that the disclosure of information would cause substantial harm to a legitimate aim in order to qualify as an exception to the principle of maximum disclosure. For non-disclosure to be legitimate in cases where disclosure may benefit as well as harm the aim, the net effect of disclosure must be to cause substantial harm to the aim. The Draft Law fails to incorporate the requirement of the substantial harm test – the provisions either broadly state that “disclosure would cause serious prejudice” to protected aim (Article 25 para d) or “disclosure of which would be unreasonable invasion” to protected aim, or presume that certain information would *ex definitio* be excluded from the regime of freedom of information (military information or unspecified “secret information” on state defense”).
- Some of the aims indicated by the categories of exceptions are overly broad. In particular, the category of military and defense of the country or information received within bilateral relations and “agreed as confidential”. In our view, this category should be focused on only exempting information which would be likely to cause prejudice to the defense or national security of the country. As it currently stands, the provision encompasses information which might concern a whole range of other issues that should be in the public realm (e.g. abuses of human rights involving foreign government). Second, section 16 on “disclosure harmful to law enforcement” should also be more narrowly focused on the precise objectives of law enforcement.¹¹ The category of privacy and personal information” refers to information involving an “unreasonable invasion of privacy...” unless data relate to public function of the individual. We believe that the provision should indicate situations where the exception should not apply, such as when an individual has consented to the disclosure of her/his personal information.¹² Further, the exceptions related to commerce, trade and scientific research should not apply insofar as a request relates to the results of any product or environmental testing, and the information concerned reveals a serious public safety or environmental risk.¹³

¹⁰ Model FOI Law, Article 22.

¹¹ *FOI Model Law*, Article 29.

¹² *Model FOI Law*, Article 25.

¹³ *Model FOI Law*, Article 31.

ARTICLE 19

GLOBAL CAMPAIGN FOR FREE EXPRESSION

- Consideration should be given to setting an overall time limit beyond which exceptions no longer apply.

To address the problems indicated with the regime for exceptions, ARTICLE 19 recommends the adoption of the relevant provisions of ARTICLE 19's Model FOI Law.

Recommendations:

- The regime of exceptions in the Law should be amended in order to comply with a three part test. Information should never be withheld, unless it affects a legitimate interest protected by law, release of the information would cause actual harm to that interest, this harm would be greater than the harm caused to the public interest by non-disclosure.

5. Public Information Commissioner

Overview

Articles 28 – 44 of the Draft Law deal with institution of the information commissioner as the single oversight body over the regime of freedom of information and include detail provisions on the powers and functions of the Commissioner, including its appellate function in case of denial of access to information requests.

Analysis

ARTICLE 19 welcomes the introduction of the institute of the Commissioner and the regulation provided in the Draft Law is fairly comprehensive. However, we recommend that the draft could be further enhanced in the following way:

- Article 34 Draft Law stipulates that the Commissioner should be appointed by the President of the Yemen Republic. However, it fails to specify on whose nomination and what should be the basis for the selection of the appointee. Based on the best practices published by ARTICLE 19, we recommend to include that the appointment should be done after nomination by a two-thirds majority vote of the Yemeni Parliament and after and after a process in accordance with the following principles:
 - (a) participation by the public in the nomination process;
 - (b) transparency and openness; and
 - (c) the publication of a shortlist of candidates.
- Article 35 of the Draft law sets personal and professional qualifications of the potential Commissioner, including age, university education, religious affiliation, criminal record and professional experience. These provisions probably intend to ensure that the position is held by person with appropriate experience and with appropriate moral and personal integrity. However, some criteria (e.g. performance of Islamic duties or education) might constitute discrimination of certain applicants, as for example non-Muslims and non-believers in terms of religion or women or minorities who traditionally experience barriers in access to higher education. Requirement of having university degree in information system also does not seem justified given the fact that the Commissioner should have in his/her disposition necessary

ARTICLE 19

GLOBAL CAMPAIGN FOR FREE EXPRESSION

personal and technical resources. Thus, instead, we propose to replace personal and professional requirements for the position with the following:

No-one may be appointed Commissioner if he or she:

- (a) holds an official office in, or is an employee of a political party, or holds an elected or appointed position in central or local government; or
- (b) has been convicted, after due process in accordance with internationally accepted legal principles, of a violent crime and/or a crime of dishonesty or theft, for which he or she has not been pardoned.¹⁴

- Article 38 of the Draft Law provides provisions against potential conflict of interest and requires that the Commissioner does not hold any other public function (paid or unpaid) during his/her tenure. However, the Draft Law does not provide any regulation as for the independence of the Commissioner from the state and public bodies. We, therefore, recommend that the Draft Law explicitly stipulates that the Public Information Commissioner enjoys operational and administrative autonomy from any other person or entity, including the government and any of its agencies, except as specifically provided for by law.¹⁵

Recommendations:

- The provisions on the appointment of the Public Information Commissioner should be extended. In particular, the Draft Law should state that his/her appointment should be done after nomination by a two-thirds majority vote of the Yemeni Parliament and after and after a process in accordance with the transparency principles.
- The Draft Law should also remove reconsider the professional and personal qualifications for the position and ensure that the Commissioner is independent body that operates without pressure or control from other governmental and public bodies and political parties.

6. Protection of Privacy

Articles 51 – 58 of the Draft Law provide regulation of the gathering, processing and maintaining personal data. ARTICLE 19 is aware that several countries regulate access to information held by public bodies and protection of private data in one piece of legislation. However, given the different nature of both issues and the lack of other regulation in Yemen on protection of personal data, we recommend that the protection of personal data is provided by separate, specific and comprehensive legislation.

7. National Center for Information

Overview

Articles 59 – 62 of the Draft Law provide regulation of the National Center for Information.

¹⁴ Model FOI Law, Article 34 para 2.

¹⁵ Model FOI Law, Article 35 para 1.

ARTICLE 19

GLOBAL CAMPAIGN FOR FREE EXPRESSION

Analysis

We are aware of the existence of the National Center and its current functions as a resource centre for public on various issues, in the absence of comprehensive freedom of information framework. However, the Draft Law does not take into consideration the fact that by establishment of the function of the Public Information Commissioner, this institution might become redundant.

Hence, we recommend reviewing the effectiveness of having two similar institutions dealing with access to information and either clarify what distinct functions should the Center carry in the future or to consider the Public Information Commissioner office to take over the Center.

8. Violations and penalties

Overview

Final provisions of the Draft Law provide sanctions for those who obstruct the access to information by: “knowingly withholding information” (Article 63), by “giving misleading information” (Article 64), for breaching obligations of proactive disclosure of certain information (Article 65) or for violating specific provisions of the Draft Law (Article 66). Violations are punishable by fines or prison sentences.

Analysis

It is positive that the Draft Law includes the list of sanctions for obstructions of the access to information or in cases of violations of official duties. However, the Draft Law fails to set out the rules that are applicable in cases of violations within disciplinary procedure and does not provide for a good faith exception from responsibility. We refer to ARTICLE 19’s Model Freedom of Information Law for guidance on recommended sanctions. In particular we propose to state that it should be criminal offence to willfully “obstruct access to any record contrary” to the aim of the law, “obstruct the performance by a public body of a duty under the law”, “interfere with the work of the Commissioner” or “destroy records without lawful authority.”¹⁶ We also recommend including good faith exception, preferably as follows

No one shall be subjected to civil or criminal action, or any employment detriment, for anything done in good faith in the exercise, performance or purported performance of any power or duty in terms of this Act, as long as they acted reasonably and in good faith.¹⁷

Finally, it would be appropriate for the Commissioner to be given the power to refer to the courts cases which disclose evidence of criminal obstruction of access to or wilful destruction of records.

Recommendations:

- Comprehensive regime of protection of personal data should elaborate either in this or specific legislation.
- The Draft Law should specify the responsibilities and the function of the National Center for Information *vis-à-vis* the institute of Public Information Commissioner.

¹⁶ Model FOI Law, Article 49.

¹⁷ Model FOI Law, Article 48.

ARTICLE 19

GLOBAL CAMPAIGN FOR FREE EXPRESSION

- The Draft Law should elaborate on the list of sanctions provided in the law. In particular, it should ensure that it would be criminal offence to willfully obstruct access to any record contrary to the aim of the law, obstruct the performance by a public body of a duty under the law, interfere with the work of the Commissioner or “destroy records without lawful authority. It should also provide for disciplinary sanctions in cases where the conduct does not reach the level of criminal responsibility and should include good faith exception.

APPENDIX 1:

Yemeni Draft Law of 2009 Concerning the Information

Section I Denomination, Definitions and Goals

Chapter One Denomination and Definitions

Article (1): This law shall be known as the law of guarantee of the right of access to information.

Article (2): For the purposes of implementation of this law, the words and expressions set out below shall have the meanings appearing opposite them, unless the context otherwise requires:

The Republic: the Republic of Yemen

Public Commissioner: Information Public Commissioner

The Commissariat: the Information Public Commissariat

The Body: the general Diwan of any ministry, the offices and branches of any ministry, governorate, directorate, service, body, institution, the courts and tribunals, the Parliament, the Election Committees, the different security apparatuses, the police, the personnel of the Public Prosecution, the judicial police, the National Center for Information, and other central services, units with independent and related budgets, special funds and any other non-governmental organizations, that are funded, in whole or in part, from the public budget as well as any body that the Public Commissioner finds necessary its submission to this Law.

The competent official: the official appointed by the Body to examine the request for access to information

The Information: facts which are consciously perceived, morally existing as knowledge values and materially existing in the form of figures, letters, drawings, photos and voices and are gathered, processed, kept, and exchanged by paper and electronic means, including but not limited to data and contents included in

ARTICLE 19

GLOBAL CAMPAIGN FOR FREE EXPRESSION

any registries, written or electronically stored documents, drawings, maps, writings, charts, photos, films, microfilms, microfiche, audio recordings, video recordings, graphs, correspondences, computer tapes and disks and other recordation, memoranda, minutes, and documents reviewed by or submitted to the Body; and any other electronically stored information, and in any and all media now known or hereafter devised.

Personal Data: Information about identifiable individual consisting of the individual's race, ethnicity, marital status, health, financial status, or other contact information; provided that the individual who is the subject of the Information has not been deceased for more than twenty years before the applicant made the request.

Cost of Access to Information: the actual cost of photocopying or copying the Information requested on papers or electronically but shall exclude the cost of any staff time required to arrange, produce, or transmit such copies.

National Center for Information: the entity created under Presidential Decree (55) of 1995.

Explanatory regulations: the regulations that identify the grounds on which the Law is based. It explains what is ambiguous as expressions and terms of the Law in such a way not to make ineffective any of its articles.

Chapter Two The Goals

Article (3): This Law aims to:

- a- Ensure and facilitates the citizen's right to have access to Information without delay and develop the rules of exercising rights and freedoms;
- b- Strengthen the components of transparency and increase the opportunities for a conscious and responsible participation; and
- c- Enable the society to develop its capacities and to increasingly benefit from the Information.

Section II Freedom of Information Chapter One Principles of the Right of Access to Information

Article (4): Access to Information is a right of the citizen's fundamental rights and citizens and foreigners are entitled to exercise such a right within the limits of the Law.

Article (5): The request for Information shall be submitted to the Body directly concerned with the requested Information.

Article (6): Access to Information can be obtained directly by the Applicant, indirectly through publication, or in both ways.

Article (7): Every person and legal entity has the right to submit a request for Information and such request submittal shall not result in any legal accountability.

ARTICLE 19

GLOBAL CAMPAIGN FOR FREE EXPRESSION

Article (8): Each Body shall appoint a Competent Official in the Information presiding over a unit of information that is part of the national system of information components, and is administratively and functionally attached to the concerned Body related thereto and such Competent Official is responsible for:

- a- Be granted the necessary powers to look for and access the requested Information;
- b- Examine the requests to access Information;
- c- Preserve and maintain the Information;
- d- Publish procedures and forms in such a way as to be easily reviewed by the beneficiaries;

Article (9): The Body shall maintain and preserve Information in its possession in an organized and orderly manner in order to facilitate its retrieval by the Competent Official through the use of adequate technologies, programs, and methods.

Article (10): The Body shall organize training sessions for its employees on the importance of the right of access to Information, enabling citizens to exercise said right, and utilizing the best and fastest means for its preservation and retrieval.

Article (11): The Body shall set informational guides and publish annual reports including at least the following:

- a- Administrative Information about the mechanism of the Body's work including the objectives, activities, programs and final accounts, and information related to the areas of their official activities and to the results of performance of their legal and constitutional duties;
- b- Description of the methods and places by which and from where the citizens may obtain the Information, and where they submit requests, inspect documents, receive and retrieve copies, and obtain decisions;
- c- An index of all types of Information that the Body is legally bound to maintain and preserve;
- d- A report on the requests for Information, received, processed, and denied and the reasons for the denials, a report on the requests of appeal being filed, their results and procedures related thereto, and the median number of days for responses to the requests for Information;
- e- A guide with lists of the topics the Bodies have to proceed to their publication with the dates and methods of publication;
- g- Any additional information that the Public Commissioner deems appropriate to publish in accordance with the purposes of this Law.

Article (12): The Information published in accordance with Article (11) of this Law shall be provided to the National Center for Information, and both the Body and the National Center for Information shall make available such Information by paper or electronic means, either free of charge or at prices not to exceed the Cost of Access to Information.

Article (13): Any official who discloses information about violations or infringements of this law or otherwise assists in any investigation about violations or infringements of this law, shall not be subject to any punishment or retaliation in his or her employment, in legal proceedings, or otherwise.

Article (14): Any official who is subject to retaliation under Article (13) of this Law has the right to relief and compensation for what was caused to him/her, by filing a complaint with the courts of the Yemeni Republic.

Chapter Two

ARTICLE 19

GLOBAL CAMPAIGN FOR FREE EXPRESSION

The Request for Access to Information

Article (15): A request for access to Information shall be submitted in writing according to the form set for this purpose to the Body which the applicant believes holds the Information, including the applicant's name, his/her address, his/her workplace. Such request shall include sufficient details enabling the Competent Official to retrieve the Information. The request for Information is submitted through e-mail, postal correspondences, or in person, at the source of the access to Information or the National Center for Information and in any event, the request for Information should be filled in the form adopted thereof.

Article (16): the provision of the additional facilities, suitable for the illiterates and those with special needs shall be observed in the procedures and forms set for the access to Information.

Article (17): the foreigner or foreign official body may submit a request for Information in accordance with the provisions of this Law.

Article (18): Upon receipt of the request, the Competent Official shall hand the applicant an acknowledgment of receipt, including the date of submittal of the request, type of Information requested, and the time period specified by this Law in which the Competent Official must answer the request.

Article (19): The Competent Official shall reply to the request for Information within 15 days as of the date of his/her receipt of the request. The Official may extend such period by a maximum period of an additional 15 days if the request includes a large quantity of Information or access to the requested Information requires the consultation of another Body and the non-reply within such period shall be considered as a denial of the request. Where such extension is required, the Official shall communicate such requirement to the applicant in writing within the original period. Priority shall be given to requests submitted by journalists and persons performing newsgathering and journalistic functions who are working within specific timelines or requesting Information matters of public interest or public concern.

Article (20):

- a- The Competent Official shall enable the applicant to access the Information and shall notify him/her of the Cost of Access to the Information, where applicable, if copies are requested.
- b- If the Competent Official finds that portions of the requested Information fall into one or more exceptions specified in this law, and he/she relies on that exception, he/she shall furnish Information that is not subject to exceptions and notify the applicant in writing that a portion of the Information has been withheld, specifically identifying in writing the exception specified in this Law upon which the Competent Official relies to withhold the requested Information.
- c- If the applicant submits a request for Information and the Information was available at the source in another language or in a format different from that requested, it would be sufficient to deliver him/her/it the requested Information in its available language or format as long as such language or format incorporates the requested Information.

Article (21): If the request is granted, the Competent Official shall deliver to the applicant all the documents containing the Information in paper or electronically according to the format available at the Body and as requested by the applicant.

ARTICLE 19

GLOBAL CAMPAIGN FOR FREE EXPRESSION

Article (22): Upon notice to the person requesting the Information and within the initial time period specified by Article (19) of this Law, the Competent Official may transfer the request to another Body if it is demonstrable to the Competent Official that the transferred-to Body is more concerned in the Information, in which case, the request shall be considered as if submitted to the Body to which it is transferred at the time it was submitted to the other Body in accordance with Article (19) of this Law.

Article (23): In the event the Competent Official refuses the request, in whole or in part, he/she shall specify in writing the reasons therefor to the applicant. The reasons for refusing the request shall not be other than:

- a- The Body does not have possession of the Information.
- b- The requested Information is included in one or more of the exceptions specified in this Law and Article 27 does not apply provided that the relied on exception/exceptions is/are to be indicated.

Article 24: In the event the applicant is not convinced of the taken decision, then in accordance with Articles (30) to (32) of this Law he/she/it is entitled to appeal against such decision before the Commissariat and then is entitled to turn to the judiciary if he/she/it was not convinced of the decision of the Commissariat.

Chapter Three Exceptions

Article (25): Subject to the provisions of Articles (4, 19, 20/b, 23, 27) of this Law, the Competent Official may reject any request for Information where such Information consists of:

- a- Details of secret military weapons, defense tactics, strategies and forces, or military operations for the defense of the country;
- b- Secret and confidential matters of foreign policy related to defense and military alliances;
- c- Information provided to, or received from, another State with whom it was agreed to keep the Information confidential before such Information was provided or received,
- d- Information whose disclosure would cause serious prejudice to:
 - (1) The prevention or detection of crime;
 - (2) The apprehension or prosecution of offenders;
 - (3) The administration of justice;
 - (4) The assessment or collection of any lawful tax or duty; or
 - (5) The assessment by a public body of whether civil or criminal proceedings, or regulatory action pursuant to any enactment, would be justified;
- e- Information whose disclosure would lead to disclosure of the identity of a confidential source of information to which law enforcement personnel have promised confidentiality.
- f- the electronic Information whose disclosure causes the penetration into the protected networks and equipment and expose them to deletion and theft.
- g- Information of commercial, financial, economic or industrial nature, the scientific or technical research whose disclosure leads to a prejudice to the copyright, intellectual property, or to the legitimate and fair competition or which leads to an illegitimate profit or loss to any person or company.

Article (26): Subject to the provisions of Articles (4, 19, 20/b, 23) of this Law, the Competent Official must reject any request for Information where it consists of:

- a- Information that, if disclosed, would be expected to endanger the life or physical safety of an individual;

ARTICLE 19

GLOBAL CAMPAIGN FOR FREE EXPRESSION

- b- Personal Data, the disclosure of which would be an unreasonable invasion of privacy of such individual, unless that Personal Data is relevant to a public duty, function, or position held by that individual.

Article (27): The Competent Official may not reject any requests for Information mentioned in Article (25) of this Law if:

- a- Such Information is still possessed by the Body and dates back to more than twenty (20) years;
- b- Such Information is already publicly available.

Chapter Four

Information Public Commissioner

Article (28): The Commissariat shall be established in accordance with the provisions of this Law. It shall be an independent legal entity as a necessity to the exercise of its activities. An independent budget within the State general budget shall be appropriated for this Commissariat.

Article (29): The Commissariat shall ensure the implementation of the provisions of this Law and the furtherance of this law's stated objectives. For these purposes, the Commissariat shall have the following powers:

- a- Set and organize programs, plans, and policies for the individual to exercise his/her right to access Information.
- b- Educate the citizen and raise his/her awareness of the importance of the right to access Information.
- c- Contribute in the training of the bodies' employees and officials on methods and importance of enabling the individual to access Information.
- d- Identify violations, and publish reports and studies on the obstacles facing the right to access Information, and the ways of overcoming said obstacles.
- e- Place a unified form for the access to Information requests from the concerned bodies.

Article (30): The Commissariat shall be deemed an appeal body for:

- a- Any person whose request for Information was rejected.
- b- Any person whose request was subject to fees charged in excess of those permissible by this Law.
- c- Any person whose necessary period of response to his/her request is extended in a way contrary to the provisions of article (19) of this Law.
- d- Any person whose request was transferred to more than one Body without approval.
- e- Any other cases accepted by the Information Public Commissioner.

Article (31): The appeal shall be filed to the Commissariat within thirty (30) days from the date of receipt by the applicant of the request denial.

Article (32): The Commissariat shall reply to the appeal within a period of not more than thirty days from the date of its submittal to it and the Commissariat shall, upon receipt of the appeal, address a letter to the Competent Official in the Body which refused the request of access to Information informing him/her about the appeal and obtaining a copy from him/her of the reason(s) that the Competent Official had specified to the applicant for the denial. The Public Commissioner, acting as an independent arbiter, shall decide whether the refusal to disclose the Information is lawful, and then order the Body to grant access to Information request within seven days from the issuance of his/her order.

ARTICLE 19

GLOBAL CAMPAIGN FOR FREE EXPRESSION

Article (33): An applicant whose request for access to Information is denied by the Commissariat may petition the courts of the Republic, which shall determine the matter *de novo*, without deference to the Body and without a presumption of correctness of the refusal. In case of issuance of an order requiring the applicant's access to the requested Information, the Body ordered to grant access to the Information shall disclose the Information to the applicant no later than seven (7) days from the issuance of the order.

Article (34): The Commissariat is headed by the Information Public Commissioner, whose rank shall be minister. The Public Commissioner shall be appointed by a decision of the President of the Republic and shall serve as Commissariat for a term of four years, renewable only once.

Article (35): The Public Commissioner shall meet the following conditions:

- a- Be a Yemeni national.
- b- Be not less than forty years of age.
- c- Hold at least one university degree in the Information Systems.
- d- Be honest, shall perform his/her Islamic duties and shall not have been found guilty by a court of an offence against honour and integrity unless his/her reputation has been restored.
- e- Shall not have less than five years' administrative experience.

Article (36): The Public Commissioner conducts the follow-up and issuance of the decisions related to the appeal filed to the Commissariat and appoints the Commissariat officials as well as establishes regulations related thereto that implement the provisions of this Law.

Article (37): the Commissariat shall have an administrative and technical structure set out in the Explanatory Regulations of this Law.

Article (38): The Information Public Commissioner shall dedicate himself/herself to the mission of the Commissariat. He/she may not, during the exercise of his/her function, exercise any other activity or occupy any other position or function, with or without remuneration.

Article (39): The Public Commissioner's services shall be terminated in the following cases:

- a- If he/she has been found guilty of a crime or a misdemeanor against honor and confidence.
- b- If he/she holds other position or function..
- c- in case of the Public Commissioner's death.

Article (40): In case the Public Commissioner is dismissed from his/her service by virtue of article (39) of this Law the President of the Republic shall appoint another Public Commissioner within thirty days from this dismissal according to the provisions of this Law.

Article (41): The recommendations and decisions issued by the Public Commissioner and related to his/her duties according to the provisions of this Law are deemed to be binding to all the bodies.

Article (42): For the purposes of executing his/her missions, the Public Commissioner shall enjoy the powers to:

- a- Get periodic reports from the Bodies specified in this Law upon his/her request;

ARTICLE 19

GLOBAL CAMPAIGN FOR FREE EXPRESSION

b- Enter any public institution and consult its registries, papers, and any supporting documents related to the requested Information;

c- Investigate with any official apart in order to reach the required Information;

d- everyone who conceals, destroys, or modifies Information in a way that is contrary to the truth, in order to avoid submitting it to its requesters.

e- Request written clarifications from the State major officials, such as ministers or any equivalent officials regarding their withholding Information, if said withholding results from orders issued by them directly. In this case, the Public Commissioner, being convinced by the submitted justifications, has the right to submit a report to the Parliament to take the appropriate measures.

f- Issue decisions and recommendations to the bodies regarding the implementation of the provisions of this Law.

Article (43): The Public Commissioner shall submit periodic reports, every four months and whenever necessary to the President of the Republic, the Parliament, and the Prime Minister. These reports shall include the following:

a- Cases of unjustified refusal to disclose Information;

b- Executive problems facing him/her during the exercise of his/her missions;

c- Operations and activities of the Commissariat related to the right to have access to Information; and

d- Any other subjects the Public Commissioner deems appropriate.

Article (44): The head office of the Commissariat shall be located in the capital of Sana'a and branches may be created in any other provinces of the Republic.

Section III Information Security

Article (45): Every Body shall maintain a secure backup storage of all what it possesses from information related to its official activities and powers. Modern machines and means can be introduced, in this regard, for the maintenance of Information in order to reduce the space and places of archives as well as can also be used modern indexation, which facilitates the process of access to Information.

Article (46): The failure or absence of Information security regulations shall not be pretended to justify the start or carrying out of an illegitimate act which would cause damage to the Information.

Article (47): A suitable administrative level specialized in the supervision and control of the implementation of the Information security norms of the Bodies shall be created within the Information unit at every Body.

Article (48): Every system of the Information systems used at the Bodies shall have the capacity of verification and of proving the responsibility of the acts of entering, processing, maintaining, and restoring Information as well as of accessing the system and all data contained within it.

Article (49): All the systems and practical software that are entered, built by, or used at the Bodies shall have shall have the security norms which guarantee their reliability and the safety of their operation regularity, and such security norms shall be regularly upgraded in a timely manner as appropriate.

ARTICLE 19

GLOBAL CAMPAIGN FOR FREE EXPRESSION

Article (50): All the Bodies shall set and implement the sufficient physical, technical, and administrative procedures to protect the systems and networks of Information they have and to ensure the continuity and regularity of their operation.

Section IV Privacy Protection

Article (51): The citizen's Personal Data may not be gathered, processed, maintained or used by any Body contrary to the Constitution and the Laws in effect.

Article (52): The gathering, processing, maintenance, and use of Personal Data by any Body shall be within the limits of what is related to the official duties and powers of that Body allowed thereto and in such a way necessary for the Body's implementation of such powers and duties.

Article (53): Subject to Articles (26), (54), the Body keeping Personal Data may not publish such Personal Data or give them to a third party unless by written consent of the subject of such Personal Data.

Article (54): Personal Data may not be provided to any State or other external body not having similar legal guarantees for the protection of privacy.

Article (55): Personal Data shall not be used by any Body for purposes other than those for which they are gathered.

Article (56): Every Body which gathers and maintains Personal Data shall follow the regulations and procedures which ensure the systems of updating the Personal Data and the one concerned with such data shall provide all what is deemed to be necessary for their update.

Article (57): Every Body maintaining Personal Data shall be fully responsible for the protection of such data. It shall place an adopted statement of privacy mentioning the regulations and procedures of dealing with the confidentiality of the Personal Data. Such statement shall be available for review.

Article (58): The subject of Personal Data shall have the right to inspect such Personal Data and he/she has the right to verify their validity or submit additional Information to correct and/or update such Personal Data.

The National Center for Information

Article (59): The National Center for Information is one of the Bodies specialized in gathering, analyzing, maintaining Information and providing it upon request. This Body is subject to the Public Commissioner in accordance with the provisions of this Law.

Article (60): Any Body may provide Information, except for Personal Data, to the National Center for Information, and a request for such Information may be made to that Body and/or the National Center for Information. A Body may not be excused from its duty to provide access to Information under this Law pretending that Information has been, or is being, provided or transferred to the National Center for Information.

ARTICLE 19

GLOBAL CAMPAIGN FOR FREE EXPRESSION

Article (61): Where Information is held both by a Body and by the National Center for Information, neither entity shall be entitled to rely on Article 25 or 26 of this Law where the other entity does not rely or intend to rely on such exception.

Article (62): The National Center for Information shall promote access to Information by providing facilities, both physical and electronic, to assist applicants in making requests for Information to the National Center for Information and to any other Body.

Section VI

The Violations and Penalties

Article (63): Shall be punished with imprisonment for a period of not more than one year or with a financial fine of not less than one hundred fifty thousand riyals, everyone who knowingly withholds Information to be disclosed by virtue of the provisions of this Law.

Article (64): Shall be punished with imprisonment for a period of not less than three months and not more than one year or with a financial fine of not less than one hundred and fifty thousand riyals everyone who gives misleading Information to the applicant.

Article (65): Shall be punished with imprisonment for a period of not less than two years or with a financial fine of not less than five hundred thousand riyals everyone who in bad faith knowingly breaches the provisions of article (11) of this Law.

Article (66): Shall be punished with imprisonment for a period of not less than three months or with a financial fine of not less than one hundred and fifty thousand riyals every Official who knowingly breaches the provisions Articles (18-24), (27-26), (51-55), 58 of this Law.

Section VII

General Provisions

Article (67): Any provision contrary to the provisions of this law shall be repealed.

Article (68): The explanatory regulation shall be issued by virtue of a decision of the President of the Republic after presentation of the Public Commissioner within a period of not more than six months from the date of issuance of this Law.