



MEMORANDUM

on the

Nepali Regulation on Right to Information, 2008

June 2008

ARTICLE 19

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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's operates the Media Law Analysis Unit which publishes around 50 legal analyses each year, commenting on legislative proposals as well as existing laws that affect the right to freedom of expression. The Unit was established in 1998 as a means of supporting positive legal reform efforts worldwide, and our legal analyses frequently lead to substantial improvements in proposed or existing domestic legislation. All of our analyses are available online at <http://www.article19.org/publications/law/legal-analyses.html>.

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 at the address listed on the front cover or by e-mail to law@article19.org.

SUMMARY OF RECOMMENDATIONS

On fees and submitting requests:

- A standard price per page should be established for providing access to information.
- A fully-fledged fee system should be put in place which provides that inspection of documents and electronic copies is free and for lower-cost or free access in certain situations, for example for the poor and for public interest requests.
- Requesters should not have to provide reasons for their requests for information.
- There should be a procedure for making oral requests for information.
- Information officers should be required to provide assistance to requesters who need it.
- Detailed rules should be put in place on consultation with affected third parties.

On the structure and independence of the Commission:

- The Commission, and not the government, should hire the secretary and other staff.
- It should be up to the Commission itself to decide on the functions of the secretary.
- The process for developing and approving the budget of the Commission should be set out clearly and should involve the Commission proposing a budget for approval by a multi-party body, such as Parliament.
- Reasonably detailed conditions of service for Commissioners should be provided for, preferably linked to those of existing independent public officers.
- It should be clear that the Commission has the power to establish such rules as may be necessary for it to carry out its functions.

On the role of the Commission:

- A number of promotional functions should be spelt out for the Commission, such as elaborating on the proactive publication and information management obligations of public bodies, training, public education and outreach, and preparing an annual report on implementation of the RTI Law.
- Provision should be made for the Commission to work with the classification committee established by Article 27 of the RTI Act to develop a formal set of principles and standards governing classification.

On appeals:

- The rules governing the submission of appeals to the Commission should be significantly simplified and rendered far less legal in nature.
- The scope of the right to appeal should extend to any breach of the rules in the RTI Act, not just a refusal to provide access to information.
- The rules regarding consideration of late appeals should be clarified.
- The Commission should be instructed to interpret exceptions narrowly.
- All parties to an appeal, as well as affected third parties, should have a right to be heard.
- The onus should be on any public body seeking to deny access to information to justify this refusal.
- Clear rules should be put in place for the enforcement of decisions of the Commission.

On direct powers to address breaches:

- The Commission should be given the power to impose remedies for a range of failures to implement the RTI Law, even in the absence of an appeal, and its powers to investigate breaches should be spelt out clearly.

ACKNOWLEDGEMENTS

This Memorandum was drafted by Toby Mendel, Senior Director for Law, ARTICLE 19. Jennifer Mather, an Intern at ARTICLE 19, provided background material. The Memorandum took into account written comments and suggestions made by Mr. Vinaya Kumar Kasajoo, now Chief Commissioner of the Nepal National Information Commission, as well as by Taranath Dahal, Chairperson, Freedom Forum. Our partners, Freedom Forum and the Federation of Nepali Journalists, made valuable comments on the draft Memorandum. Manju Pandey translated the English Memorandum into Nepali.

We would like to thank the United Kingdom Foreign and Commonwealth Office for its financial support for this work.

ARTICLE 19 has been working with Freedom Forum and the Federation of Nepali Journalists for some time, most intensively over the past year in a project that seeks to develop a comprehensive Agenda for Change for Nepal in the area of freedom of expression. The three organisations produced a joint analysis of the Right to Information Act in January 2008.¹

ARTICLE 19 is an international, non-governmental organisation based in London with a specific mandate to promote the rights of freedom of expression and to information. Through the provision of legal expertise and training, ARTICLE 19 has been involved in the adoption and implementation of right to information legislation in many countries around the world. We have also been actively involved in the development of the Nepali RTI Act in various ways, including through providing analyses of it in January 2004² and December 2006,³ as well as in January 2008.

The Federation of Nepali Journalists (FNJ) is the representative umbrella association of the media community in Nepal. Its 6000 members operate across the length and breadth of the country and belong to every sphere of the modern media, print, broadcast and Internet. FNJ has been active on the right to information Act in Nepal since the mid-nineties, including by submitting a draft RTI bill to the government and hosting a series of talk programmes with parliamentarians, the media and others on this issue.

Freedom Forum is a not-for-profit, non-governmental organisation founded in February 2005 promoting democracy and human rights, including freedom of expression. The right to information has been a key themes for Freedom Forum since its establishment. It organized a 'National Campaign for Right to Information' along with the network called 'Citizens' Campaign for Right to Information' which has held national and regional workshops, consultative meetings with parliamentarians and grassroots advocacy. The Forum has also cooperated with the task force preparing the Right to Information Act.

¹ Available in English at: <http://www.article19.org/pdfs/analysis/nepal-rti-act.pdf> and in Nepali at: <http://www.article19.org/pdfs/analysis/nepal-rti-act-nepali.pdf>.

² Available at: <http://www.article19.org/pdfs/analysis/nepal-information-act-jan-2004.pdf>.

³ Available at: <http://www.article19.org/pdfs/analysis/nepal-foi-analysis.pdf>.

1. INTRODUCTION

This Memorandum contains an analysis by ARTICLE 19, the Federation of Nepali Journalists and Freedom Forum of the draft Nepali Regulation on the Right to Information, 2008 (draft NRRI). The version analysed here was released in January 2008 and is entitled “Initial Draft Prepared for Discussion”. The NRRI will be adopted pursuant to Article 38 of the Right to Information Act, 2007 of Nepal (RTI Act), which provides for the government to adopt regulations to implement the Act. The purpose of this analysis is to help promote the adoption of Regulations which are both practical and in line with best international standards in this area.

The three organisations welcome this initiative, which is an important part of the process of implementing the RTI Act. We note that it follows on from the recent appointment of the three Information Commissioners – Mr. Vinaya Kumar Kasajoo, Chief Commissioner, Mr. Shree Acharya, Commissioner, and Ms. Sabita Bhandari Baral, Commissioner – which was also an important step forward in implementing the RTI Act.

Our assessment of the draft NRRI is generally positive. It respects and elaborates upon the positive provisions in the main law, it protects appeals against being withdrawn and it moves forward in implementing the RTI Act. At the same time, we have some concerns with the draft NRRI. Our main set of concerns revolves more around what is not in the document than with problems with what is there. Important matters such as conditions of service for Commission members, a clear fee structure for the provision of information, the budget of the Commission, the promotional roles of the Commission, the enforcement of decisions of the Commission and the process for developing standards on classification are not dealt with in the draft NRRI. The draft NRRI also includes somewhat confusing provisions on the role of the secretary of the Commission and excessively formal rules regarding the processing of appeals.

Our analysis of the draft NRRI is based on international law and best practice in the field of the right to know information, as summarized in two of Article 19’s publications: *The Public’s Right to Know: Principles on Freedom of Information Legislation* (ARTICLE 19 Principles) and *A Model Freedom of Information Law* (ARTICLE 19 Model Law). Both publications represent broad international consensus on the best practice for right to information legislation. It is also based on our review of various comments on the draft NRRI provided to us by local experts. Finally, the analysis in this Memorandum draws on our analysis of the RTI Act itself, published in January 2008.⁴

⁴ *Ibid.*

2. Analysis of the Regulations

2.1. Processing of Requests

A number of the provisions in the draft NRRI relate to the processing of requests. At the same time, there are certain matters regarding requests which are important for proper implementation of the Act and yet which the regulations fail to address.

2.1.1. Fees

Overview

Article 8 of the RTI Act provides that applicants shall pay the prescribed fee when requesting information, provided that such fee shall not exceed the “actual cost of providing information”. The draft NRRI does not address the question of fees in a comprehensive manner. It does, however, provide at clause 18(2) that the Commission shall provide documents in the case file at the rate of Rs. 2 per page while, pursuant to clause 22(1), public bodies may charge only Rs. 1 per page.

Analysis

An obvious issue arises regarding the discrepancy between the fees to be charged by the Commission and by other public bodies. If the rate is cost price, presumably all public bodies, including the Commission, can manage to provide access at that price.

More problematical is the failure of the draft NRRI to set out a clear and full regime regarding charges for access to information. It should be clear that inspecting copies and receiving copies electronically should be free. To facilitate use of the RTI Act, consideration should be given to providing a certain amount of information – say the first 50 pages – for free. Provision should be made for poor people to have access for free. Consideration should also be given to reducing or eliminating the fee for requests which have a public interest element, such as media requests with a view to publishing the information to the general public.

2.1.2. Submitting Requests

Overview

The draft NRRI does not include a lot of detail regarding the submission of requests. The form in Appendix-4 provides that applicants must state the purpose of their requests for information, along with a description of the information.

Analysis

It is very well established under international standards (see our January analysis of the RTI Act) that it is not legitimate for reasons to be required to be provided for a request. We are aware that Article 7 of the RTI Act does require reasons for a request but we suggest that the regulations avoid this breach of the constitutional and international guarantees of the right to information by removing this from the form.

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We note that the form does not require requesters to provide any contact information. This is necessary to satisfy their requests and should be added to the form. The regulations should also make it clear that requests may be made orally, as well as in writing, along with details about how oral requests are to be processed (for example whether the information officer should reduce them to writing).

There are a number of other matters which the draft NRRI should clarify regarding the submission of requests. Information officers should be required to provide assistance to requesters who are having difficulty formulating their requests. This will help hone requests, saving time for the public body and also benefiting requesters.

It is also necessary to set out in the regulations detailed rules for consulting with third parties where disclosure of information may affect their interests. This is important not only to protect those interests, but also to ensure proper application of any exceptions which relate to third parties. The regulations should also contain rules regarding the provision of information within 24 hours, as provided for in Article 7(4) of the RTI Act where the information relates to the “security or life of any person”.

Recommendations:

- One standard price for providing access to information should apply to all public bodies, including the Commission.
- A fully-fledged fee system should be put in place which provides that inspection of documents and receiving electronic copies are free and that impecunious requesters do not have to pay copy charges. Consideration should also be given to providing for a certain number of pages for free, as well as to reducing or eliminating fees for requests in the public interest.
- The requirement to provide reasons for a request for information should be removed from the form at Appendix-4 of the NRRI.
- The NRRI should prescribe a procedure for making oral requests for information.
- The form for requests should include a line for providing the contact details of the requester.
- The NRRI should require information officers to provide assistance to requesters who need help formulating their requests.
- The NRRI should include detailed rules on consultation with affected third parties and on provision of information on an urgent basis within 24 hours.

2.2. The Commission

2.2.1. *Structure and Independence*

Overview

The draft NRRI does not include a lot of detail on issues relating to the structure and independence of the Commission. Clause 13 provides for the appointment of a secretary, as the administrative head of the Commission, by the government, upon recommendation of the Commission. Article 22(2) of the RTI Act provides that the government shall provide the staff for the Commission. The government also sets the tenure and conditions

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of service of the secretary. The functions of the secretary, as set out in Clause 14 and Clause 4(6), are to maintain records of Commission decisions and implement those decisions, and, under the direction of the Commission, to undertake various tasks relating to the processing of appeals. The Commission may arrogate to itself any of the functions of the secretary.

Clause 4 of the draft NRRI sets out a basic framework of rules for meetings of the Commission, including when they are to be held (as necessary or upon a written request of two members), how voting is to be conducted (majority vote with a deciding vote of the Chief Commissioner, as needed) and what constitutes quorum (the Chief and one other Commissioner).

Analysis

It is unfortunate that the RTI Act provides for the staff of the Commission to be provided for by the government and this was one of our criticisms of the Act. It is still possible for the NRRI to largely overcome this by indicating that the Commission shall identify its own staff, even if they are formally 'provided for' by the government. It should, therefore, be quite clear from the language of the NRRI that it is for the Commission to identify the secretary and other staff.

The draft NRRI clouds the issue of the respective roles of the Commissioners and the secretary (and other staff). Although they provide for the Commission to allocate to itself any function given to the secretary, by stating that the secretary shall implement the Commission's decision, they suggest that the Commission will play a primarily policy/oversight role. This is reinforced by the reference, in clause 14 of the NRRI, to the idea that the Secretary will work under the 'general direction and control' of the Commission. It would be preferable to remove the provisions on the function of the secretary from the NRRI and leave this important matter up to the Commission to decide itself, as part of its power to manage its own affairs. It should, however, be quite clear that the Secretary is directly and solely accountable to the Commissioners and not to the government.

Article 23 of the RTI Act provides for the government to 'arrange' the budget of the Commission. The draft NRRI is silent on this very important matter. It is a matter of considerable importance that the NRRI set out the budget procedure for the Commission. Ideally, this should involve the Commission preparing its budget and presenting it to Parliament for approval, at least in principle, even if funding rules mean that the budget must still be formally signed off by a line ministry, such as the ministry of finance.

Article 17 of the RTI Act provides for the conditions of service of Commission members to be 'as prescribed'. Despite this, the draft NRRI says nothing about this key issue, although Clause 5 does refer to the issue, but leaves the actual conditions blank. The most independent, and easiest, way to do this is to link conditions of service to an existing independent public officer, such as an elections commissioner or judge. This will protect against interference and provide a ready-made and tested set of conditions.

Article 13 of the RTI Act sets out a number of 'rules of incompatibility' or conditions which prevent individuals from being appointed as Commission members. The NRRI should make it clear that these rules continue to apply after a member is appointed. In

other words, it should be clear that should a member come to be in breach of one of these rules, he or she will be removed from the position of Commissioner.

Finally, the NRRI should make it clear that the Commission has the power to formulate such rules as may be necessary to enable it to carry out its functions efficiently and independently. These may include rules relating to staff, operational matters such as investigations, meetings and the processing of appeals, and so on.

2.2.2. Role

Overview

Article 19 of the RTI Act gives a very broad and general mandate to the Commission, including the power to take action “regarding the protection, promotion and exercise of right to information”. Neither the Act nor the draft NRRI, however, elaborates on the specific ways in which the Commission could do this.

Analysis

Many right to information laws and/or regulations do set out in some detail the promotional roles to be played by oversight bodies like the Commission. Some of the activities that could be spelt out in the NRRI for the Commission are as follows:

- To play a role in elaborating the proactive publication obligations of public bodies. Article 5(3)(n) of the RTI Act provides for further proactive obligations to be ‘as prescribed’ and this is also mentioned in Clause 20(1) of the draft NRRI. The Commission seems the ideal body to undertake this task.
- To develop a Code of Practice on information management. Good information management is central not only to realisation of the right to information but also to all aspects of proper governance and running a professional civil service. The Commission, or some other central body, should be tasked with developing a set of standards – a Code of Practice – for information management and also given the power to ensure proper implementation of those standards.
- To publish and disseminate widely a guide for the public, and other awareness-raising materials, on the right to information and how to make a request under the Act.
- To develop and deliver training courses for public officials on how to meet their obligations under the RTI Act. The Commission could work with other bodies to deliver this work, as it is a large task which cannot be fulfilled by just one body. But the Commission, given its central expertise on the right to information, could take on key functions such as developing key training modules, assisting in training of trainers, and so on.
- To prepare an annual report on progress in implementing the RTI Law. This function is provided for in most right to information laws and is central to tracking progress in implementation, identifying problem areas and bodies, and generally understanding how the system works. For the Commission to prepare such a report, however, depends on all public bodies providing detailed reports to the Commission on their own efforts to implement the law, including through tracking and reporting on requests for information and how they were dealt with.

Article 27 of the RTI Act provides for the establishment of a committee to classify information. Pursuant to this article, the Commission has the power to override the

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classification of the committee and to order the disclosure of the information in the context of an appeal against a refusal to provide access to information based on classification. This is a cumbersome and confrontational manner of dealing with classification issues. It would be far preferable for the Commission to work with the committee to develop appropriate classification standards in the first place. This will limit the need for appeals, which may lead to situations where the Commission publicly overrides the committee. The committee could work with the Commission to develop general standards and principles relating to classification and the committee could then apply those standards to particular documents. These should establish when classification is to take place and who is responsible for classification, along with the standards for actual classification.

Finally, the Regulations provide that the meetings should be held ‘as per necessity’ (clause 4(1)). It would be better for the NRRI to stipulate that meetings should be held at least once a month to ensure that the Commission remains active.

Recommendations:

- The NRRI should make it quite clear that the Commission, and not the government, hires the secretary and other Commission staff.
- The NRRI should not set out the functions of the secretary but, instead, leave this up to the Commission to decide itself.
- It should be quite clear that the Secretary is directly and solely accountable to the Commissioners and not to the government
- The NRRI should set out clearly the process for developing and approving the budget of the Commission. This should involve the Commission proposing a budget for approval by a multi-party body, such as Parliament.
- The NRRI should set out reasonably detailed conditions of service for Commissioners, preferably by linking them to existing independent public officers, such as election commissioners or judges.
- The NRRI should make it clear that the rules of incompatibility in Article 13 of the RTI Act continue to apply to Commissioners after their appointment.
- The NRRI should provide for the Commission to establish such rules as may be necessary for it to carry out its functions.
- The NRRI should spell out a number of promotional functions for the Commission, along the lines of what is suggested above.
- The NRRI should provide for the classification committee established by Article 27 of the RTI Act to work with the Commission to develop a formal set of principles and standards governing classification, which the committee can then apply to particular documents.
- The NRRI should provide for meetings of the Commission to be held at least once a month.

2.3. The Enforcement Role of the Commission

2.3.1. Appeals

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Overview

Chapter 2 of the draft NRRI deals with the processing of appeals. Clause 7(1) sets out the information to be provided upon appeal, including the address and age of the applicant and a certified copy of the decision to which the appeal relates, and provides that the appeal shall be 'signed and sealed'. Clause 7(2) sets out further conditions on appeals, including that they should indicate the date of the initial decision, the law under which the appeal is being brought, submissions on limitation of action and the name of the public body and official against whom the appeal is being brought.

Appeals are, pursuant to Clause 8, to be returned by the secretary if made after the period of limitation or 'due date' as it is sometimes referred to (which is 35 days from the original decision refusing access, according to Article 10(1) of the RTI Act), although applicants may, pursuant to Clause 15 appeal against any rejection on this ground and, pursuant to Clause 9, the Commission may extend the time limits for up to another 15 days.

Other clauses provide a brief framework of procedures for appeals and provide that appeals shall not be cancelled in certain cases, for example if the applicant dies or is not present at the appeal. Appendix-2 provides a form for appeals, set out in legal form of appellant vs. respondent.

Analysis

Article 9 of the RTI Act provides for an internal appeal to the head of a public body where the information officer originally refused a request for information. The Article fails, however, to provide for a time limit for a decision on such a complaint by the head of the public body.

The rules governing the submission of appeals are far too complex. It should be a simple and cost-free matter for anyone to submit an appeal against a refusal to provide information. There is no need for a certified copy of the original decision; indeed, it should be possible to lodge an appeal against a failure of a public body to produce any decision at all on a request for information, a common occurrence in many countries. There is no need for applicants to provide their address – the provision of any appropriate contact details, such as an email address, is enough – their age, which is irrelevant, or the law upon which the appeal is based, which is obvious. And there is certainly no need for appeals to be signed and sealed. Finally, the whole tenor of the draft NRRI on appeals is too legalistic and hence confrontational. Introducing legal language is counter-productive and may confuse applicants.

The NRRI should make it clear that appeals may be lodged in hard copy either in person or by post, and also via email. It should also clarify that the right of appeal is not limited to cases where a public body refuses to provide information but should also apply in the context of any material breach of the law, including cases where time limits are breached, excessive fees are charged, the information is not provided in the form sought, and so on.

The rules for processing late appeals should be clarified. At the moment, it seems that the secretary will return them and then the applicant might appeal against this, but this is not very clear from the provisions of the draft NRRI, which are spread among different

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clauses in different parts of the rules. These rules should also be relaxed since, as noted, there will be cases where there is no written decision denying access.

Clear rules should be put in place regarding consultation with affected third parties. These parties have a right to have their concerns taken into account when appeals are considered. The NRRI should also make it clear that the Commission should interpret the scope of exceptions narrowly, in accordance with the underlying purpose of the RTI Act, which is to give effect to the right to information, and to herald in a period of greater openness and transparency.

When processing appeals, the Commission should be required to give both parties an opportunity to be heard, either in writing or via oral presentation. This is required by the principles of natural justice and will also help ensure that the Commission resolves complaints in a fair and appropriate manner. At the same time, the onus should be on the public body which has refused the request for information to justify this refusal. This flows from the fact that access to information is a fundamental right, whose denial must be justified by the State, as well as by virtue of the fact that the public body holds the information and is, as a result, in a better position to bear this onus.

Consideration should be given to establishing a procedure for urgent processing of appeals, for example where the information relates to the life or security of any person (the RTI Act provides, at Article 7(4) for the urgent processing of requests for information in these cases).

Neither the RTI Act nor the draft NRRI addresses the question of how decisions of the Commission are to be enforced, although both make it clear that such decisions are binding on public bodies and even the classification committee. One possibility is for such decisions to be registered with courts, so that a failure to implement them becomes a contempt of court.

Finally, consideration should be given to providing the Commission with the power to mediate disputes in addition to resolving them through the more adversarial appeals process. Mediation can be a far more effective way to resolve disputes in some cases, for example where the underlying problem is about relationships and approach rather than a simple refusal to provide information. Mediation requires the establishment of a process for the parties to agree to this, along with binding powers on the part of the Commission to enforce mediated agreements.

2.3.2. Direct Powers to Address Breaches

The Commission should be given clear oversight powers over and beyond appeals to address breaches of the RTI Act by public bodies. The Commission should, for example, be able to require public bodies to appoint information officers, to fulfil their proactive publication obligations and to address structural implementation problems, such as poor information management.

The Commission should, to this end, have the power to conduct investigations and to impose remedies where problems are identified. The former may also be needed to resolve complaints. The NRRI should set out the investigation powers of the

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Commission, for example to compel evidence and witnesses, to enter into premises and so on.

Recommendations:

- The NRRI should establish a time limit within which heads of public bodies must process internal complaints against refusals to disclose information.
- The rules governing the submission of appeals to the Commission should be significantly simplified and rendered far less legal in nature so that anyone can submit an appeal at a minimum of fuss and cost.
- The NRRI should make it clear that appeals may be delivered in person, by post or by email.
- The scope of the right to appeal should extend to any breach of the rules in the RTI Act, not just a refusal to provide access to information.
- The rules regarding consideration of late appeals should be clarified.
- The NRRI should establish clear rules for consultation with third parties whose rights and/or interests may be affected by the disclosure of information.
- The NRRI should provide for narrow interpretation of exceptions by the Commission, in accordance with the openness goals of the RTI Act.
- All parties to an appeal should have a right to be heard, either orally or in writing.
- The onus should be on any public body seeking to deny access to information to justify this refusal.
- Consideration should be given to providing for the processing of urgent appeals, for example where the information requested relates to the life or security of any person.
- The NRRI should set out clearly how decisions of the Commission are to be enforced, for example by registering them as court decisions so that a failure to comply becomes a contempt of court.
- Consideration should be given to providing the Commission with mediation powers, which can provide more appropriate and substantive solutions in some cases, particularly where the underlying problems are structural in nature.
- The Commission should be given the power to impose remedies for a range of failures to implement the RTI Law, even in the absence of an appeal.
- The NRRI should spell out the powers of the Commission to undertake investigations into breaches of the RTI Law whether this is pursuant to an appeal or pursuant to its own enforcement powers.