MEMORANDUM

on the

Draft Bill on Access to Information of Brazil

July 2009

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About the ARTICLE 19 Brazil Programme

ARTIGO 19 Brasil was registered as a Brazilian NGO in 2008. Since 2007, the organisation's local office in São Paulo has been actively engaged in right to information work in Brazil, through the promotion of right to information legislation at the federal level and through work with civil society organisations and social movements, fostering awareness and activism in the area. ARTIGO 19 Brasil has actively promoted the implementation of existing legal norms on openness in order to encourage transparency practices and combat the culture of secrecy within the Brazilian public administration.

ARTIGO 19 has, since 2007, organised three international seminars on the right to information in Brazil and more than ten workshops with NGOs and social movements in different regions of the country. Since 2008, we have also engaged in sectorial discussions addressing the right to information in specific areas, such as environmental issues, education and women's rights. We maintain a leading thematic webportal on the right to information and related topics in the country – www.LivreAcesso.Net – which provides general information and daily news on the right to information and provides an interactive section that can be used and developed by users for the exchange of experiences, joint work and articulation. In March, 2009 ARTIGO 19 launched Marco do Acesso – www.marco.artigo19.org – a user-friendly online database of Brazilian legal provisions on access to information in different pieces of legislation, aimed at enhancing access to information while a federal law on access to information does not exist.

ARTIGO 19 Brasil enjoys a special position within Brazilian civil society, for it operates as a local organisation – equipped with a team of Brazilian staff, aware of and daily engaged in the domestic socio-political context – while at the same time counting on well established international expertise on the right of access, linked to significant experience with developing practical approaches to the promotion and realisation of the right to information in different countries.

The organisation's Latin America Program was established in 2000 and, since that time, has worked on right to information campaigns in Argentina, Mexico, Peru and Paraguay. Right to information laws have since been passed in Mexico and Peru, and legislation is pending in Argentina and Paraguay, as well as Brazil.

SUMMARY OF RECOMMENDATIONS

Guarantee of the Right:
- The definition of information could be simplified so that it covers all recorded information.
- It is of the greatest importance that a definition of public bodies, and one which is broad in scope, be added to the law.

Routine Disclosure:
- Consideration should be given to providing for more extensive routine disclosure obligations, and for the levering up of these obligations over time.
- Deadlines for establishing websites, for meeting proactive publication obligations and for updating information should be introduced into the law.

Processing of Requests:
- Conditions on extending the response timeline beyond 20 days should be set out in the law.
- The law should allow applicants to specify how they wish to receive information.
- Consideration should be given to providing for a central set of fees for standard charges, and for fee waivers for requests in the public interest.

Regime of Exceptions:
- The right to information law should override secrecy provisions in other laws.
- The law should make it clear that requests for information will be assessed against the regime of exceptions set out in the law, and not whether or not a document is classified.
- A public interest override should be introduced into the law, whereby information shall be disclosed in the public interest, even if it poses a risk of harm to any protected interest.
- The law should protect other private interests, such as commercial advantage and legally privileged information.

Appeals:
- The law should provide a framework of rules for the processing of internal complaints.
- The law should establish an independent administrative oversight body to decide on appeals from information requests. This body should have the power to investigate appeals properly, to remedy failures to apply the law and to order the release of information.

Sanctions and Protections:
- The prohibition on disclosing confidential information should be removed and, instead, civil servants should be protected against sanction for disclosing information in good faith.

Promotional Measures:
- Consideration should be given to appointing a central body, possibly the independent administrative oversight body recommended above, with overall responsibility for oversight of implementation of the law.
- The system for reporting on implementation of the law should be substantially expanded, including by providing for central reporting on an annual basis to the National Assembly.
- Consideration should be given to allocating responsibility to a central body for establishing a binding code of practice containing minimum record management standards.

1. INTRODUCTION

The government of Brazil is in the process of preparing federal legislation to give effect to the right to access information held by public authorities (right to information legislation). During a conference hosted by the Brazilian National Forum for Access to Information on 1-2 April 2009, of which ARTICLE 19 is a member, the government promised to send a Bill on the right to information to Congress imminently. According to Dilma Roussef, the Minister who is head of the President's Cabinet and a speaker at the event, such legislation is "a debt the Government has with the Brazilian society" to consolidate democracy in the country. The Bill on access to information (RTI Bill) was published on 13 May 2009.

ARTICLE 19 very much welcomes the decision by the Brazilian government to adopt right to information legislation. The right to access information held by public authorities is a fundamental human right recognised in international human rights law, including the *International Covenant on Civil and Political Rights* (ICCPR),[1] a legally binding treaty to which Brazil acceded on 24 January 1992, and the UN *Convention Against Corruption*, which Brazil ratified on 15 June 2005.[2] Proper effect can be given to the right to information only through implementing legislation. The government of Brazil is therefore under a positive international law duty to enact effective domestic legislation to protect the right to information.

The right to information is important to promote democratic participation and respect for other rights. Enhancing the flow of information helps to promote government accountability and a sense of trust amongst the people about the government and public authorities. It is also a key tool in combating corruption and other forms of public wrongdoing. The right to information is, therefore, a key public policy tool for promoting good governance and other social benefits.

This Memorandum sets out ARTICLE 19's analysis of the RTI Bill[3] in light of international standards in this area and comparative practice by other States. The aim is to contribute to the adoption of a progressive RTI law, which will give full effect to this fundamental human right.

The RTI Bill contains a number of positive features. It includes, among other things, a clear statement of the right of access, tight timelines for responding to requests, strong notice provisions, absolute openness in relation to information concerning human rights protection and violations, a progressive system for classification of information, good rules on sanctions for obstructing access and important extensions of protection for whistleblowers.

At the same time, the RTI Bill could still be improved. Our most serious concern is that it fails to provide for an independent administrative oversight body, such as an information commissioner. These are established by better practice laws and are crucial to promoting proper implementation of the right to information. Other key concerns with the RTI Bill

[1] Adopted and opened for signature, ratification and accession by UN General Assembly Resolution 2200A (XXI), 16 December 1966, entered into force 23 March 1976.
[2] Adopted by UN General Assembly Resolution 58/4, 31 October 2003, entered into force 14 December 2005.
[3] Bill No. 5228/2009 (Projeto de Lei 5228/2009). The Memorandum is based on an English translation of the RTI Bill prepared by ARTIGO 19 Brasil, with the assistance of Amy Traduções Ltda.

include the lack of any definition of the public bodies governed by it, the fact that the access law fails to override secrecy laws in case of conflict, the fact that decisions on access are made by reference to classification, rather than on the basis of the harm that release of the information would cause, the absence of a public interest override in the law, and the need for more robust promotional measures.

Our analysis of the RTI Bill is based on international law and best practice in the field of access to information, as crystallised in two key ARTICLE 19 documents: *The Public's Right to Know: Principles on Freedom of Information Legislation* (ARTICLE 19 Principles)[4] and *A Model Freedom of Information Law* (ARTICLE 19 Model Law).[5] Both publications represent broad international consensus on best practice in this area.

2. ANALYSIS OF THE DRAFT

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

2.1. Guarantee of the Right

Overview

Article 3 of the RTI Bill provides a clear statement of the right, placing an obligation on the State to ensure access to information in a simple and accessible manner and language. This is supplemented by Article 5, which provides a long list of different attributes of the right, including guidance on access, access to information held in records or documents and that is authentic and updated, access to information on activities carried out by public bodies, information on the administration of public property, use of public resources and public bidding and contracts, information on implementation, indicators and follow-up on public projects, and information on inspections and auditing.

Article 4 contains a number of principles relating to access to information, including that public bodies should ensure the transparent management of information, should manage information in a manner that ensures its availability, authenticity and integrity, and should protect classified and personal information.

Article 2(I) defines information as data, whether processed or unprocessed, that can be used to produce or transmit knowledge, in any form or format.

Analysis

[4] (London: June 1999).
[5] (London: July 2001).

The clear statement of the right of access in Article 3 is welcome. The intent behind Article 5 appears to be to set out different aspects of this right. However, it lacks logical flow and appears to be a bit of a collection of sometimes unrelated ideas. Furthermore, by specifically listing some types of information that are covered by the right – such as information on the administration of public property and use of public resources – Article 5 may be understand by some to suggest that other types of information are not covered. Although it uses the term "among others" to indicate that it is not exclusive, this term is usually used in front of an illustrative list, whereas the list in Article 5 simply refers to some of the more important types of information subject to disclosure.

The principles found in Article 4 are useful as an interpretive guide to the law, but they could be strengthened by adding in the underlying objectives of the law – such as promoting democratic participation, controlling corruption, promoting good governance and so on – and also by making it clear that exceptions will be interpreted narrowly so that they cannot be abused. In particular, the principles should make it clear that exceptions apply only where disclosure would pose a risk of harm to an interest listed in the right to information law, and where that harm outweighs the overall public interest in openness.

The definition of information in Article 2(I) appears to be broad. At the same time, the idea of transmitting knowledge could be interpreted in different ways. Better practice right to information laws simply define information as any recorded information, whatever means is used to record it (electronic, paper, video, etc.), the notion of 'recorded' being central here.

The RTI Bill fails to include any definition of the bodies to which it applies, i.e. it fails to define which bodies are under an obligation to disclose information in accordance with its rules. ARTICLE 19 understands that an initial draft was intended only to cover federal bodies while this draft is intended to cover all levels of government.

Regardless of the above, the failure to define the scope of the law in terms of bodies covered is a very serious shortcoming which must be addressed if the law is to work in practice. ARTICLE 19 is not aware of any right to information law anywhere which does not define its scope in terms of bodies covered. The ARTICLE 19 Model Law includes within its definition of public body all bodies established by the constitution or any other law, all bodies which form part of any level or branch of Government, all bodies owned, controlled or substantially financed by Government or the State, and all bodies carrying out a statutory or public function.

Finally, the RTI Bill is not entirely clear as to who has the right to lodge requests for information. It does not introduce any specific restrictions on this, but neither does it clarify it. In particular, it does not make it clear that everyone, including non-citizens, have the right to make information requests, in line with better practice right to information laws in other countries.

Recommendations:

- Article 5 should be reconsidered and either reworked to make it flow better and to make it clear that all types of information are covered, or removed.
- The principles in Article 4 could be expanded to include the wider objectives behind the right to information law, as well as the idea that while the law will protect confidential information, it will be defined narrowly, in accordance with

the main thrust of the law, which is to promote openness.
- Consideration should be given to simplifying the definition of information to make it clear that it covers all recorded information.
- It is of the greatest importance that a definition of public bodies be added to the law, preferably along the lines recommended above.
- The law should make it clear that everyone has the right to make a request for information.

2.2. Routine Disclosure

Overview

The key provisions in the RTI Bill on routine disclosure are Articles 6-7. Article 6 provides generally that public bodies shall promote the disclosure of information of collective or general interest, and provides a list of six categories of information that shall, at a minimum, be provided. These include, among other things, an organisational framework, records of financial transfers, information relating to public procurement via bidding, including signed contracts, information relating to programmes, projects and construction works, and "answers to society's frequently asked questions".

Article 6, paragraph 2 provides for this information to be disseminated by all legitimate means, including via the Internet, and paragraph 3 sets minimum conditions for the websites operated by public bodies, including a good search engine, protection of the authenticity and integrity of information, updating of information, contact details, and provision for access by those with disabilities. Article 7 further provides that access shall be ensured through the creation by public bodies of a citizens' information service to orient the public on the right to information, to inform the public about the information it holds and to receive requests for information. Public bodies are required to conduct public consultations or hearings as another means of disseminating information.

These provisions are supplemented by Article 5, paragraph 3, which provides for the publication of decisions.

Analysis

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

It may also be noted that no deadlines are imposed in relation to these proactive publication rules, other than the coming into force of the law within 120 days of its adoption. Public bodies that do not yet have websites should be given a deadline, for example of one year, to establish one. All public bodies should be given an overall deadline, for example of six months, to meet their proactive publication obligations (including on websites, once they have them). Finally, public bodies should be required to update this information periodically, for example on an annual basis.

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

Recommendations:

- Consideration should be given to providing for more extensive routine disclosure obligations, in line with modern trends in this area.
- Deadlines for establishing websites, for meeting proactive publication obligations and for updating information should be introduced into the law.
- Consideration should be given to building a system into the law for levering up the amount of information subject to routine disclosure over time.

2.3. Processing of Requests

Overview

The rules on the processing of requests are set out in Articles 8-12 of the RTI Bill. Pursuant to Article 8, requests may be made by 'any legitimate means' and shall include the applicant's identification and a specification of the requested information.

Article 9 provides for immediate access to information or, where this is not possible, for access to be granted within 20 calendar days. This may be extended by another 10 calendar days upon 'express justification' for this being provided to the applicant.

Article 9, paragraph 5 provides that where information is stored digitally, it may be provided to the applicant in this form. Article 9, paragraph 3 provides for inspection of documents, subject to security and protection of records. Article 11 also addresses form of access, but in a negative way, providing that where a form of access would harm a document, a certified copy will be provided. Where it is not possible to obtain a copy, the applicant may request a reproduction that does not harm the original, at his or her own expense.

The RTI Bill includes a number of provisions relating to notice. Article 9, paragraph 1 provides for applicants to be informed of the manner in which they are to be given access or of the "de facto or de jure" reasons for any refusal of access. In case of refusal, paragraph 4 requires the applicant to be told of the possibilities for appeal. Article 12 provides that an applicant has the right to the "full content" of any refusal to provide access in the form of a copy or certified copy and, where this is denied, he or she may appeal to a higher authority in the same public body.

Article 10 addresses the issue of fees for access. Access is free, except where a reproduction of the information is sought, in which case the costs of the "services and materials used" can be charged. For poorer requesters, this fee shall be waived.

Analysis

These are generally progressive and comprehensive rules on the processing of requests. It might be preferable, however, to spell out what constitutes a 'legitimate' means of making a request in Article 8 to avoid any possibility of confusion. For example, some public bodies may consider it reasonable to make a request orally or by fax, while others do not. It is also not clear why a request should include the applicant's name. Better practice, for example in Mexico, is simply to require requesters to provide contact details for purposes of provision of the information (often an email).

The draft Bill does not appear to provide specifically for assistance to be given to requesters. Article 5(I) does refer to guidance on how to access information within the general right of access recognised by the law and Article 7(I)(a) calls for the creation of a citizen's information centre within each public body. These may serve as useful tools for providing support to requesters. But specific rules requiring public bodies to provide assistance to requesters *at the point of making a request* is something that is found in many right to information laws, and this can greatly facilitate the exercise of the right. While this is an obvious need for disabled requesters, many requesters also have difficulty describing with sufficient precision the information they are seeking.

Article 9, paragraph 1(III) provides for applicants to be informed where a public body does not hold the information, and either for the application to be forwarded to the body that does hold it, if this is known, or for the applicant to be informed about that body. It would be preferable to have a single clear rule on this (i.e. the law should require public bodies either to inform the requester or to transfer the request but not give them the option of choosing between these). The draft Bill also fails to include rules on consultation with third parties about information that relates to them. This is a good way of striking a balance between protecting those rights while also giving effect to the right to information, as it allows third party concerns to be heard but does not give them an explicit or implicit veto over disclosure.

The timelines in Article 9 of the RTI Bill are sound. They set an appropriate balance between the need to get information out as quickly as possible and yet not impose impossible burdens on public bodies. At the same time, many right to information laws set conditions on the possible grounds for extending the timeline, for example because the request requires searching through many records or consulting with different public bodies. This helps narrow the discretion of public bodies in this area and thereby contributes to a tight system of deadlines.

Article 9, paragraphs 3 and 5, providing for different forms of access to information, are welcome but progressive laws give applicants an explicit right to demand access in the form they would prefer, subject to this being practical and not harming the document. Applicants may have reasons for wanting information in a form that is not electronic, for example.

The rules on fees are generally progressive and in line with good practice in other countries. At the same time, consideration should be given to setting fees – such as the cost of photocopying or the provision of a disk containing the information – centrally to avoid a patchwork of fees across different public authorities and to ensure that these fees are reasonable. Furthermore, consideration should be given to providing for fee waivers or reductions where the information is sought for public interest reasons, for example for purposes of dissemination to the wider public.

Recommendations:

- Consideration should be given to spelling out in the law what constitutes a legitimate means of making a request.
- Consideration should also be given to removing the requirement that applicants identify themselves in a request and instead simply require them to provide contact details for purposes of provision of the information.
- The law should make it clear that public bodies are required to provide assistance to requesters if they are having problems making their requests.
- Where public bodies do not hold information, they should either be required to transfer requests to the public body which does hold it, if they are aware of this, or to inform the requester of that public body (rather than having discretion as to which course of action to take).
- The law should provide for consultation with affected third parties.
- Conditions on extending the timeline for responding to a request beyond the initial 20 calendar days should be set out in the law.
- The law should allow applicants to specify the form in which they wish to receive information.
- Consideration should be given to providing for a central set of fees for standard charges, and for fee waivers for requests in the public interest.

2.4. The Regime of Exceptions

Overview

The regime of exceptions in the RTI Bill works primarily through establishing a system of classification, rather than setting out actual exceptions as such. This is supplemented by a few other provisions. Article 16 provides that information required for the judicial or administrative protection of human rights, along with information about human rights violations by public authorities, is not exempt. Article 17 preserves secrecy provisions in other laws. Article 26, for its part, addresses personal information (see below), while Article 9, paragraph 6 provides that where information has already been published, it does not need to be provided in response to a request. Article 5, paragraph 1 appears to exclude completely from the ambit of the access law any information relating to research and scientific or technological developments the secrecy of which is "crucial to the security of society and of the State". Article 5, paragraph 2, on the other hand, establishes a form of severability rule,

whereby if part of a document is classified, the rest shall still be accessible if it may be severed from the main document.

Articles 18-25 establish a system of classification. Article 18 sets out three levels of classification – top secret, secret and reserved – with different periods of classification – 25, 15 and five years, respectively. Article 19 establishes the grounds upon which information may be classified, which include information which, if disclosed, may:

- threaten national defence or sovereignty, strategic plans or the operations of the armed forces;
- harm the State's negotiations or international relations, if the information was provided on a confidential basis by another State or international organisation;
- threaten the life, security or health of others;
- pose a significant risk to the monetary, economic or financial stability of the country;
- put at risk the security of institutions, or 'high' national or foreign authorities and their families; or
- compromise intelligence activities, or ongoing investigations or prosecutions of crime.

Articles 20 and 21 place an obligation on both public bodies and private bodies to protect secrets and set out various rules regarding the handling of classified information.

The classification regime includes a number of rules and systems to prevent over-classification and abuse. Pursuant to Article 18, paragraph 5, the least restrictive classification shall be applied, taking into account the severity of the risk of harm and the time needed for classification.

Article 22 places clear limits on who may classify at different levels. Top secret classification may be imposed only by the President, Vice-President, State ministers and their equivalents, military commanders and chiefs of diplomatic missions and consulates abroad. This becomes far less stringent for secret classification and authority to restrict information is left to public bodies to determine. Article 32 establishes the Nucleus of Security and Certification (NSC), under the Cabinet of Institutional Security of the Presidency of the Republic, to oversee individual security certification for purposes of handling classified information, and to promote the security of classified information.

Pursuant to Article 23, classification at any level must be made through a formal decision setting out the basis for classification[6] and its duration. This decision shall be classified at the same level as the information.

Article 24 provides for regular review of classification, with a view to shortening the period of classification, taking into account the reasons for secrecy and the risk of harm from disclosure of the information. Furthermore, any information classified as top secret must be sent to the Commission of Reassessment of Information (Article 22, paragraph 3). The Commission is comprised of State Ministers and operates at the level of the Chief of Staff of the Presidency of the Republic (see Article 30). The Commission may extend the period of classification of top secret information where it continues to pose a risk of harm to sovereignty, territorial integrity or international relations. The Commission is also entitled to review any information classified as secret.

[6] The RTI Bill refers to Article 18 here but it is presumed that this is intended to refer to the grounds for classification in Article 19.

These review provisions are supplemented by Article 34, which provides for review of pre-existing classification (i.e. before the right to information law) to bring it into line with the new law within two years. Where classification is not reviewed within this timeframe, the information shall be considered public.

Finally, pursuant to Article 25, public bodies are required to publish annually, on the Internet, a list of information which has been declassified in the last 12 months, as well as the number of documents classified at each level of secrecy.

Personal information, defined as any information from which an individual may be identified (Article 2(III)), is protected by Article 26, which calls for personal information to be handled in a way which respects "intimacy, private life, honor and image". Such information shall be provided only to officials as legally authorised, and the information shall remain confidential for up to a maximum of 100 years, unless it is required for medical purposes in relation to someone who is incapable, for statistical or scientific research and the identity of the person is not revealed, for compliance with a court order, or for the protection of an overriding public interest. The personal information exception may also not be held up to bar investigations into irregularities which may involve the person, or inquiries into historical events of overriding importance.

Analysis

It is clear from the RTI Bill that an attempt has been made to keep the system of classification narrow, presumably in an attempt to respect constitutional and international guarantees of the right to information. At the same time, there are some serious problems with the approach taken towards exceptions to the right of access in the RTI Bill.

First, pursuant to Article 17, the RTI Bill preserves specific secrecy rules in other laws. Better practice right to information laws override pre-existing secrecy provisions in other laws, to the extent of any inconsistency. For example, the South African Promotion of Access to Information Act, 2000, specifically provides that it applies to the exclusion of any other legislation that prohibits or restricts disclosure of information and which is materially inconsistent with its objects or one of its specific provisions (section 5). The Indian Right to Information Act, 2005 explicitly overrides inconsistent provisions in other laws 'for the time being in force', and it specifically mentions the Official Secrets Act, 1923, as one such law (section 22).

This is important because, in most countries, secrecy provisions were not adopted with a perspective of openness in mind and, as a result, they are inconsistent with the principles set out in the right to information law, in particular that restrictions should be narrowly drawn, harm-based and subject to a public interest override. The requirement of harm, pursuant to which information may only be withheld when its release would cause harm to a protected interest, is of particular importance.

A central structural problem with the approach taken in the RTI Bill is that a system of classification, even if relatively tightly drawn and subject to regular review, does not address the need for the risk of harm to a protected interest to be assessed at the time a request for information is made. Often, timeliness of information is of the essence, and a commitment to review classification, even every two years, is of little use to an individual whose request has been rejected. It may be noted that even reserved information may be classified for up to five

years, a considerable period of time, and that the controls over this level of classification are less stringent than for higher levels of classification.

A better approach would be to provide for a tight system of classification, such as is set out in the RTI Bill, but provide that actual decisions about the release of information be decided at the time of a request, based on the grounds set out in Article 19 of the law. This will serve the dual purposes of promoting narrow and appropriate classification, and yet ensuring that decisions about the release of information are based on an assessment of the risk of harm that disclosure of the information would pose at the time of the request.

There are other less structural problems. It is assumed that only information which falls within the categories set out in Article 19 may be classified but this does not appear to be entirely clear. Regardless, the standard of risk varies, ranging from may put at risk, to may compromise, to may harm, to poses a major risk. It would be better to have a consistent and high standard, such as likely to cause serious harm.

The exclusions in Article 5, paragraph 1 are not harm-based. Even if research is crucial for security purposes, this is not the same as saying that disclosure of the research will harm security. Furthermore, the law already provides for the protection of national security and defence, so there is no need for Article 5 to provide double protection for this interest.

It is also unclear why it was deemed necessary to provide, in Article 23, that the decision on classification of a document shall be classified at the same level as the information to which it relates. It may be noted that this is not harm-based and, indeed, it is not even clear what interest it serves. Decisions to classify are documents held by public bodies and they should be subject to the same standards of openness as other such documents. In other words, whether a decision to classify should itself be classified should depend on an assessment of whether or not it falls within the scope of the regime of exceptions.

In a similar vein, while we welcome the commitment, in Article 25, to publish the number of documents classified at each level of secrecy, in many countries, the actual list of documents which have been classified is published, excluding the very small number of documents in relation to which even to disclose their existence would undermine a legitimate confidentiality interest.

The law fails to provide for a general public interest override whereby information which poses a risk of harm will still be disclosed where this is in the overall public interest. A form of public interest override in relation to personal information is included in Article 26, paragraph 3(IV), which is welcome, but the same reasons which motivated this provision also apply to the exceptions set out in Article 19. Indeed, experience in other countries demonstrates that the public interest override is particularly important in relation to public secrecy interests. This might be engaged, for example, where sensitive military information discloses evidence of corruption in military procurement. Although release of the information might harm security, the longer term benefits, including to security, outweigh this.

There are also problems with the protection of personal information. Article 26 calls for information to be handled in a way which respects not only privacy but also such things and honour and image. This is inappropriate. If a public body holds information which nevertheless undermines the honour or image of an individual, this information should still be disclosed. This should not be confused with general prohibitions on the making of defamatory

statements, which are needed to protect reputation. In many right to information laws, officials are protected against defamation suits for the information they disclose.

On the other hand, the RTI Bill fails to protect other key private interests, such as information provided on a confidential basis by a third party, for example as part of a tender, the disclosure of which would undermine the competitive advantage of that third party, and legally privileged information. These should be added to the law.

Recommendations:

- The right to information law should override secrecy provisions in other laws, to the extent of any inconsistency.
- The law should make it clear that requests for information will be assessed against the regime of exceptions in the law, and not against whether or not a document is classified.
- At the same time, the conditions on classification of documents should be retained, and it should be made clear that the only grounds for classifying documents are the interests listed in Articles 19 and 26.
- The standard of harm required in Article 19 should be standardised, and at a relatively high level of risk of harm.
- The exclusions in Article 5, paragraph 1 should be removed from the law.
- The rule that a decision to classify shall be classified at the same level as the document to which it relates should be removed from the law. Instead, decisions to classify should, like all public documents, be assessed against the standards for secrecy for all documents (i.e. the standards set out in Articles 19 and 26).
- A commitment should be made to publish not only the number of documents which have been classified but also a list of the actual documents.
- A general public interest override should be introduced into the law, whereby even if information poses a risk of harm to any protected interest, not just to privacy, it shall still be disclosed where this is in the overall public interest.
- Protection of personal information should only apply where disclosure of the information would breach a privacy interest.
- Other private interests, such as commercial advantage and legally privileged information, should be added to Article 26.

2.5. Appeals

Overview

Article 12, single paragraph provides that where no notice is provided, or a notice is not provided in time, the requester may appeal this to a higher authority within the same public body. Article 13 supplements this by providing that a requester may appeal to the Office of the Comptroller General where access to unclassified information has been denied, where a notice of refusal, whether in whole or in part, does not indicate the superior authority to receive an access or declassification request, where the procedures for classifying information were not observed or where other procedures established by the law have not been observed. Such an appeal may be lodged only where an internal appeal to a higher authority has been unsuccessful. In deciding an appeal, the Comptroller General has the power to order the public body to take the necessary steps to redress the wrong.

Article 14 provides that, while observing Article 13, a requester may appeal to the responsible minister in cases where a request for declassification of information has been denied. As with an appeal to the Comptroller General, this appeal may only be lodged where an internal appeal to a higher authority has been unsuccessful.

Analysis

Both of the appeals in Articles 13 and 14 are available only where an internal appeal to a higher authority has been unsuccessful. Such internal appeals can be a useful way of resolving information disputes without needing to engage external bodies. In particular, more senior officers often have the confidence to disclose information that lower-ranking officers lack, particularly in the early stages of implementation of a right to information law. Internal appeals can also help clarify for more junior staff what the scope of disclosure is. However, the RTI Bill says nothing about the obligation of public bodies to put in place a system of internal appeals or how such appeals should work. It fails, for example, to specify important conditions for such appeals, such as how long they may take to provide an answer, what notice they must provide and so on. It also fails to make clear that one may lodge an internal appeal for the full list of issues that would ground an appeal to either the Comptroller General or the Minister. This leaves open the possibility that internal appeals could be abused to delay responding to requests and to undermine the right of access.

While internal appeals can help resolve many issues, independent oversight is necessary to ensure proper interpretation and application of the rules. The courts can theoretically provide such independent oversight, but they are too expensive and time-consuming to be used by the vast majority of information requesters.

It may be noted that neither the Comptroller General nor the responsible minister provide independent oversight of the right to information. It is true that the Comptroller General plays a role of financial oversight of government, and has carried out initiatives to improve transparency within federal bodies. But the Comptroller General is a body of the federal executive, organized to assist the President of the Republic in matters concerning public assets, corruption and good governance. It is a body that serves to ensure *internal* control of the acts of the federal public administration, and which reports to a minister. It therefore lacks the independence which is required for proper oversight of the right to information. Furthermore, experience in other countries has demonstrated the critical importance of having a specialised body to address issues relating to the right to information.

Better practice right to information laws provide for appeals to be lodged with a specialised independent administrative oversight body, such as an information commission. Thus, under the Mexican 2002 Federal Transparency and Access to Public Government Information Act, appeals from any refusal to provide information go first to the Federal Institute of Access to Information (IFAI), established under the Act, and from there to the courts. The five commissioners are nominated by the executive branch, but nominations may be vetoed by a majority vote of either the Senate or the Permanent Commission. Under the Indian Right to Information Act 2005, a system of Central and State Information Commissions is established with the power to hear appeals regarding failures to implement the law. Central Information Commissioners are appointed by the President upon nomination by a committee consisting of the Prime Minister, the leader of the opposition and a Cabinet Minister nominated by the Prime Minister. In both cases, the oversight bodies have the power to investigate fully any refusals to provide information and to order the information to be disclosed if it does not fall within the scope of the regime of exceptions.

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

The FOI Bill is not entirely clear on the respective roles of appeals to the Comptroller General and to the minister. It is assumed that while the former could order disclosure of information, it would be for the minister to order declassification. This seems excessively bureaucratic, since once the information has been disclosed, the classification should be irrelevant. Indeed, in some countries, such as Mexico, all information that has been disclosed pursuant to a request is automatically put online.

Recommendations:

- A framework of rules for the processing of internal complaints should be set out in the law, including the grounds for lodging such complaints and how they are to be processed.
- The law should make provision for an independent administrative oversight body to decide on appeals from information requests, rather than these going to the Comptroller General or minister. This body should have the power to investigate appeals properly and to remedy any failures to apply the law, including by ordering the release of information and the declassification of documents.

2.6. Sanctions and Protections

Overview

Articles 27-29 of the RTI Bill provide for sanctions for various forms of obstruction of the right of access. Article 27 sets out a long list of wrongs in relation to officials, including denying access to information or slowing it down, wrongly using, or destroying, information, acting in bad faith in the processing of requests for information, keeping information secret for purposes of personal benefit, concealing classified information from oversight for personal gain or to harm a third party, and destroying information concerning possible human rights violations by officials. The same article also provides for liability for giving access to classified or personal information. Breach of these rules may lead, as appropriate, to disciplinary action (for military personnel), or to an administrative sanction or at least a suspension for others.

Article 28 provides for a range of sanctions for private individuals and bodies for failing to observe the law, including a warning, fine, termination of relations with the government, suspension from participating in public bidding for up to two years, and a declaration of lack of good repute and inability to participate in public bidding until the problem is addressed.

Both public and private bodies are directly liable for damages arising out of improper use of classified or private information (Article 29).

The RTI Bill does not include any provision providing protection for those who disclose, in good faith, information pursuant to the law (for example in response to a request for

information), even if they make a mistake. It does, however, bolster existing provisions on whistleblowing by providing for two amendments to Law nr. 8,112 on federal civil servants. The first allows civil servants to report irregularities to a superior authority or, where there is suspicion of involvement of the latter, to another competent authority (Article 37). The second provides protection against civil, criminal or administrative liability for such a report involving information concerning a crime or improbity.

Analysis
The sanctions provided for in Articles 27-29 are welcome. The threat of incurring sanctions for obstructing the right to information has proven important as a way of demonstrating to officials how important it is to respect the right to information law. At the same time, it is unfortunate that Article 27 also prohibits the disclosure of classified or personal information. The purpose of a right to information law is to promote the disclosure of information and this is likely to be seriously undermined if civil servants are fearful of sanctions for making mistakes and disclosing confidential information. Instead, they should be protected for good faith disclosures, although wilful and wrongful disclosures of confidential information may legitimately be sanctioned.

The inclusion of whistleblowing rules in the RTI Bill is very welcome. Whistleblowing is a key information disclosure safety-valve which can help ensure that important public interest information reaches the public. At the same time, consideration might be given to ensuring that the protection afforded is suitably broad. Many whistleblowing laws allow officials to report problems not only to authorities but also, in appropriate cases, to the world at large, including to the media, for example where they fear retaliation or internal reporting is unlikely to be effective. Furthermore, in many cases whistleblowing goes beyond just reporting irregularities and improbity to include maladministration as well as serious threats to public health, safety or the environment. Existing whistleblower provisions only apply to civil servants; ideally, whistleblowing provisions should also be introduced for everyone.

Recommendations:
- The prohibition on disclosing confidential information should be removed from Article 27 and, instead, civil servants should be protected against sanction for disclosing information in good faith.
- Consideration should be given to expanding the whistleblowing protect to include general disclosures and to cover everyone, as well as a wider range of wrongdoing and threats.

2.7. Promotional Measures

Overview
The RTI Bill includes few promotional measures. Pursuant to Article 35, each public body is required to designate an 'authority' within it to ensure efficient implementation of the law, to report periodically on progress, to make recommendations for reform and to provide guidance to the body on implementation. Article 7 also calls for the creation of a citizen's information service in each public body to "serve and orient the public", to "provide information on documents" and to "file documents and requests". These are both welcome and the former, at least, follows the practice of more progressive right to information laws which call for the appointment of such an information officer or other dedicated focal point for implementation.

Analysis

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

Apart from the very general reference in Article 35 to the production of periodic reports on progress, the RTI Bill does not establish any system for reporting on implementation. Many better practice laws place an obligation on all public bodies to report annually to a central body, and outline in some detail the content of these reports, which normally include detailed information about the number and processing of requests. The central body, in turn, is required to provide a consolidated report to the legislature so that it can exercise oversight over implementation of the law.

Another key promotional measure included in many right to information laws, and one which has benefits far beyond the right to information, is a system to promote better information or record management practices by public authorities. A simple system for achieving this is established in many laws whereby authority for setting and implementing minimum record management standards, for example in the form of a binding code of practice, is allocated to a central body, such as the minister of justice or finance. These standards should be levered up over time as the capacities of public authorities in this area increase.

Recommendations:

- Consideration should be given to appointing a central body, possibly the independent administrative oversight body recommended above, with overall responsibility for oversight of implementation of the law, including by undertaking public awareness-raising activities and training for public officials.
- All public bodies should be required to ensure that their staff receive adequate training on their right to information obligations.
- The system for reporting on implementation of the law should be substantially expanded, including by providing for central reporting on an annual basis to the National Assembly.
- Consideration should be given to allocating responsibility to a central body for establishing a binding code of practice containing minimum record management standards.