MEMORANDUM

on a proposal for a

draft Law on Access to Information of Palestine

London
May 2005

ARTICLE 19 · 6-8 Amwell Street · London EC1R 1UQ · United Kingdom
Tel +44 20 7278 9292 · Fax +44 20 7278 7660 · info@article19.org · http://www.article19.org

TABLE OF CONTENTS

1. INTRODUCTION

This Memorandum provides commentary on the draft Law on Free Access to Information of Palestine (draft Law), as currently pending before the Palestinian Legislative Council and sponsored by AMAN, the Coalition for Accountability and Integrity.[1] It analyses the draft Law against international law and best practice in the field and provides recommendations for further improvement.

We wholeheartedly welcome this draft Law. If adopted, it would realise the internationally recognised right of access to information in Palestine and the Palestinian National Authority would follow in the steps of the nearly sixty countries around the world who have passed freedom of information legislation, most of them in the last fifteen years. The draft Law is based on the principle that public bodies hold information not for themselves but for the public good, and it recognised the right of every Palestinian citizen or resident to access documents held by public bodies, as well as certain documents held by private bodies. It lists certain narrow exceptions on the basis of which access to information may be refused and establishes a Public Commissioner to supervise implementation. In doing so, it follows international law and best practice on the right to access information and it heeds recent calls by the UN Special Rapporteur on Freedom of Opinion and Expression.

If implemented properly, this Law would be a significant step towards increasing transparency and accountability in Palestinian public life. However, we believe that there are some areas in which the Draft Law could be further improved. For example, the right of access should be for all, not just for citizens and residents, and the exceptions regime should be tightened up to ensure that information may be withheld only if its disclosure would cause significant harm to a legitimate public or private interest which outweighs the public interest in disclosure. Also, the procedure for obtaining access could be streamlined, the protection for whistleblowers needs to be spelled out in more detail and it should be clear that access refusals can be challenged before a court as well as before the Public Commissioner.

We will elaborate on these and other recommendations in Section III of this Memorandum. In Section II, we provide an overview of international law and best practice on the right to access information. We will use this as a yard-stick by which to assess the draft Law.

[1] AMAN is also the Palestinian section of Transparency International. Our comments are based on an English translation of the Arabic original.

2. INTERNATIONAL STANDARDS

2.1. Freedom of Information in International Law

The right to access information held by public bodies, often referred to as 'freedom of information', is a fundamental human right recognised in international law. It is crucial as a right in its own regard as well as central to the functioning of democracy and the enforcement of other rights. Without freedom of information, State authorities can control the flow of information, 'hiding' material that is damaging to the government and selectively releasing 'good news'. In such a climate, corruption thrives and human rights violations can remain unchecked.

For this reason, international bodies such as the United Nations Special Rapporteur on Freedom of Opinion and Expression[2] have repeatedly called on all States to adopt and implement freedom of information legislation.[3] In 1995, the UN Special Rapporteur on Freedom of Opinion and Expression stated:

> The Special Rapporteur, therefore, underscores once again that the tendency of many Governments to withhold information from the people at large … is to be strongly checked.[4]

His comments were welcomed by the UN Commission on Human Rights, which called on the Special Rapporteur to "develop further his commentary on the right to seek and receive information and to expand on his observations and recommendations arising from communications."[5] In his 1998 Annual Report, the Special Rapporteur declared that freedom of information includes the right to access information held by the State:

> [T]he right to seek, receive and impart information imposes a positive obligation on States to ensure access to information, particularly with regard to information held by Government in all types of storage and retrieval systems…."[6]

In November 1999, the UN Special Rapporteur was joined in his call by his regional counterparts, bringing together all three special mandates on freedom of expression – the United Nations Special Rapporteur on Freedom of Opinion and Expression, the Representative on Freedom of the Media of the Organisation for Security and Cooperation in Europe and the Special Rapporteur on Freedom of Expression of the Organisation of American States. They adopted a Joint Declaration which included the following statement:

> Implicit in freedom of expression is the public's right to open access to information and to know what governments are doing on their behalf, without which truth would languish and people's participation in government would remain fragmented.[7]

---

[2] The Office of the Special Rapporteur on of Opinion and Expression was established by the UN Commission on Human Rights, the most authoritative UN human rights body, in 1993: Resolution 1993/45, 5 March 1993.
[3] See, for example, the Concluding Observations of the Human Rights Committee in relation to Trinidad and Tobago, UN Doc. No. CCPR/CO/70/TTO/Add.1, 15 January 2001, para. 14. The comments of the UN Special Rapporteur on freedom of Opinion and Expression are discussed at length below.
[4] Report of the Special Rapporteur, 4 February 1997, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/1997/31.
[5] Resolution 1997/27, 11 April 1997, para. 12(d).
[6] Report of the Special Rapporteur, 28 January 1998, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/1998/40, para. 14.

The special mandates' call on States to implement freedom of information legislation is firmly rooted in international law. As early as 1946, the UN General Assembly adopted a Resolution on the free circulation of information in its broadest sense, stating:

> Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the UN is consecrated.[8]

Since then, the right to access information held by or under the control of a public body has been guaranteed through Article 19 of the *Universal Declaration on Human Rights* (UDHR), adopted in 1948,[9] and through Article 19 of the *International Covenant on Civil and Political Rights* (ICCPR), adopted in 1966.[10] Article 19 of the UDHR, which was adopted as a United Nations General Assembly resolution, states:

> Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

While the UDHR is not directly binding on States, parts of it, including Article 19, are widely regarded as having acquired legal force as customary international law.[11] The ICCPR is a formally binding legal treaty ratified by 154 States;[12] it ensures the right to freedom of expression and information in terms similar to the UDHR. Both Article 19 of the UDHR and Article 19 of the ICCPR have been interpreted as imposing an obligation on States to enact freedom of information laws. The UN Human Rights Committee, the body established to supervise the implementation of the ICCPR, has long commented on the need for States to introduce freedom of information laws. In its 1994 Concluding Observations on the implementation of the ICCPR in Azerbaijan, for example, the Committee stated that Azerbaijan "should introduce legislation guaranteeing freedom of information…"[13]

A rapidly growing number of States have now recognised the importance of freedom of information and have implemented laws giving effect to the right. In the last fifteen years, a range of countries including India, Israel, Japan, Mexico, South Africa, South Korea, Sri Lanka, Thailand, Trinidad and Tobago, Guatemala, the United Kingdom and most East and Central European States have adopted freedom of information laws. In doing so, they join a large number of other countries that have enacted such laws some time ago, including Sweden, the United States, Finland, the Netherlands, Australia and Canada.

---

[7] 26 November 1999.
[8] Resolution 59(1), 14 December 1946.
[9] *UN General Assembly Resolution 217A (III*), adopted 10 December 1948.
[10] *UN General Assembly Resolution 2200A (XXI),* adopted 16 December 1966, in force 23 March 1976.
[11] For judicial opinions on human rights guarantees in customary international law law, see *Barcelona Traction, Light and Power Company Limited Case* (Belgium v. Spain) (Second Phase), ICJ Rep. 1970 3 (International Court of Justice); *Namibia Opinion*, ICJ Rep. 1971 16, Separate Opinion, Judge Ammoun (International Court of Justice); *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980) (US Circuit Court of Appeals, 2nd Circuit). For an academic critique, see M.S. McDougal, H.D. Lasswell and L.C. Chen, *Human Rights and World Public Order*, (Yale University Press: 1980), pp. 273-74, 325-27. See also United Nations General Assembly Resolution 59 (1), 1946.
[12] As of 27 April 2005. The ICCPR has been ratified by Israel which, however, maintains that its provisions do not apply in the occupied territories, a position with which the UN Human Rights Committee disagrees. Palestine, which has yet to gain widespread recognition as a State or membership of the UN, is ineligible to ratify the ICCPR. In this Memorandum, we discuss Article 19 of the ICCPR as reflective of international customary law, and thus applicable in Palestine.
[13] UN Doc. CCPR/C/79/Add.38; A/49/40, 3 August 1994, under "5. Suggestions and recommendations".

2.1.1. The Content of Freedom of Information

A survey of international law and best practice shows that to be effective, freedom of information legislation should be based on a number of general principles. Most important is the principle of maximum openness: any information held by a public body should in principle be openly accessible, in recognition of the fact that public bodies hold information not for themselves but for the public good. Furthermore, access to information may be refused only in narrowly defined circumstances, when necessary to protect a legitimate interest. Furthermore, access procedures should be simple and easily accessible and persons who are refused access should have a means of challenging the refusal in court.[14]

In his 2000 Annual Report to the UN Human Rights Commission, the UN Special Rapporteur endorsed ARTICLE 19's overview of the state of international law on freedom of information as published in *The Public's Right to Know: Principles on Freedom of Information Legislation* and called on Governments to revise their domestic laws to give effect to the right to freedom of information. He particularly directed States' attention to nine areas of importance:

> [T]he Special Rapporteur directs the attention of Governments to a number of areas and urges them either to review existing legislation or adopt new legislation on access to information and ensure its conformity with these general principles. Among the considerations of importance are:
>
> - Public bodies have an obligation to disclose information and every member of the public has a corresponding right to receive information; "information" includes all records held by a public body, regardless of the form in which it is stored;
>
> - Freedom of information implies that public bodies publish and disseminate widely documents of significant public interest, for example, operational information about how the public body functions and the content of any decision or policy affecting the public;
>
> - As a minimum, the law on freedom of information should make provision for public education and the dissemination of information regarding the right to have access to information; the law should also provide for a number of mechanisms to address the problem of a culture of secrecy within Government;
>
> - A refusal to disclose information may not be based on the aim to protect Governments from embarrassment or the exposure of wrongdoing; a complete list of the legitimate aims which may justify non-disclosure should be provided in the law and exceptions should be narrowly drawn so as to avoid including material which does not harm the legitimate interest;
>
> - All public bodies should be required to establish open, accessible internal systems for ensuring the public's right to receive information; the law should provide for strict time limits for the processing of requests for information and require that any refusals be accompanied by substantive written reasons for the refusal(s);

[14] For an overview of these general principles, see ARTICLE 19's *The Public's Right to Know* (London: 1999) (ARTICLE 19 Principles). These Principles are the result of a study of international law and best practice on freedom of information and have been endorsed by, amongst others, the UN Special Rapporteur on Freedom of Opinion and Expression in his report to the 2000 session of the United Nations Commission on Human Rights (UN Doc. E/CN.4/2000/63, annex II), and referred to by the Commission in its 2000 resolution on freedom of expression (Resolution 2000/38). They were also endorsed by Mr. Santiago Canton, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression in his 1999 Report, Volume III of the Report of the Inter-American Commission on Human Rights to the OAS.

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

- The law should establish a presumption that all meetings of governing bodies are open to the public;

- The law should require that other legislation be interpreted, as far as possible, in a manner consistent with its provisions; the regime for exceptions provided for in the freedom of information law should be comprehensive and other laws should not be permitted to extend it;

- Individuals should be protected from any legal, administrative or employment-related sanctions for releasing information on wrongdoing, viz. the commission of a criminal offence or dishonesty, failure to comply with a legal obligation, a miscarriage of justice, corruption or dishonesty or serious failures in the administration of a public body.[15]

This constitutes strong and persuasive guidance to States on the content of freedom of information legislation.

2.1.2. Limits to Freedom of Information

One of the most important issues to be addressed in freedom of information law is when a public body may legitimately refuse to disclose information. Under international law, freedom of information, like freedom of expression, may be subject to restrictions but only where these restrictions meet a strict test of legitimacy. The third paragraph of Article 19 ICCPR states:

> The exercise of the rights [to freedom of expression and information] may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> (a) For respect of the rights or reputations of others;
> (b) For the protection of national security or of public order (ordre public), or of public health or morals.

In concrete terms, this translates into a three-part test whereby a public authority must disclose any information which it holds and is asked for, unless:

1. The information concerns a legitimate protected interest listed in the law;
2. Disclosure threatens substantial harm to that interest; and
3. The harm to the protected interest is greater than the public interest in having the information.[16]

The first part of this test requires that freedom of information laws provide an exhaustive list of all legitimate interests for the protection of which access to information may be refused. This list should include only interests that constitute valid grounds for refusing to disclose documents and should be limited to such matters as law enforcement, the protection of personal information, national security, commercial and other confidentiality, public or individual safety, and protecting the effectiveness and integrity of government decision-making processes.[17] Exceptions should be narrowly drawn to avoid capturing information the disclosure of which would not harm the legitimate interest. Furthermore, they should be based on the content, rather than the type of document sought. To meet this standard, exceptions should, where relevant, be time-limited. For example, the justification for

[15] *Ibid.*, at para. 44.
[16] See ARTICLE 19's *The Public's Right to Know*, note 14, at Principle 4.
[17] *Ibid.*

classifying information on the basis of national security may well disappear after a specific national security threat subsides.

The second part of the test confirms that simply because the information falls within the scope of a listed legitimate interest does not mean non-disclosure is justified. This would create a class exception that would seriously undermine the free flow of information to the public and would be unjustified since public authorities can have no legitimate reason to withhold information the disclosure of which would not cause harm to a legitimate interest. Instead, the public body must demonstrate that the disclosure of the information would cause substantial harm to the protected interest.

The third part of the test requires governments to consider whether, even if disclosure of information causes serious harm to a protected interest, there is nevertheless a wider public interest in disclosure. For instance, in relation to national security, disclosure of information exposing instances of bribery may concurrently undermine defence interests and expose corrupt buying practices. The latter, however, may lead to eradicating corruption and therefore strengthen national security in the long-term. In such cases, information should be disclosed notwithstanding that it may cause harm in the short term.

Cumulatively, the three-part test is designed to guarantee that information is only withheld when it is in the overall public interest. If applied properly, this test would rule out all blanket exclusions and class exceptions as well as any provisions whose real aim is to protect the government from harassment, to prevent the exposure of wrongdoing, to avoid the concealment information from the public or to preclude entrenching a particular ideology.

3. ANALYSIS OF THE DRAFT LAW

3.1. Overview of the Draft Law

The draft Law consists of seven chapters.[18] The first chapter lays down a set of general principles. Article 2 states that the law aims to "[instill] a spirit of transparency and accountability within the Palestinian public institutions"; while Article 3 provides: "All information maintained by public institutions shall be accessible, excluding all information falling within the scope of exceptions specified by this law." These two provisions provide important guidance on the interpretation of the law: the aim of the law is to encourage openness and transparency. This means, for example, that if there is any doubt in a public official's mind whether or not to grant an access request, that doubt should be resolved in favour of disclosing the information.

Chapter 2 provides that public institutions should actively publish certain categories of information, for example detailing the work they carry out, while private bodies are under an obligation to publish information relating to environmental hazards. Public bodies must also open their meetings to members of the public and protect so-called 'whistleblowers' (individuals who disclose information on wrong-doing within a public body).

The first of the two chapters numbered as '3'[19] lays down a number of procedural rules relating to requests; the second Chapter 3 concerns exceptions. This is a crucial part of the

[18] Two chapters are numbered as 'Chapter 3', which is presumably a drafting oversight.
[19] See note 18.

draft Law which details those State and private interests for the protection of which access may be refused.

Chapter 4 establishes the office of the Public Commissioner for Information, an important independent body that will supervise the implementation of the law and to whom individuals may direct complaints about violations. Chapter 5 sets down the parameters for the fee regime, and Chapter 6 contains a number of concluding provisions.

As stated in the Introduction, we believe that, as it stands, the draft Law provides a sound basis for the introduction of a freedom of information regime in Palestine. However, there are areas in which it could be improved further. In the following paragraphs, we examine the draft Law in some detail and we provide suggestions and recommendations for further improvement.

3.2. Scope of the Draft Law

Under the draft Law, citizens and residents of Palestine will have a right of access to all information held by "ministries, agencies, apparatus, legislative, judicial, executive institutions, as well as local councils, private institutions that manage a public facility, or perform public works, or maintain information related to the environment, health, or public safety, or any other institution considered by the Public Commissioner for Information as a public institution for the purposes of this law" (Articles 1 and 2).

While this means that access can be enforced against a wide range of bodies, it raises two issues:

1. Only citizens and residents of Palestine enjoy a right of access.
2. The range of bodies subject to access obligations is left unclear.

We discuss these issues in turn.

1. Any person should have a right of access

Under international law, every person should have the right to access information, regardless of nationality, residential or any other status. Article 19 of the International Covenant on Civil and Political Rights provides: "*Everyone* shall have the … freedom to seek, receive and impart information" (emphasis added). In addition, Article 2 of the ICCPR requires States to implement the rights guaranteed by it to all persons within their jurisdiction, without distinction of any kind, including on the basis of national origin. This means that freedom of information laws should guarantee access to information for *everyone*. This principle has been implemented in the freedom of information laws of other countries, such as the United States,[20] the United Kingdom[21] and Japan, [22] to name but a few.

2. The range of bodies subject to freedom of information obligations

As a matter of principle, any body, whether public or private, that fulfils a public function should be subject to information disclosure obligations. This is reflected in the draft Law in the definition of "public institution" in Article 1 as including private bodies that perform

[20] 5 USC 552 grants the right of access to "any person". This has been interpreted as including foreign citizens, corporations and even governments: *Stone v. Import-Export Bank of the United States*, 552 F.2D 132 (5th Cir. 1977, *reh'g denied*, 555 F.2d 1391 (5th cir. 1977), *cert denied*, 434 US 1012 (1978).
[21] Freedom of Information Act 2000, Section 1.
[22] Law Concerning Access to Information Held by Administrative Organs, Law No. 42 of 1999, Article 3.

"public works". However, the definition in Article 1 raises questions with regard to exactly which bodies are subject to the law. In particular, the reference to "apparatus" is unclear, as is the scope of the power of the Commissioner to designate bodies as a public institution.

Broadly speaking, freedom of information laws from different countries have adopted two approaches in defining the range of bodies subject to FOI obligations. The first approach is to list each and every body subject to it in the law itself, which would typically result in a list of several hundred. This has the advantage of being clear and predictable, but the disadvantage that in order to add bodies to the list, the law needs to be amended. Another disadvantage is that some bodies may be left out, particularly private bodies that perform public functions. The second approach is to include in the law a definition of 'public body' that is sufficiently precise yet broad enough to capture all relevant bodies. An example of the first approach can be found the in the United Kingdom's Freedom of Information Act 2000, Schedule 1 to which lists all public authorities subject to the Act; an example of the second approach can be found in the recently adopted federal Right to Information Bill of India, Section 2(h) of which defines public bodies as any body established by law or that is owned, controlled or substantially financed by the State.[23] It is clear that the drafters of the Palestinian draft Law have chosen to include a broad definition of 'public body'. While this is entirely legitimate, we are concerned that the definition should be sufficiently precise to give individuals a fair indication which bodies are covered, and which are not. The law should therefore not refer to an undefined "apparatus" (unless this term has a precise meaning in the Palestinian context) and it should establish guiding principles on the basis of which the Commissioner may exercise his discretion to designate those bodies which are subject to the access law.

In addition, we note that the draft Law extends to any private body that maintains information "related to the environment, health or public safety". This is a somewhat vague definition. ARTICLE 19 considers that everyone should have access to privately held information that is necessary for the enforcement of any right.[24] This empowers individuals to request information concerning a broad range of issues, including socio-economic rights such as the right to housing, clean air or water. This approach is followed in South African law[25] and may in actual practice be more effective than the definition currently employed in the draft Palestinian law.

Recommendations:

- The right of access should extend to any person, rather than being limited to citizens and residents.
- The draft Law should more clearly define the bodies subject to freedom of information obligations.
- Consideration should be given to granting a right of access to information held by private bodies whenever this is necessary to enforce a right.

[23] Adopted May 2005.
[24] See ARTICLE 19's *Model Freedom of Information Law*, London: 2001, section 2(b).
[25] See the South African Constitution, Section 31(1)(b), and the Promotion of Access to Information Act, 2002. For an example of how this operates in practice, see the 2003 decision of *Andrew Christopher Davis v Clutcho (Pty) Limited*, 10 June 2003, Cape of Good Hope Provincial Division of the High Court of South Africa (unreported but discussed at: http://www.deneysreitz.co.za/news/news.asp?ThisCat=5&ThisItem=352).

3.3. The Exceptions Regime

Article 3 of the draft Law provides: "All information maintained by public institutions shall be accessible excluding all information falling within the scope of exceptions specified by this law". Articles 19-28 of the draft Law lay down the specific exceptions to the right of access, each provision detailing a specific protected interest. The exceptions are divided into discretionary exceptions, giving an institution the discretion to refuse to disclose certain categories of information to protect a certain interest, and mandatory prohibitions on the disclosure of information. The discretionary exceptions are the following:

- Article 22 provides that disclosure of information may be refused if it "may cause damage" to ongoing police investigations or if disclosure "shall harm the reputation of suspects/individuals who are not convicted";
- Article 23 provides that disclosure of information may be refused if it concerns professional or commercial secrets of the institution, or if disclosure "may inflict material damages to the economic interests of the state, or its capacity to manage the national economy, or may result in special benefits to an individual or an institution";
- Article 25 allows refusal of disclosure of "any information related to the internal affairs of the institutions, its employees, internal orders, discussions, and preliminary proposals and suggestions";
- Article 26 allows for the refusal of any information "related to unconfirmed expectations of natural disasters, or contagious diseases with minimal outspread probability rates"; and
- Article 27 allows for the refusal of any information whose disclosure "might affect or inflict damage to the safety of individuals".

Mandatory exceptions are found in the following provisions:

- Article 19 prohibits disclosure of any information whose release "may affect" defence capabilities and national security;
- Article 20 prohibits disclosure of any information that is related to a foreign state or organisation and which has been "agreed with them" as confidential;
- Article 24 prohibits the disclosure of any information containing professional secrets of a third party, or that would impact negatively on the competitive ability of a third party, unless consent has been obtained; and
- Article 28 prohibits the disclosure of "any information related to the private life of a third party" unless consent has been obtained, the information was already public, disclosure is requested pursuant to a court or order or approved by the Public Commissioner, if the requester has custody over the third party or if the requester is related to the third party and at least twenty years has passed since the third party's death.

Article 21 provides that information falling within the categories described in Articles 19 and 20 must nevertheless be released if it is more than twenty years old, unless the Public Commissioner determines that it should remain confidential for "another renewable period of time."

As detailed in Section 2.1.2 of this Memorandum, international law requires public institutions to release information held by them unless they can demonstrate that:

1. the information relates to a specific protected interest;
2. disclosure of the information would or would be likely to cause significant harm to that interest; and

3. the harm to the protected interest from disclosure of the information is greater than the public interest in releasing the information.

While the majority of the provisions in the exceptions chapter of the draft Law protect legitimate interests (although we have concerns about the wording of some of them, as discussed below), our overriding concern is that parts 2 and 3 of the international law test are not reflected in the draft Law. The exceptions outlined in Articles 19-28 all set a very low threshold for access refusals, allowing – or, in the case of the mandatory exceptions even requiring – public authorities to refuse access if disclosure "may affect", "may cause harm" or "may inflict material damages" to a protected interest. This fails to reach the international standard, which allows for refusal only if it "would or would be likely to" cause "substantial harm" to a protected interest. The third part of the test, which requires that information must be released whenever the public interest in its disclosure outweighs the harm done to a protected interest, is entirely absent from the draft Law. This is an important oversight since the 'public interest override' is key to revealing misfeasance in public office. For example, it requires the release of private information that reveals corruption. Although release of such information usually causes harm to the privacy of the person whose corruption it exposes, the wider public interest in exposing corruption outweighs this harm. All provisions therefore need to be redrafted to incorporate a clear requirement of serious harm and a public interest override should be introduced at the beginning of the exceptions chapter.

As mentioned, we also have concerns regarding the wording of some of the exceptions provisions. Many of the exceptions are phrased in very broad language; as a result, they may be used to refuse a broad range of information, beyond the legitimate interests that these provisions seek to protect. Article 19, for example, requires that no information be disclosed regarding weapons, tactics or strategies of the national army. This would prohibit any release of information relating to weapons purchases, an area in which there can be significant corruption. Although the protection of national security interests is legitimate, tighter wording is necessary if the provision is not to be used illegitimately.

Article 25 lays down an even broader exception, allowing for refusal of any information related to the internal affairs of public institutions. This would allow a ministry to refuse to disclose how much has been spent on hospitality or how much is spent on foreign trips for its staff. The only legitimate interest that a public institution may protect under this heading is the safeguarding of internal policy making processes, in order to allow officials a limited 'space to think'. To this end, ARTICLE 19's Model Freedom of Information Law suggests a provision along the following lines:

> (1) A body may refuse to indicate whether or not it holds a record, or refuse to communicate information, where to do so would, or would be likely to: –
>
> (a) cause serious prejudice to the effective formulation or development of government policy;
>
> (b) seriously frustrate the success of a policy, by premature disclosure of that policy;
>
> (c) significantly undermine the deliberative process in a public body by inhibiting the free and frank provision of advice or exchange of views; or
>
> (d) significantly undermine the effectiveness of a testing or auditing procedure used by a public body.
>
> (2) Sub-section (1) does not apply to facts, analyses of facts, technical data or statistical information.[26]

[26] Note 24, section 32.

Article 26 allows for the refusal of any information relating to "unconfirmed expectations of natural disasters, or contagious diseases with minimal outspread probability rates". Although there is no explanatory memorandum accompanying the draft Law, we assume that this provision aims to prevent the circulation of rumours of imminent disasters based on incomplete information. We doubt whether this is legitimate or even effective. Every State is under a strong obligation to inform its people of any impending threats to life or property. It follows that if a State has credible reports of an impending natural disaster, it is under an obligation to make this information public, even if it is unconfirmed. Particularly with regard to natural disasters, there can be very little time between the first warning signs being detected and the disaster occurring. Article 5(1)(c) of the UN Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the Aarhus Convention, after the city where it was signed), states:

> In the event of any imminent threat to human health or the environment, whether caused by human activities or due to natural causes, all information which could enable the public to take measures to prevent or mitigate harm arising from the threat and is held by a public authority is disseminated immediately and without delay to members of the public who may be affected.[27]

Although not signed by the Palestinian Authority or by Israel, the Convention can be taken as authoritative guidance on best practice regarding information management in emergency situations and we suggest it should be followed in the draft Law.

Recommendations:

- Public authorities should be allowed to refuse to disclose information only where this would cause substantial harm to a legitimate protected interest.
- A public interest override should be introduced to allow for the release of information in cases where the public interest in disclosure outweighs the harm that would be caused to a protected interest.
- The exceptions should be phrased in precise language, using narrow terms.
- Information relating to environmental threats should be released proactively and not be subject to exceptions.

3.4. Access Procedures

Articles 11-18 of the draft Law lay down the access procedure. Under Article 11, persons wishing to obtain access to information need to submit a request in writing, including sufficient details to enable the institution to identify the information requested. Article 12 provides that, when the request is lodged, the requester is provided with a notice indicating the date of submission, type of information requested and the time period needed to respond to the request. Under Article 13, the public institution has a maximum of fifteen days within which to respond. This period may be extended by another fifteen days if the request concerns a large amount of information or if it is necessary to consult with a third party or with another public institution. If the requester does not receive a response, then the request should be considered refused.[28] If successful, Article 14 requires the public institution concerned to set a fee and allow the requester to access the information. The requester must be provided with the information in the format in which it is kept by the institution; it is insufficient merely to tell

[27] Adopted 25 June 1998, entry into force 30 October 2001. The Convention currently has 35 State Parties.
[28] Our translation refers to a response "during" this period; we assume this is a typo and the text of Article 13 should read "by the end of" this period.

the requester about the contents of the document. In case of a disagreement about the form of access, the Public Information Commissioner will decide. Article 16 provides that, if necessary, disabled persons should be provided with access in a format accessible to them, insofar as this is possible. If this involves extra costs, these should be covered by the requester.

Article 17 provides that if a public institution is of the opinion that another public body "is more relevant in providing the information", for example because it authored the document(s) requested or owns an alternative format of the information requested, it may refer the request to that other institution.

Article 18 provides that if a public institution denies an access request it must do so in writing "indicating reasons behind rejection". Article 18 states that information requests may be denied for two reasons only:

1. that "the information is not available within the institution"; or
2. that "the requested information falls within the scope of exceptions specified by this law".

As drafted, the regime is transparent and provides clear guidance on the access procedure, from beginning to end. There is, however, some room for improvement and we are concerned that certain elements may be open to abuse.

One potential for abuse resides in Article 17, which provides that a public institution may refer a requester to another public institution if that institution is "more relevant". This introduces the risk that requesters may be sent from one institution to the next in a lengthy quest to access information. It would be better if the draft Law only allowed for referrals to another public institution if the institution with whom the request was originally lodged does not hold the information. In such a case, the fifteen day limit for responding should start anew.

A second problem is with the reasons that must be provided under Article 18. In order to challenge a refusal, a requester needs to be provided with the fullest possible reasons and this should be made clear in Article 18. As currently drafted, there is a significant danger that public institutions will merely provide unsuccessful requesters with one of the two reasons stated, or just the particular exception relied upon, which is insufficient to challenge a decision.[29]

Third, the procedure does not allow for oral requests, for example by applicants who are illiterate or who can't lodge a written request because of their disability. The draft Law could include a provision requiring public institutions to provide assistance to those who need it in reducing an oral request to writing.[30] This would not be likely to be very onerous on public institutions while at the same time it would provide crucial assistance to persons who would otherwise be unable to access the procedures. We are also uncertain about the fairness of charging disabled persons for the cost of transferring information to an accessible form. As recommended in relation to the fee schedule (discussed below, in section 3.5 of this Memorandum), we consider that a minimum amount of information should be made available

[29] See, for example, the decision of the Court of First Instance of the European Communities in *Interporc Im- und Export GMBH v. Commission of the European Communities*, Case T-124/96 [1998] ECR II-231.
[30] For an example of such a provision, see ARTICLE 19's Model Law, note 24, section 8.

at no cost. We also note that it is not clear whether the draft Law would allow for requests to be lodged via email or otherwise through the Internet.

Fourth, Article 14 provides for partial access to a document if part of it falls within the exception regime. Article 14 phrases this as something that is discretionary, stating that "the competent staff member may allow" access. This should be a mandatory obligation; the draft Law should require that access "shall" be granted to that part of a document that is not covered under the access regime, to the extent reasonably possible.

Fifth, it is not clear whether the fifteen day deadline refers to fifteen working days or fifteen calendar days. We recommend that the draft Law should set a deadline for responding of fifteen working days but require a response as soon as possible within that period. That deadline should be extendable only if the request is for a large amount of documents or would require a search through a large amount of documents and complying within the deadline would interfere unreasonable with the activities of the institution.

Recommendations:

- Applicants should be referred to another institution only if the public institution with whom the request was originally lodged does not hold the information.
- The draft Law should require that public institutions give full reasons for every refusal and not merely indicate the applicable exception.
- The draft Law should allow for access requests to be lodged by email or orally as well as in writing.
- The draft Law should require that public institutions provide reasonable assistance to applicants. In particular, those who for reasons of disability or illiteracy cannot lodge a request in the form required should be rendered the necessary assistance.
- The draft Law should require that partial access shall be granted if only part of a document falls within one of the exceptions.
- The draft Law should require public institutions to respond to access requests as soon as possible but in any case within fifteen working days. The deadline should be extendable only if the request concerns a large number of documents or would require a search through a large amount of documents and complying within the deadline would interfere unreasonably with the activities of the institution.

3.5. Fees

Article 42 of the draft Law provides that a fee schedule for providing access to information will be prepared by the Public Information Commissioner and issued by the Council of Ministers. This means the schedule will be binding on all authorities subject to the Law. Fees will not be more than 10 Jordanian Dinars or the equivalent in other currencies legally in circulation, except insofar as is necessary to cover the cost of photocopying, to cover the cost of transferring information to a requested alternative format or if the requester asks for more than one copy of the information. The fee for appealing a decision to the Commissioner shall not exceed 10 Jordanian Dinars.

We welcome that fees will be set by the Commissioner, which should go some way to ensuring that the schedule will be fair. However, we recommend that the draft Law provides a few more parameters. First, we recommend that consideration be given to stating that fees will never exceed the actual costs of providing the information, rather than 10 Jordanian

Dinars. 'Costs' should be understood as the physical costs of providing photocopies of documents. We note that 10 Jordanian Dinars, the equivalent of 14 USD, is a considerable amount which would probably pay for a few hundred photocopies. We also recommend that consideration be given to providing a certain amount of information for free – for example, the first 50 or 100 pages of every request. Further consideration could be given to the introduction of a fee waiver for public interest groups or journalists. Neither measure would be particularly onerous for public institutions while contributing greatly to the transparency and accountability of public institutions. As a means of subsidising the system, consideration might also be given to charging more for requests by commercial institutions.

Recommendations:

- The draft Law should state that fees will never exceed the actual cost of providing the information.
- Consideration should be given to providing a certain amount of material for free and to establishing a fee waiver for requests made by public interest groups or journalists.

3.6. Proactive Publication

Under Article 7 of the draft Law, all public institutions will be required to publish annual reports containing information on the following:

- documents on internal working matters such as audited accounts, regulations and activities;
- procedures through which individuals can find out about the institution's policies and projects;
- an explanation of the types of information kept by the institution;
- the contents of decisions taken by the institution, along with an explanation of the implications and repercussions of that decision on individuals, its expected results and the reasons behind it; and
- any information deemed necessary by the Public Commissioner.

Article 8 requires both public and private "industrial institutions" to publish six-monthly reports providing information on the location, nature and associated hazards of toxic materials used by them, the volume of materials released into the environment as a result of manufacturing processes and waste disposal methods and mechanisms used by them.

We welcome the obligation on public authorities proactively to make available information in a number of areas, without a request having to be lodged. In particular, the requirement to publish decisions, the reasons behind them and their implications is important. However, we recommend that the Law should go further and require public bodies to publish an addition range of information. First and foremost, public institutions should be required to make public information on access procedures, including on how to complain about violations of the right to access information. Second, in line with our comments on environmental information in the exceptions regime, we consider that public authorities are under a legal obligation to publish proactively any information in their possession that relates to an imminent threat of natural disaster.[31] Third, public authorities should publish information regarding the way in which members of the public can make representations or otherwise influence its policies. Finally,

[31] See Section 3.3 and footnote 27.

every public authority should collect and publish annual statistics on access to information requests made to it – including on the number of requests received, refused and granted. All information published proactively should be made widely available, including on websites and through other means likely to reach a high number of persons.

With regard to Article 8, we note that the term 'industrial institution' is left undefined. This could cause difficulties in interpretation and it would be good if a definition was included in Article 1.

Recommendations:

- In addition to the categories of information mentioned, the draft Law should require public bodies proactively to publish the following:
  - information on access procedures, including on how to complain about violations of the right to access information;
  - information relating to imminent environmental threats or disasters;
  - information regarding the way in which members of the public can make representations or otherwise influence policies; and
  - annual statistics on information released, including the number of requests received, refused and granted.
- The draft Law should define the term 'industrial institution'.

3.7. Appeals and Complaints about Violations

Under Article 32 any individual whose request for access to information has been denied, who has a complaint about the fee charged for access, whose request for information in an alternative format was rejected, in respect of whose request the time limit was extended in violation of the law or whose request was referred to more than one other institution without approval may lodge an appeal with the Office of the Public Information Commissioner. Under the sixth indent of Article 32, the Public Information Commissioner has a further, undefined remit to accept "any other cases". Appeals must be lodged within 30 days of the action complained of, and the Public Information Commissioner must respond to a complaint within 3 months of receiving it. Under Article 40, the Commissioner has access to any information needed to reach a decision, including the documents withheld from the applicant, and he or she may request that officials clarify the grounds upon which access was refused. Article 39 provides that decisions of the Public Information Commissioner are binding on all public authorities. The draft Law does not mention any further appeal from decisions of the commissioner, although we do not rule out that this is possible under general administrative law.

We welcome the appeals process and in particular the fact that the Commissioner's findings will be binding. While we also welcome the broad mandate envisaged for the Commissioner, we doubt whether the provision under Article 32(6) for the Commissioner to accept 'any case' will be workable. The Commissioner's remit needs to be clearly defined so that those seeking access, as well as public institutions, have a reasonably clear expectation of what the Commissioner can and cannot do. It would be preferable, therefore, if the Commissioner's remit was explicitly limited to investigating complaints about alleged violations of the draft Law.

We also note that the draft Law does not provide much detail regarding procedure before the Commission. While we appreciate the relatively informal nature of Commissioner proceedings, some minimum rules should be provided, setting out the burden of proof, and guaranteeing both applicants and respondent public institutions an opportunity to argue their case, if necessary in a hearing. The Commissioner should also have the power summarily to reject frivolous or vexatious complaints, although this power should not be used lightly.

Finally, it is of importance that the Commissioner's decisions can be appealed to a court of law. These cases sometimes raise complex issues which need court attention to resolve. Insofar as general administrative law does not provide for this, provision needs to be made in the draft Law.

Recommendations:

- The Commissioner's remit should be limited to investigating complaints about alleged violations of the draft Law.
- The draft Law should provide some minimum procedural provisions.
- The Commissioner's decisions should be subject to appeal to the courts of law.

3.8. The Public Information Commissioner

Chapter 4 of the draft Law establishes the Office of the Public Commissioner for Information as a moral person "enjoying full independence necessary for its work" (Article 29). Article 30 lists the functions of the Office of the Public Information Commissioner as receiving and reviewing complaints from individuals and, broadly, "ensuring the implementation of provisions of this law and the achieving of its desired goals". In relation to the latter, the Office "may":

- "set, organise and implement programs, plans and special policies related to" the protection of the right to access to information;
- educate the general public and engage in awareness raising activities;
- contribute to the training of the employees of public institutions;
- "track violations, publish reports and studies that include information on obstacles to" access to information and the best ways of overcoming them.

The Commissioner's decisions will be binding on public bodies.

Article 35 provides that the Office will be headed by the Public Commissioner for Information. This person will be appointed by the Prime Minister, with the endorsement of the Legislative Council, for a term of four years. This term may be renewed only once. Article 37 provides that the Commissioner may not "undertake any other work or occupy any other position whether paid or unpaid throughout the duration of his work as Commissioner". Under Article 38, the Commission will be dismissed if he or she is convicted of "a crime violating honour and integrity", if he or she occupies another position in contravention of Article 37, or if the Commissioner is "quarantined" or declared bankrupt.

Under Article 41, the Commissioner is required to submit six-monthly reports to the President, Prime Minister and the Legislative Council, reporting on violations of the right to access information and problems faced by the Commissioner in the execution of his or her task, and making any recommendations he or she deems appropriate.

Article 40 provides the Commissioner with the following powers:

- to have access to any public institution and inspect its records, papers or any other information;
- to "investigate with any employee separately" in order to access information;
- to refer to the courts cases where individuals are found to have tampered with or destroyed information;
- to request that senior officials such as ministers and others of that rank clarify the reasons behind refusals to release information.

The Office of the Public Commissioner will be crucial in the successful implementation of the Law. Without a strong and independent office driving the process, implementation may be long and drawn-out. Similarly, the review of complaints can be successful only if the Commissioner has sufficient powers and is fully independent from other State bodies. Against this background, we welcome the powers of access and interrogation that the Commissioner will have, and the fact that the Commissioner's decisions will be binding. However, we are of the view that appointments process could be more open and that the limited guarantees in the draft Law for the independence of the Office of the Commissioner could be enhanced.

The appointments process for the Public Information Commissioner should be open, transparent and allow for input by civil society. As currently drafted, the Law fails to provide for any of this, which may result in the appointments process being shrouded in secrecy. The only option the Legislative Council will have in relation to a candidate it disapproves of is to refuse to appoint him or her. It would be better if the system allowed for some public scrutiny of a list of candidates, either during proceedings in the Council, or during formal nomination proceedings prior to the vote in the Legislative Council.

Although the draft Law does guarantee the Commissioner's independence in principle, in Article 29, there are few practical guarantees to safeguard his status. There is no mention in the draft Law of how the Office of the Commissioner will be funded or that he or she should be able to hire *sufficient* staff to carry out his or her functions (the draft Law merely mentions that some staff may be hired, and additional offices set up). The Commissioner's own salary should be sufficient to attract a high-calibre individual and to ensure insofar as possible that he or she is not vulnerable to bribery, and the draft Law should make it clear that no person who holds an elected office, or who holds official office in or who is an employee of a political party should be appointed Commissioner. We also note that the term of office, four years, is relatively brief and may coincide with the term served by a Prime Minister or parliamentarians. This may put pressure on a Commissioner in relation to their re-election – resulting in a Commissioner being 'soft' with the government – and it may also lead to successive Prime Ministers appointing new Commissioners purely as political appointees. In order to avoid such a situation, it would be better if the Commissioner served a longer period, say a seven-year term.

Recommendations:

- The appointments process for the Public information Commissioner should be open, transparent and allow for input by civil society.
- The draft Law should safeguard the independence of the Commissioner by ensuring sufficient and stable funding, by ensuring that no politician or employee of a political party is appointed and by lengthening the term of service to seven years.

3.9. Open Meetings

Article 9 of the Law requires any public institution that wishes to hold a 'general meeting' to announce the location, time and objective of the meeting and to open it to the public. The second sentence of Article 9 states that exceptions to this general principle may be "specified by this law"; but none are specified.

As a matter of principle, we welcome this provision which follows the ARTICLE 19 Principles[32] and has been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression.[33] However, as currently stated, this obligation is too vague and general to be able to be implemented properly. First, the term 'general meeting' needs to be clarified. It should be clear that not every meeting of a public body should be open to the public. The ARTICLE 19 Principles recommend that only meetings of governing bodies should be open to the public, understood as bodies that exercise decision-making powers. This would include meetings of elected bodies and their committees, and meetings of bodies such as planning authorities and the boards of public and education authorities and public industrial development agencies. Bodies that merely proffer advice and meetings of political parties are not covered.

Exceptions to the general principle of openness should also be clarified. Generally speaking, legitimate grounds for closing a meeting include public health and safety considerations, law enforcement interests or the protection of national security. However, in order to prevent abuse of the exceptions it is important that the decision to close a meeting is itself open and can be challenged before a court or appropriate tribunal.[34]

Recommendations:

- The range of bodies subject to the open meetings requirement should be clarified.
- The draft Law should clearly list exceptions to the principle of openness.
- The decision to close a meeting should itself be public and individuals should be able to challenge that decision.

3.10. Measures to Promote Open Government

The draft Law contains three provisions that are aimed at promoting openness within public institutions. Article 4 of the draft Law requires every public institution to appoint a person responsible for handling information requests. This person will have the necessary powers and security clearance to "search for and retrieve the required information". Article 5 requires public institutions to keep their information filed and categorised so that the responsible person may easily retrieve requested information. As much as possible, public institutions should keep information electronically. Article 6 requires all public institutions to organise training courses for staff members on the importance of freedom of information and how best to realise this right for citizens. These training courses should include components on efficient information maintenance and retrieval.

We welcome these provisions, which will help ensure that once the draft Law is passed, steps will be taken to combat the culture of secrecy that often pervades public bodies. We do have

[32] Note 14.
[33] Discussed in Section 2.1.1 of this Memorandum.
[34] ARTICLE 19 Principles, note 14, Principle 7.

some suggestions for further improvement, though. First, the responsibilities of the information officer within each public institution should be broadened to give that person an educational and promotional remit. The public information officer should be placed in charge of the training to be provided under Article 6, together with the Office of the Public Information Commissioner,[35] and should seek to promote best practices in information management, in line with Article 5. It should be noted that for medium-sized and large public institutions, a single person will not suffice to carry out these tasks and an information department may need to be considered. Any initial costs associated with setting up such a department should be recouped through efficiency savings that will be achieved over the longer term.

Second, the Public Information Commissioner should be required to publish a Code of Practice or another form of guidance on information management. Article 5 requires public institutions to maintain their records in "a manner that allows the competent staff member to easily retrieve it" but does not set any further standards. The Public Information Commissioner is ideally placed to provide guidance on how best to implement good record management practices.

Third, we recommend that some consideration be given to introducing limited criminal offences, of obstructing access to information, interfering with the work of the Public Information Commissioner and wilful destruction of documents. Although the emphasis in the draft Law should be on positive measures and training, the existence of an offence of wilfully obstructing access to information clearly signals the importance of the right.[36]

Recommendations:

- Information officers should be given a general mandate to promote best practices in relation to access to information.
- The Public Information Commissioner should be required to publish a code of practice on record management for public bodies.
- Criminal penalties should be introduced for those who wilfully obstruct access to information in any way.

3.11. Protection for Whistleblowers

Article 10 provides protection for so-called 'whistleblowers', stating: "No penalty shall be inflicted upon any staff member who may reveal information on violations to the law."

While we welcome inclusion of this clause, we note that it is limited to revealing violations of the draft Law. Whistleblower protection laws in other countries, such as Japan, the United States and the United Kingdom, protect individuals who reveal information on any wrong-doing in public office. The ARTICLE 19 Principles[37] recommend the same. 'Wrong-doing', in this context, should be understood as including the commission of a criminal offence, failure to comply with a legal obligation, a miscarriage of justice, corruption or dishonesty, or

[35] This currently an optional activity, under Article 30 of the draft Law.
[36] Such an offence is already hinted at in Article 40, under the third indent of which the Public Information Commissioner may refer individuals to court for destroying information. It is not clear, however, whether this provision on its own would be sufficient legal basis for a successful prosecution so we recommend the introduction of a separate clause.
[37] Note 14.

serious maladministration regarding a public body. It should also include a serious threat to health, safety or the environment, whether linked to individual wrongdoing or not. It is important that the individual who releases the information acts in good faith and in the belief that the information is true and discloses wrong-going.

Furthermore, officials who in good faith and in the exercise of their function release classified information should also not be subject to punishment. This protection would apply to the employee of a public institution who releases classified information pursuant to an access to information request in the erroneous belief that its release would not harm a legitimate protected interest. So long as it is made clear that this protection extends only to the release of information in good faith and not to deliberate 'leaks' (unless protected under the whistleblower provision), such a provision will signal a commitment to openness and reinforces the point that in the exercise of their job, information officials should always err on the side of transparency.

Recommendations:

- The draft Law should protect the release of information in the public interest on any wrong-doing, not just violations of the Access to Information Law.
- The draft Law should protect employees who in good faith and in the performance of their duties erroneously release confidential information.