ARTICLE 19

Cambodia: Draft Law on Access to Information

October 2019

Legal analysis

Executive Summary

The right of persons to access information held by public bodies is ensured and protected by United Nations treaties and agreements as well as national constitutions and right to information laws adopted by more than 120 countries. The Government of Cambodia's commitment to adopt the Draft Law on Access to Information is a positive step in enabling the right in Cambodia. Once it is adopted and fully implemented, the law should enable Cambodians to more effectively obtain information from public institutions concerning the use of public funds, how decisions that affect their communities are being made, and other matters impacting their lives and wellbeing.

Unfortunately, the Draft Law has many unclear or undefined provisions and definitions that will undermine its effectiveness and that fall short of international standards. These include overbroad exemptions, its non-application to key public bodies including the judiciary and private organisations managing public funds, and unnecessary formalities concerning the system of requests. It also includes a number of provisions unrelated to its primary purpose that threaten free expression.

It is crucial that the Government amends the Draft Law prior to adoption in order to ensure compliance with international standards and to fully enable the right of information in Cambodia.

Recommendations:

There are numerous provisions within the Draft Law that should be revised. ARTICLE 19 recommends that the Government of Cambodia make the following changes to the draft law before its passage:

- *Amend Article 1 to state that the application of the Draft Law should prevail in the case of conflicts with other legislation or regulations restricting access to information.*
- *Include the presumption of full disclosure in the principles informing the implementation of the Law.*
- *Add references to international law instruments relevant to access to information such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the UN Convention Against Corruption.*
- *Revise Article 3 to specify that it applies to all information, no matter the format, in possession, custody or control of public institutions, not just "official documents".*
- *Delete the final sentence in Article 3 relating to confidential information.*
- *Amend Article 3 and 4 to clearly apply to all public bodies and bodies exercising public functions or private bodies operating with public funds.*
- *Strengthen the public interest test in Article 7 by giving examples of conditions in which the public interest test might weigh particularly strongly.*
- *Amend Article 11 to remove the requirement that the requester provide their gender, age, nationality and occupation to make a request.*
- *Remove requirements that requesters use a specified application form and that requests be filed by letter or email. In Article 11, only require that the request reasonably describe—rather than provide a "detailed description of"—the information that the requester wishes to obtain.*

- *Insert the three-part test as a general principle in Article 20 by specifying that requests will be refused only following application of the harm and public interest tests.*

- *Revise Article 20(6) to include a substantial harm test for decision-making processes, appointments processes and examinations.*

- *Delete Article 20.7 as a residual category in the exemption regime in relation to confidential information.*

- *Amend Article 24 to protect whistleblowers that release any information on wrongdoing, including the commission of criminal offences, failure to comply with a legal obligation, a miscarriage of justice, corruption or dishonesty, serious maladministration regarding a public body, or threats to public health and the environment.*

- *Remove Article 30 on criminal libel establishing imprisonment and/or a fine for whoever makes a lying denunciation to any public institutions or judicial authorities about an offence causing the investigation to become useless. Defamation provisions should not be introduced in the Draft Law as they would have a chilling effect on the right of individuals to make information requests.*

- *Revise Article 33 to limit the application of criminal penalties to those who provide access to confidential information causing damage to national security, reduce the penalty to make it proportionate, and include a serious harm test.*

- *Create an independent oversight body to review decisions of administrative bodies, and empower the body to issue binding orders to release information and to provide oversight on the implementation of the law.*

- *Include in Article 29 a reference to violence against requesters and apply the same penalties as to those who commit an act of violence against officers of public institutions or officers in charge of information.*

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About the ARTICLE 19 Transparency Programme

The ARTICLE 19 Transparency Programme advocates for the development of progressive standards on access to information at the international and regional levels, and their implementation in domestic legal systems. The Transparency Programme has produced a number of standard-setting publications, which outline international and comparative law and best practice in areas such as national security and privacy.

On the basis of these publications and ARTICLE 19's overall legal expertise, the Transparency Programme publishes a number of legal analyses each year, commenting on legislative proposals, as well as existing laws that affect the right to information. This analytical work frequently leads to substantial improvements in proposed or existing domestic legislation. All of our analyses are available online at https://www.article19.org/issue/access-to-information/.

If you would like to discuss this analysis further, please contact David Banisar, Head of Transparency of ARTICLE 19 at Banisar@article19.org or +44 207 324 2500.

I. Introduction

In this analysis, ARTICLE 19 reviews the most recent publicly available version of the Preliminary Draft of the Law on Access to Information of Cambodia (the Draft Law), dated 20 August 2019. The analysis examines both the contents of the Draft Law and its compliance with international standards on freedom of expression and information.

While ARTICLE 19 welcomes this initiative, the current text of the Draft Law presents some significant shortcomings in relation to international law standards on access to information and freedom of expression. In its current form, there has been some regression in comparison with former drafts and many problematic provisions remain, as described below.

II. The benefits of the right to information

The right to information gives individuals, groups, and companies the right to obtain information from public bodies while also obliging those public bodies to facilitate access to information through responses to requests and proactive publication. There is wide agreement that a properly implemented right to information regime provides benefits to the public and to government departments. Some of those benefits are:

Anti-corruption
Right to information is a key tool in anti-corruption initiatives, requiring documentation and justification of the awarding of contracts and financial transactions. The UN Convention Against Corruption and regional anti-corruption conventions in the Middle East, Europe, the Americas, and Africa all require governments to adopt laws to make information available to the public. The ADB / OECD Anti-Corruption Initiative for Asia and the Pacific calls for participating states (Cambodia joined in 2003) to "Ensure that the general public and the media have freedom to receive and impart public information and in particular information on corruption matters… though… [i]mplementation of measures providing for a meaningful public right of access to appropriate information."

Democratic participation and understanding
Members of the public are better able to participate in the democratic process when they have information about the activities and policies of their government. Public awareness of the reasons behind decisions can improve support and reduce misunderstandings and dissatisfaction. Individual members of parliament are also better able to conduct oversight when enjoying access to information.

Decision-making processes
Officials are more likely to make objective and justifiable decisions when it is known that the decisions will eventually be made public. Public confidence in government is improved if it is known that the decisions will be predictable and rational.

Internal sharing of information
Right to information can also improve the flow of information inside governments. Excessive secrecy discourages government bodies from sharing information and reduces their efficiency. Many jurisdictions have reported that enacting right to information laws has improved coordination and policy development.

Government records management
The adoption of right to information legislation has been found to improve the record keeping practices of public bodies. This is both due to revised record keeping systems which meet the new legal requirements of access and to perceptions that decisions are based on rational processes. Some governments have used the passage of right to information legislation as an opportunity to rewrite

manuals and other documents or keep more information on decisions. Many modern right to information laws such as Tunisia's 2016 Access to Information Act have also included provisions on better record keeping.

III. International law on the right of access to information

The right of access to information is well established in international law as a human right relating to freedom of expression as well as an important mechanism for achieving other rights and objectives, including combatting corruption and ensuring social and economic rights.

It is recognised under Article 19 of the Universal Declaration of Human Rights and Article 19 of the International Covenant on Civil and Political Rights (ICCPR) as an element of freedom of expression and the right to seek and receive information. The UN Human Rights Committee in General Comment 34, adopted in 2011, interpreted the scope and limits of the right to information, stating that Article 19 of the ICCPR ensures the right to access information held by public bodies. It requires that states proactively disseminate information in the public interest and ensure that access is "easy, prompt, effective and practical." The Comment also states that countries must enact "necessary procedures" such as legislation to give effect to the right to information. The Comment further stipulates that fees for access must be limited, responses to requests must be timely, authorities must provide explanations for withholding information, and states need to establish appeals mechanisms.[1]

The Human Rights Committee provided guidance on the right to information under Article 19 of the ICCPR in the case of *Toktakunov v Kyrgyzstan*,[2] reaffirming that exceptions to the right are limited to only those permitted under Article 19(3) and that information should be provided without requiring a direct interest or explanation.

The right to information has also been recognised in international law relating to social and economic rights. Under international conventions and agreements, the right to information is considered an enabling right, which facilitates people to better achieve other rights and to more effectively participate in public discussions on policy and government activities. In the Sustainable Development Goals, UN member states agreed to a specific target calling on states to "ensure public access to information".[3] The UN has also found the right to information an essential factor in ensuring the right to water,[4] the right to health,[5] and the right to education.[6] The right to information is also specifically protected in the Convention of the Rights of the Child and the Convention on the Rights of Persons with Disabilities.

The right to information has been also recognised as a key enabler in environmental protection. In the 1992 Rio Declaration, the world's leaders agreed in Principle 10 that:

[1] UN Human Rights Committee, General Comment No. 34 Article 19: Freedoms of opinion and expression, (2011) http://www.refworld.org/pdfid/4ed34b562.pdf.

[2] *Toktakunov v Kyrgystan*, Communication No. 1470/2006, 21 April 2011.

[3] Target 16.10. Also see Indicator 16.10.2 which measures the target: "Number of countries that adopt and implement constitutional, statutory and/or policy guarantees for public access to information."

[4] Committee on Economic, Social and Cultural Rights, General Comment No. 15: The Right to Water (2002).

[5] Committee on Economic, Social and Cultural Rights, General Comment No. 14 (2000): The Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights); Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Mission to Japan , A/HRC/23/41/Add.3, 31 July 2013; Committee on the Elimination of Discrimination against Women, General Recommendation No. 24: Article 12 of the Convention (Women and Health) (1999).

[6] Committee on Economic, Social and Cultural Rights, General Comment No. 13: The Right to Education (Article 13 of the Covenant) 1999.

> Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

The right to information is also found in international treaties and agreements relating to pollution[7] and climate change.[8]

There are also other important international treaties which require public access to information. Article 10 of the UN Convention Against Corruption (UNCAC) requires states to "take such measures as may be necessary to enhance transparency in its public administration" including:

> Adopting procedures or regulations allowing members of the general public to obtain, where appropriate, information on the organization, functioning and decision-making processes of its public administration and, with due regard for the protection of privacy and personal data, on decisions and legal acts that concern members of the public […]

Article 13 of UNCAC requires that states should "[ensure] that the public has effective access to information" and take measures for "[r]especting, promoting and protecting the freedom to seek, receive, publish and disseminate information concerning corruption". It also requires whistle-blower protections.

IV. Global and regional overview

At the national level, the first law on the right to information was adopted in Sweden in 1766. Over the past 20 years, there has been a significant growth in recognition of the right to information, with now over 120 countries around the world having adopted right to information laws or national regulations which set out legal rules on access to information held by government bodies.[9] Such regimes have been in place in a number of Asian countries for over a decade, including China, Japan, Korea, and Thailand. In the past decade, countries in Asia at various stages of political and economic development have also adopted laws, including Indonesia, the Philippines, Sri Lanka, Timor Leste, and Vietnam. A number of other countries, including Malaysia and Myanmar, are currently at various stages of considering proposals. In addition, non-legislative measures such as open data and e-government are increasingly making information proactively available to the public.[10]

[7] Stockholm Convention on Persistent Organic Pollutants; Minamata Convention on Mercury, 2014.

[8] United Nations Framework Convention on Climate Change, 1992.

[9] For a comprehensive list of countries, see ARTICLE 19, Open Development: Access to Information and the Sustainable Development Goals, July 2017, https://www.article19.org/resources/open-development-access-to-information-and-the-sustainable-development-goals/.

[10] See Stagars, Open Data in Southeast Asia: Towards Economic Prosperity, Government Transparency, and Citizen Participation in the ASEAN (Palgrave 2016).

V. Analysis of the Draft Law

1. General principles

Article 1 outlines the purpose of the Draft Law to ensure the public's freedom of access to information in accordance with the Constitution. While the reference to the Constitution is welcome, the provision should be further expanded.

Firstly, the Article does not specify that in cases of conflicts with any other legislative or regulatory provisions restricting access to information, the implementation of this Law should prevail. This is not consistent with the principle of the primacy of the right to information. As a law based on a constitutional provision, the Draft Law should have primacy over other non-constitutional laws when a conflict emerges between them.

Article 1 also fails to clarify that the Law as a whole must be applied in a way that prefers the right to access information to any other restrictive interpretation. The presumption of disclosure is a key principle in international human rights standards.

Lastly, in the latest version of Draft Law the references to Article 19 of the Universal Declaration of Human Rights have been removed. This is a serious step which weaknesses the new text and does not take into account Cambodia's international human rights obligations. Besides, it should also mention other international law provisions and legal instruments such as Article 19 of the International Covenant on Civil and Political Rights (ICCPR) and General Comment No. 34 on Freedom of Opinion and Expression.

Recommendations

- *Amend Article 1 to state that the application of the Draft Law should prevail in the case of a conflict with other legislation or regulations restricting access to information.*
- *Include the presumption of full disclosure in the principles informing the implementation of the Law.*
- *Add references to international law instruments relevant to access to information such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the UN Convention Against Corruption (UNCAC).*

2. Definition of information

In Article 3, the Draft Law states that it applies to "all pieces of information" held by national and subnational administrations, with the exception of confidential information.

Article 4 defines information as "all pieces and all formats of official documents under the possession of public institutions." The definition should be strengthened by referring to all information held by public bodies, not just official documents. In some circumstances, officials may use the pretence of documents not being official to limit access.

Article 3 should more explicitly state that the right to access to information applies to all information "in possession, custody or control of any public authority". Such a provision would be in line with the principle of maximum disclosure that is later stated in Article 6, and help ensure that all information held by public bodies is complete, timely and accessible.

Finally, the provision in Article 3 stating that the law does not apply to confidential information as set out in the law should be removed. This provision contradicts Chapter 4 which sets out rules on the release of information and Article 7 which states that confidential information can be disclosed when it is in the public interest. The law should apply to all information, with the recognition that some information may be exempt from release when it causes harm and does not meet the public interest test.

Recommendation

- *Article 3 should be revised to specify that it applies to all information, no matter the format, in possession, custody or control of public institutions, not just "official documents".*
- *The final sentence in Article 3 relating to confidential information should be deleted.*
- *Article 4 should be strengthened by referring to all information held by public bodies, not just official documents.*

3. Bodies covered by the Act

Article 3 states that the Draft Law applies to national and subnational administration bodies of the Kingdom of Cambodia. In Article 4, public institutions are defined as "ministries/institutions, or other entities performing public functions including national and subnational administrative, created by law or/and other regulations".

Under these provisions, the law appears to be limited to mainly administrative bodies and others created by law or regulations. It does not appear to include the judicial and legislative (national and subnational) branches or private bodies that perform public functions. Constitutional bodies are not explicitly included in the scope of application of the Draft.

According to international standards, the right to access to information shall apply to all public bodies and to private bodies using public funds. This provision too narrowly defines the bodies to which it applies.

Recommendations:

- *Amend Article 3 and 4 to clearly apply to all public bodies and bodies exercising public functions or private bodies operating with public funds.*

4. Request formalities

Articles 5 and 10 of the Draft Law states that the right of access applies to all natural and legal persons without any discrimination. It is positive that the draft makes clear that there may be no discrimination on any grounds. The principle of non-discrimination is further emphasized in Article 7. This means that public institutions shall facilitate access to information without regard to the ethnicity, gender, or social or economic status of the requester.

However, this principle is contradicted by Article 11 which lists a series of conditions that must be fulfilled to make a request, including that the requester must provide the following information:

- Name, sex, age, nationality, occupation
- Current address and/or electronic address (if any)

These formalities are inconsistent with international law and contradict the principle of non-discrimination. Gender, nationality, age and occupation are all unnecessary information to process a request if under Article 10 all persons are entitled to make a request and receive the information without favour or discrimination. A legal requirement that this information must be provided raises grave concerns that it will be used to limit access to disfavoured groups and persons, which would be in violation of numerous international conventions that Cambodia has signed and ratified. The requirement to indicate one's occupation also poses a serious threat to freedom of the press, as journalists will have to unveil their identity with worrying impacts for reporting in Cambodia.

The provision also demands the requester's "current address and/or electronic address (if any). While it is positive that requester is allowed to choose how he or she would like to receive the information, it is unnecessary in that case to indicate also his or her current address. Therefore, the word "and" should be deleted to make it consistent with international standards. The requester should indicate either his or her email address or the current address.

Further, Article 11(1) also requires that the requester provide a "list of detailed information to be requested". While in some circumstances, the requester may know the details of a specific document that they wish to obtain, in most cases, officials in the public body are the only persons aware of the details and format of information they hold that might be of interest to the requester. Thus the requester should only be required to reasonably describe the information that he or she wishes to obtain, as without insider knowledge or assistance, they may not be able to give a detailed description.

Finally, Article 15 requires that specified information be filled in an application form or the request can be rejected. This is a formality that contravenes best practices in making information requests, as indicating the required information in a letter or in an email should be sufficient. In any event, if public authorities ask requesters to fill a form, it should be simple and should not require only limited and necessary details from the requester.

Recommendations:

- *Amend Article 11 to remove the requirement that the requester provide his or her gender, age, nationality and occupation to make a request.*
- *Remove the requirement that requesters use a specified application form and grant the possibility to file a request by letter or email.*
- *Only require that the request reasonably describe the information that the requester wishes to obtain.*

5. Fees

There are multiple provisions in the Draft Law regarding charges that can be imposed on requesters. Article 19(2) states that "service fees charged for providing a copy of document in writing, sound, picture, or other forms shall be fixed by joint-Prakas between the Ministry of Economy and Finance and relevant Ministries/institutions. For documents submitted by post, the price should be depended." This is seemingly inconsistent with Article 7, which states that public institutions shall facilitate access to information by setting reasonable fees. Article 13 provides that when a positive response is given to the requester, the officer shall indicate the public service fees applicable for receiving the information. Finally, Article 19(1) clarifies that no fees are to be charged for providing information about how to request information nor for assistance in preparing an application.

The current formulation may lead to limits on the right of access though the imposition of excessive charges for making requests and receiving information. Furthermore, the Draft Law does not include

any provisions exempting impoverished requesters from paying fees, which in practice limits the right of access to information to those who can pay for it.

A better approach would be to clarify that there is no fee for making applications for information and fees may only be charged for copies and postage. It would follow that information delivered electronically should be provided free of charge.

Recommendations

- *Specify that no fee should be imposed for making requests and that charges should be limited to copies and postage.*
- *Specify that information supplied electronically will be provided free of charge.*
- *Exempt impoverished requesters from all fees. Exempt journalists from fees if information is needed for the exercise of the right to freedom of expression.*

6. Exceptions

Article 20 lists the circumstances under which public authorities can deny access to information. The provision lists six categories of exemptions: national defence and security matters, relations with foreign countries, national economy and finance, criminal and judicial processes, personal privacy, and internal confidential information.

According to international standards, exceptions to access to information are allowed but should be limited. The refusal to disclose information by a public authority must meet a strict three-part test:

- The information must relate to a legitimate aim listed in the law;
- Disclosure must threaten to cause substantial harm to the aim; and
- The harm to the aim must be greater than the public interest in having the information.

Moreover, non-disclosure of information must be justified on a case-by-case basis.

The Draft Law falls short with respect to all three parts of the test. The first, most problematic aspect, is that the provisions refer to confidential information that is generally defined in Article 4 as “the information that public institutions cannot disclose to the public”. This information is described as something absolute rather than something that should be assessed on a case-by-case basis. The current text generates confusion between the concept of “confidential information” and “exceptions”, and therefore is likely to undermine the purpose in Article 2(g) to “reduce the confidential information as much as possible”.

For most of the exemptions, the test for harm is set quite low and applies to broad categories of information. For instance, information that is “harmful” to the national security and defence matters can be withheld. Exceptions should be narrowly drawn so as to avoid including material which does not harm the legitimate interest.

Furthermore, refusals must meet a substantial harm test. It is not sufficient that the information simply falls within the scope of a legitimate aim listed in the law. The public body must also show that the disclosure of information would cause substantial harm to the legitimate aim. Article 20 of the Draft Law generally mentions “damage”. This is particularly relevant when, in some cases, disclosure may benefit as well as harm the aim. For instance, in national security and defence matters, the exposure

of corruption in the military may appear to weaken national defence but actually would help to disclose wrongful behaviours and help to unveil and eliminate corruption. In such case, the disclosure of information would strengthen the armed forces over time. This explains why is so crucial that the effect of disclosure must be a "substantial harm" to the aim.

Of particular concern is Article 20(6), which excludes from the scope of the law "information classified as confidential related to internal meetings of public institutions, process of appointments and examinations that are organized by the public institution". This is an absolute exemption with no harm test and is likely to be arbitrarily imposed by officials with little oversight.

This provision greatly undermines transparency as it contradicts the idea that in a democratic society everything that a public authority does is public activity and should be made available to the public. Therefore, internal meetings should not be absolutely exempted. In relation to the example mentioned, giving the public access to information about internal meetings could help combat high-level corruption within government. Therefore, the harm to the legitimate aim must be weighed against the public interest in having the information made public. When the latter is greater, the law should provide for disclosure of information.

Even if it can be shown that the disclosure of information would cause substantial harm to a legitimate aim, the information should still be disclosed if the benefits of disclosure outweigh the harm. The harm to a legitimate aim must be weighed against the public interest in having the information made public. When the latter is greater, the law should provide for disclosure of the requested information. In some cases, the information requested can be private in nature but can at the same time expose high-level corruption within the government.

Further, the latest draft now includes a catch-all exemption in Article 20 (7) which includes "Other confidential information as stipulated in the prohibition provisions". This is a very broad category that would allow the arbitrary inclusion of any information, no matter the harm or public interest, when the Information Officer examining the request is not willing to release the information.

Article 7 states that "in the case of public interest greater than the preservation of confidential information, as stipulated in the prohibition provisions, the confidential information must be provided to the public on request." However, there is no reference to the public interest test in Chapter 4 of the Draft Law.

The public interest and harm tests are standards against which the justification for an exemption to disclosure must be weighed to determine if it meets the requirements of proportionality and necessity. In applying these tests, it is necessary to adopt a restrictive interpretation of the exemption, as is mentioned in this chapter. The presumption of publicity thus requires that an exemption take the least restrictive form possible; that is: non-disclosure must be directly implicated by a particular exception, be proportionate to the public or private interest protected, and interfere to the least extent possible with the effective exercise of the right of access.

Recommendations

- *Insert the three-part test as general principle in Article 20 by specifying that requests will be refused only following application of the harm and public interest test.*
- *Strengthen the public interest test in Article 7 by giving examples of conditions in which the public interest test might weigh particularly strongly.*
- *Revise Article 20.6 to include a substantial harm test for decision-making process, appointments processes and examinations.*
- *Delete Article 20.7 as residual category in the exemption regime in relation to confidential information.*

7. Protection of whistleblowers

Article 24 provides that "No person shall be criminally, civilly and disciplinarily responsible for the denunciation of a felony or a misdemeanor they had known and/or during the performance of their function or duty made before the judicial authority or other competent authorities."

The provision falls short in protecting individuals who release information on wrongdoing from any legal, administrative or employment-related sanctions. The Draft Law should not limit protections to those exposing felonies and misdemeanors, but rather should protect those exposing all forms of "wrongdoing", including the failure to comply with a legal obligation, a miscarriage of justice, corruption or dishonesty, and serious maladministration regarding a public body, as well as more general issues such as threats to public health or the environment.

This limited but positive provision is undermined by Articles 32 and 33 which state that whoever is obliged to provide or hold confidential information and discloses or reveals it to incompetent persons is liable to imprisonment of up to 15 years and to a fine from 20 million riels. It is also undermined by Article 30 on lying denunciations.

Whistleblowers should benefit from protection as long as they acted under the reasonable belief that the information they provided was substantially true and included evidence of wrongdoing or threats to public health and the environment. Such protection should apply even where disclosure would otherwise be in breach of a legal or employment requirement. The provision should also include protection in the context of disclosure to any individuals, without limitation to any particular category, oversight body, or the media.

In relation to whistleblowers, the "public interest" test should be applied to situations where the benefits of disclosure outweigh the harm, or where an alternative means of realising the information is necessary to protect a key interest.

Furthermore, such provision should be reconciled and integrated with the Law on Anti-Corruption[11] that specifically lists in Article 13 the protection of whistle-blowers as one of the duties of Anti-corruption Unit that shall "take necessary measures to keep the corruption whistle blowers secure".

Recommendation

- *Amend Article 24 to protect whistleblowers that release any information on wrongdoing, including commission of criminal offences, failure to comply with a legal obligation, a miscarriage of justice, corruption or dishonesty, serious maladministration regarding a public body, and threats to the public health and the environment.*

8. Penalties for disclosure of classified information

Article 33 establishes that "[w]hoever is obliged to provide or hold information provides or facilitates access to confidential information from any foreign States or international agencies, causing damage to the national security and economy shall be liable to an imprisonment from seven years to fifteen

[11] Cambodia, Law on Anti-Corruption of 11 March 2010, available here http://www.cambodiainvestment.gov.kh/anti-corruption-law_100417.html.

years and to a fine from ten millions to twenty millions riels and shall be subject to be punishable by additional penalties."

This provision is highly concerning. According to international standards, states must only narrowly restrict access to information for national security reasons. It is not compatible with the right to access to information to suppress or withhold from the public information of legitimate public interest that does not harm national security or to prosecute journalists, researchers, environmental activists, human rights defenders, whistleblowers or other individuals for having disseminated such information.

In other words, the public interest and harm tests are standards against which the justification for an exemption to disclosure must be weighed in order to determine if it meets the requirements of proportionality and necessity. As noted above, in applying these tests, it is necessary to adopt a restrictive interpretation of the exemption. The non-disclosure must have a direct effect on the exercise of a particular exception, be proportionate to the public or private interest protected, and interfere to the least extent possible with the effective exercise of the right of access.

The provision too broadly refers to "causing damage to the national security" and does not include a serious harm test. Besides, the penalty of imprisonment from 7 to 15 years is disproportionate.

Furthermore, the definition of national security should be clearly set down in a law or case law that provides concrete elements for the determination of potential harm.

Recommendation

- *Revise Article 33 to narrow the possibility of applying penalties to those who provide access to confidential information causing damage to national security, make the penalty proportionate, and include a serious harm test.*

9. Appeals

Chapter 6 of the Draft Law provides a general outline of a system of appeals for requests for information. In Article 26, requesters can appeal decisions to the head of the institution and if at the sub-national level to the local ombudsman. Public institutions must respond within 15 days. Requesters can appeal the decisions of the head within 30 days to the capital or provincial courts. If the court rules for the requester, Article 27 requires officials to follow the time frames for response set out in Articles 14 and 15.

This system of appeals is quite limited and in stark comparison to those established by the laws of most other countries in the region, which have independent administrative bodies—often called "information commissions"—to review appeals. These commissions help ensure timely and inexpensive reviews of decisions for individuals and groups that are not able to afford taking cases to court.

Information commissions are also important bodies in ensuring the effective operation of a right to information law. They have a number of important functions: they oversee the implementation of the law, issue guidance to clarify provisions of the law, provide training for officials and users, and recommend changes to the law. Over 50 countries around the world including Bangladesh, India, Indonesia, Nepal, and Pakistan have created independent commissions, while another 30 countries give authority to an existing independent ombudsman or human rights commission. In Thailand, an independent commission is set up under the office of the Prime Minister. In only a handful of countries is the executive branch solely in charge of oversight.

Further, in many countries that have created a council form of commission, the right to information law requires people other than officials to be included. In Afghanistan, the Commission includes

representatives of the Bar Association, Lawyers Union, Professional Journalists Union, Chamber of Commerce, and two elected representatives from civil society.[12]

Recommendation:

- *Create an independent oversight body to review decisions of the administrative bodies, with the power to issue binding orders to release information and a mandate to provide oversight on the implementation of the law.*

10. Criminal libel

The law also contains a number of provisions which are not related to its core purpose on government transparency which raise serious concerns. Of primary concern is Article 30, which states that "whoever makes a lying denunciation to any public institutions or judicial authorities about an offence, causing the investigation to become useless, shall be liable to an imprisonment from one month to six months and/or to a fine from one hundred thousand riels to one million riels." This is a highly concerning provision that should be removed.

Access to information laws should promote open access to information held by public authorities. Such laws play a crucial role in promoting accurate reporting and in limiting publication of false and potentially defamatory statements in democratic societies.

It is quite unusual to have libel provisions in access to information laws as they aim to achieve different purposes, respectively to ensure the right to information and to protect the right of others, which is one of the grounds under which freedom of expression can be restricted. For this reason, such laws should be kept separate and the rights at stake properly balanced.

Further, according to international standards,[13] criminal defamation laws should be abolished without delay. They should be replaced, where necessary, with appropriate civil defamation laws. Besides, prison sentences, suspended prison sentences, any other form of deprivation of liberty, suspension of the right to express oneself through any particular form of media or to practise journalism or any other profession, excessive fines, and other harsh penalties should never be available as a sanction for breach of defamation laws, no matter how egregious or blatant the defamatory statement.

It should also be noted that such a provision would have a chilling effect on the exercise of the right to access to information as it would constitute a deterrent to making information requests to public institutions and bodies in Cambodia.

Recommendation

- *Remove Article 30 on criminal libel establishing imprisonment and/or a fine for whoever makes a lying denunciation to any public institutions or judicial authorities about an offence causing the investigation to become useless. No defamation provision should be introduced in the Draft Law, as it would have a chilling effect on the right of individual to make information requests.*

[12] Access to Information Act, §16.

[13] ARTICLE 19, Defining Defamation: Principles on Freedom of Expression and Protection of Reputation (2017) available here: https://www.article19.org/data/files/medialibrary/38641/Defamation-Principles-(online)-.pdf.

11. Protection of requesters

Article 29 states that in case there is an act of violence committed against officers of public institutions or officers in charge of information performing their duties shall constitute an offence punishable with the crime of “obstruction against the implementation of public works”.

Sanctions play an important role in right to information laws by deterring negative conduct that hinders the exercise of the right of access to information and cuts against the principles of openness and transparency.

While it is important to protect public officers who are key actors in the enforcement of the Draft Law, it is fundamental that the same level of protection is granted to requesters as well, who may receive threats from corrupt officials or private parties if they seek to reveal their activities.

By including requesters in protection provisions, the Draft Law would deter those who seek to obstruct the exercise of the right to access to information and would make requesters feel more protected, thus advancing the goals of the law and the right to information more broadly.

Recommendation

- *Include in Article 29 a reference to requesters and apply the same penalties as relate to acts of violence against officers of public institutions or officers in charge of information.*