



CENTRE FOR LAW  
AND DEMOCRACY

## *Afghanistan*

### **Comments on the draft Access to Information Law**

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## ***Introduction***

There have been discussions about adopting an access to information or right to information law for many years in Afghanistan.<sup>1</sup> Article 50 of the 2004 Constitution of Afghanistan includes a guarantee of the right of citizens to access information held by government, “in accordance with the provisions of law”. However, legislation to implement this right has not yet been adopted. Article 50 also provides that the right “has no limits, unless violation of the rights of the others”.

Recently, the government published a draft Access to Information Law (draft Law) for purposes of getting public feedback. These Comments present an analysis of the draft Law based on international standards regarding the right to information.<sup>2</sup> The analysis is based, in particular, on Article 19 of the *International Covenant on Civil and Political Rights* (ICCPR),<sup>3</sup> which guarantees the right to information.<sup>4</sup> The ICCPR is a legally binding treaty ratified by 167 States as of March 2013, including Afghanistan.<sup>5</sup>

### ***1. Right of Access and Scope***

Article 1 of the draft Law provides that it has been enacted to implement Article 50 of the Constitution, while Article 2, states as its aims, to ensure the right of citizens to access information held by government, to regulate the way information is requested and provided, to respect the ICCPR, and to ensure transparency and accountability in government. However, Article 5 introduces a very serious limitation to the scope of the right, providing that the right to access information held by public authorities applies only where the information shall “serve a right or bring ease to performing of the relevant duties”.

This limitation represents a significant breach of international standards regarding the right to information. These apply to *all* information held by public authorities, regardless of the benefits that may be considered to flow by making it public. This is consistent with the idea of the right to information as a human right, which should not be conditioned on what benefits it may be deemed to serve (just as the wider

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<sup>1</sup> The Centre for Law and Democracy provided an analysis of a draft of the Afghan Access to Information Law in November 2011. Available at: <http://www.law-democracy.org/live/comments-on-the-draft-afghan-access-to-information-law/>.

<sup>2</sup> The analysis is based on an unofficial translation of the draft Law. We apologise for any errors based on translation.

<sup>3</sup> UN General Assembly Resolution 2200A(XXI), adopted 16 December 1966, in force 23 March 1976.

<sup>4</sup> See, for example, the UN Human Rights Committee’s General Comment No. 34, 12 September 2011, CCPR/C/GC/34, para. 18.

<sup>5</sup> Afghanistan ratified the ICCPR on 24 January 1983.

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right to freedom of expression does not only protect expression which the authorities deem to be useful or beneficial). It is also inconsistent with the Constitution, which does not envisage limitations on the right except as needed to protect the rights of others.

There are also significant practical problems with this approach. In practice, it is officials who will, at least at the first instance, decide whether or not to release information. They may have very limited ideas about whether or not information which has been requested will serve to protect a right or improve government services, so that giving them this power is likely to present a serious barrier to access to information. Instead, they should only be tasked with assessing whether or not the information falls within the scope of the regime of exceptions.

Article 3(1) defines information, at least in translation, as “any records (documents) or data”. This could be read as being restricted to data and information held in a document (as opposed, for example, to information held in electronic forms, or on a video). A better approach is simply to define information as any recorded content, regardless of the form in which it is stored.

Article 3(6) defines public authorities (‘organizations’) as including ministries, “independent directorates and commissions”, local administrations, the judiciary, various levels of elected bodies and their meetings, including national, provincial, district and community, as well as the enterprises, companies and public-private partnerships of these bodies, and “other government institutions”. This is broad, but it might not be deemed to include certain bodies that are created by law to pursue public functions, private bodies that undertake public functions or bodies that are controlled or substantially funded by public bodies.

Article 3(3) defines a requester as a local, natural or legal person, which is consistent with the Constitution and Article 2, both of which are also limited in scope to citizens. Under international law, however, the right to information applies to everyone, not just citizens, consistent with its status as a human right. Better practice national laws extend the right to everyone. There is no reason why the access to information law should not go beyond the scope of the Constitution, and give everyone a right to request information.

### **Recommendations:**

- Article 5 should be amended to give requesters a right to access all information held by public authorities, subject only to the regime of exceptions.
- Article 3(1) should be amended, as necessary, to make it clear that it covers

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- all forms of recorded information.
- Consideration should be given to amending Article 3(6) to make it clear that it applies to all bodies that are created by law, to private bodies that undertake public functions and to bodies that are controlled or substantially funded by public bodies.
  - Consideration should be given to allowing everyone to benefit from the right to information, not just citizens.

## **2. Proactive Disclosure**

The main provision in the draft Law on proactive disclosure is Article 15, which includes a list of ten categories of information which public authorities are required to publish at least once per year. This is a good list. However, it could be further strengthened by adding a requirement to publish the following items:

- Detailed financial information including the budget of the authority, budgets of its main projects and programmes, its audited accounts and financial reports, and reports on any disbursements of funds or benefits to individuals or companies.
- A list of the types of information it holds.
- More detailed information about the activities it has undertaken in the past year to implement the law (in addition to a summary of requests); indeed, this could be required to be a separate report (see Section 7, Promotional Measures).

### **Recommendation:**

- Consideration should be given to expanding the list of types of information subject to proactive disclosure in line with the analysis above.

## **3. Procedures for Making Requests**

The draft Law includes detailed procedures for making requests. Article 6 provides that requesters should use the Information Request Form (contained at the end of the law) and address it to the “appropriate unit” of the public authority, presumably the information office which each public authority is required to create pursuant to Article 11. The form requires requesters to provide their names, designation and location, local identity or passport number, address, phone number, email, a description of the information sought and a timeline for responding. The form also

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includes spaces for responding to requests by public authorities (including, for example, space for reasons for refusals, payment instructions and so on).

The form does not require requesters to provide reasons for their requests, but better practice is for the law to provide explicitly that they should not be asked for such reasons. It is also unnecessary to require requesters to provide all of the information listed in the form. As noted, it would be better if everyone, and not just citizens, were allowed to make requests. In any case, there is no need to require requesters to provide an address, phone number and email (unless they wish to). The information on the form should be limited to what is strictly required to process requests.

It is not clear from the form how it may be submitted. It should be clear that this may be done in person, by mail or fax or, where the public authority has the capacity, by email.

Article 12 provides that the information office shall explain the request form to the requester, while Article 13 gives the information office the power to reject a request where the form is not submitted in conformity with the law. It should be clear that the information office shall provide such reasonable assistance to requesters as may be needed to ensure that the form is filled in properly. To this end, it should be clear in Article 13 that a request may not be rejected for an improperly completed form until after assistance has been offered. The information office should also be required to provide reasonable assistance to illiterate or disabled requesters to help them complete the form.

Article 6(2) provides that public authorities shall respond to requests in writing and the form does include a place for indicating the date of receipt and the signature of the receiving officer. It is not, however, clear whether or not requesters are to be provided with a receipt upon lodging a request. This is important, for example to show that the request was indeed submitted when public authorities fail to respond.

The draft Law does not include any provisions on how to deal with a request where the public authority does not hold the information. Better practice is to require the public authority to transfer the request to another public authority which holds the information or, if it does not know of such other public authority, to inform the requester of this.

Article 9 sets out various forms for delivery of the information, including a copy, taking notes and obtaining the information in audio or visual format. It also provides that the information shall be delivered in one of these formats unless this would harm the original record. It is not clear from this that public authorities are required to provide the information in the form indicated by the requester (it seems from

these provisions that the form of provision of the information is up to the public authority).

Article 7 provides that public authorities shall make information available in no more than 15 working days, which may be extended by another three working days if “reasonable excuses exist”. For media outlets, the information should be provided within 48 hours. It should be clear that information should in all cases be provided as soon as possible, and that these time limits are just maximums. It would be preferable to set out the reasons that may justify an extension of the time limit, such as that the request requires the information office to search through a number of documents to find the information or to consult with others. On the other hand, it might be reasonable to allow for a slightly longer extension, for example of up to ten days. It is also not clear whether it is realistic to answer all requests for information from the media within 48 hours.

Article 8 provides that requesters shall cover the expenses of processing their requests, while the amount of this shall be set out separately in regulations prepared by “the concerned organizations” and approved by the oversight body (the commission). Article 31 provides that the Ministry of Information and Culture shall provide the form for making requests for no more than AFN 100 (approximately USD 2). Better practice is to make such forms available for free and to make it clear in the law that it is free to file a request for information. Article 8 is also vague inasmuch as it is not clear what expenses may be charged to requesters. Although this might be clarified in the regulations, better practice is to make it clear from the law that this can only cover the costs of duplicating the information (i.e. photocopying) and sending it to the requester (i.e. postage fees). Rather than having each public authority set its own fees, it would be preferable to have this provided for centrally, for example in a schedule of fees developed by the commission. Finally, poor requesters should benefit from fee waivers.

#### **Recommendations:**

- The law should state that requesters may not be asked for reasons for their requests.
- Consideration should be given to limiting the information that must be provided on the form to a description of the information and an address for providing the information (which may only be an email).
- The law should make it clear that requests may be submitted in various different ways, including in person, by mail, by fax and, where possible, by email.
- The information office should not be able to reject a request for problems with the form until after assistance has been offered. It should also be

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- required to provide assistance to disabled and illiterate requesters.
- Public authorities should be required to provide requesters with a receipt upon lodging a request.
- The law should include a provision on transfer of requests, as well as notice of this to the requester.
- It should be clear from Article 9 that requesters have the right to access the information in the form they wish, unless this would harm the original record. To facilitate this, the form for making requests should include a space for indicating how requesters would like to receive the information.
- Article 7 should require public authorities to provide information as soon as possible, and make it clear that the time limits listed are maximum periods.
- Consideration should be given to listing in the law the reasons which may justify an extension of the time limit, but then allowing this to be up to ten days instead of just three. Consideration should also be given to whether it is realistic to respond to all requests from the media in just 48 hours.
- The law should make it clear that it is free to make requests for information, and this should include the provision of the form for making requests for free.
- Public authorities should only be able to charge for the costs of duplicating the information and sending it to the requester, and a central schedule of fees should be developed for this, for example as developed by the commission. This should include fee waivers for poor requesters.

#### **4. Exceptions**

Article 32 of the draft Law provides generally that in case of conflict with other laws, the access to information law shall prevail. This is useful, but experience in other countries demonstrates that this is often not sufficient and that a specific override provision in relation to the exceptions is useful.

The main provision on exceptions is Article 17. This includes a number of legitimate exceptions, as well as exceptions to exceptions which further limit their scope. However, it also includes the following problematical exceptions:

- Article 17(1)(a): violates the human rights of citizens. While this seems legitimate, in fact it is too broad, keeping in mind that we are referring here only to accessing information held by public authorities. Better practice right to information laws only have an exception to protect privacy, which the draft Law already does, and do not recognise other human rights as potentially justifying a refusal to provide information.
- Article 17(1)(b): threat to the prestige or dignity of a person. Like the previous exception, this is not necessary. If public authorities hold false

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- information about individuals, this should be exposed, not hidden. If the information is true, it should also be made available.
- Article 17(1)(i): information which involves an impartial third party. It is not clear what this refers to, but other exceptions protect the privacy and commercial interests of third parties, so that should be enough.
  - Article 17(1)(j): confidential business secrets. It should be made clear that this refers only to cases where disclosure of the information would cause harm to the legitimate commercial interests of a third party, and not all cases where the third party claims the information is confidential or a business secret.

Article 14 is also relevant to this last point, because it deals with consulting third parties where requests for information about them are made. Article 14(2) states that in such cases the third party shall “take a decision within” seven days, failing which the information office shall release the information. While this is generally welcome, it should be clear that third parties only have the right to raise objections to the disclosure of information, and not to decide whether or not information shall be disclosed. The latter should always be done in the first instance by the public authority, on the basis of an objective assessment of whether the harms listed in Article 17 would result from the disclosure.

The draft Law does not include a public interest override, providing for the release of information when the overall public interest is still served by disclosure, even where this would result in harm to an interest protected by Article 17. This is very important, for example to avoid situations where minor risks to privacy or security from preventing the disclosure of information revealing evidence of corruption or other wrongdoing, or harm to the environment.

Better practice is also to include an overall time limit beyond which exceptions do not apply, for example of twenty years. In very exceptional cases, this time limit may be extended, but this should require a special procedure, for example the agreement of the commission.

In many cases, only part of the information contained in a document will be exempt. The law should still require public authorities to release the rest of the information after severing the exempt information from the document (severability).

Article 13 requires the information office, when refusing a request, to provide written notice of the reasons for this. Better practice is also to require public authorities to inform requesters about their right to lodge an appeal against the refusal.



### Recommendations:

- The access to information law should provide specifically that in case of a conflict between secrecy provisions on other laws and its regime of exceptions, the latter shall prevail.
- Articles 17(1)(a) and (i) should be removed, and the references to prestige and dignity should be removed from Article 17(1)(b). Article 17(1)(j) should be limited to cases where disclosure of the information would harm the legitimate commercial interests of the third party.
- It should be clear in Articles 14 and 17(1)(j) that third parties do not have the power to veto the release of information, but simply the right to raise objections to its release, which shall then be taken into account by the public authority when deciding whether or not information falls within the scope of the regime of exceptions.
- A public interest override should be added to the law.
- An overall time limit, for example of twenty years, beyond which exceptions no longer apply should be added to the law, along with a procedure for extending this in highly exceptional cases.
- A severability clause should be added to the law.
- Article 13 should be amended to require public authorities to inform requesters about their right to appeal against any refusals to provide information.

## 5. Oversight and Appeals

Articles 12(2) and (3) provide for requesters to lodge internal complaints with the information office when they are “not satisfied with the information provided”. This is useful but could be improved by: 1) making it clear that they may complain about any breach of the rules relating to the provision of information (for example, delays and fees, as well as the information provided); 2) including a clear timeframe, for example of ten days, for processing internal complaints; and 3) providing for complaints to go not to the information office, which would already have dealt with the original request, but to a higher authority within the public authority, such as the head of the authority.

Article 18 establishes the Access to Information Oversight Commission (or commission), with nine members, including representatives of the Ministries of Information and Culture, Foreign Affairs, Communications and Information Technology, the Afghanistan Independent Human Rights Commission, the National Department of Security, civil society (two) and journalists’ unions (two). Provincial commissions are also envisaged. Members must be Afghan citizens of at least 35

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years with at least a bachelor's degree and five years of experience, and must not be members of political parties or convicted of various offences (Article 19).

Tenure is for three years, and individuals may be reappointed once. Membership may be terminated through resignation, loss of employment (presumably for members representing the various official bodies), loss of health, having provided false information about their qualifications, or absence from four consecutive meetings without cause (Articles 18 and 20).

Commissioners appoint a chair and vice-chair from among themselves for one year, renewable, and the commission regulates its own procedures (Article 19). Article 22 provides rules for the conduct of meetings of the commission, while Article 24 provides for conflict of interest rules and requirements of secrecy for members in respect of information obtained while in office. Article 26 stipulates that the administrative affairs of the commission will be provided by the Ministry of Information and Culture, and that members shall be paid allowances as proposed by the same ministry and approved by the President.

Overall, this is a robust system for oversight. It would be preferable, however, if the members of the commission were all independent of government, given that an important role of this body will be to review decisions of government (i.e. decisions to refuse to disclose information). Under international law, such commissions should be independent of government. They are not supposed to be representative bodies but oversight bodies, analogous to the courts, which also argues against government representatives. Along the same lines, while it is positive to exclude members of political parties from being appointed, it would also be useful to exclude officials and elected representatives.

The rules on tenure are also robust, but it would be useful to set out clearly the procedures for removing members. One option would be to provide for mandatory removal only upon a two-thirds vote of the other commissioners, based on one of the grounds set out in Article 20.

The independence of the commission is seriously undermined by the fact that its administration is undertaken by the Ministry of Information and Culture. Instead, the commission should be given its own budget, preferably as approved directly by parliament, and it should have the power to hire its own staff, including the director. In a related vein, it would be preferable if the benefits accruing to members were linked to those of other officials (for example judges), rather than being set by the Ministry of Information and Culture and the President.

Pursuant to Article 27, requesters may file complaints with the commission, and the commission shall decide such complaints within ten working days. The detailed

procedures for this shall be set by a decision of the commission. Article 21 sets out the duties of the commission, which include processing complaints, getting information from information offices, and monitoring implementation of the law, among other things. Article 25 stipulates that the decisions of the commission shall be binding and final.

It is not entirely clear from these provisions that public authorities are required to provide information to the commission when the latter requests it, or that the commission has the power to investigate complaints properly, including by requiring witnesses to appear and by inspecting the premises of public authorities.

It is positive that the decisions of the commission are binding, but the law should set out clearly the scope of the powers of the commission in terms of making decisions, including that it may order public authorities to release information to requesters and to put in place structural measures to improve their processing of requests, such as training programmes or better information management systems.

The law should also make it clear that requesters may lodge a complaint for any failure to apply the law, not just for refusals to provide information, that lodging such a complaint is free and does not require legal assistance and that in deciding on complaints, the public authority bears the burden of proving that it acted in compliance with the law, given that this is a human right.

#### **Recommendations:**

- Internal complaints should not go to the information office but to a higher authority within the public authority, they should be allowed for any breach of the rules regarding the processing of requests and they should be required to be dealt with within a set period of time, for example ten days.
- The membership of the commission should be amended so as to exclude government representatives.
- Consideration should be given to excluding officials and elected representatives from being appointed to the commission.
- A clear procedure for the mandatory removal of members of the commission should be included in the law.
- The administration of the commission should not be done by the Ministry of Information and Culture; instead, the commission should have its own budget and power to hire its own independent staff, preferably with the budget being set by parliament.
- Consideration should be given to linking the benefits of commissioners to those of existing official positions, such as judges.
- The law should grant clear powers to the commission, including to require

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witnesses to appear and information to be provided, and to inspect the premises of public authorities.

- The law should set out clearly the powers of the commission, including to order the disclosure of information and to order public authorities to take various measures to improve the way they process requests.
- The scope of permissible complaints should be broad, and include any failure to apply the law.
- Complaints should be free and not require legal assistance.
- Public authorities should bear the burden of proof in complaints before the commission.

## **6. Sanctions and Protections**

Article 28 of the draft Law sets out various violations of its provisions, including providing information contrary to what is indicated on the request form, refusing to provide information without reasonable justification, providing false information to the commission, failing to provide information within the stipulated time limits, failing to respect the decisions of the commission, and failing to report to the commission. Breach of these rules can lead to the provision of advice, a warning or a salary cut. This is useful but it would be helpful to include a general clause punishing any wilful obstruction of access to information.

The draft Law does not provide for protection for officials or members of the commission who release information in good faith pursuant to the law. This is important to give officials the confidence to release information, taking into account that they have spent their whole working lives prior to the enactment of this law operating largely in secret. Instead, Article 29 creates an offence of providing information protected by Article 17, along with heavy fines of up to AFN300,000 (approximately USD6,000) for breach. This is unnecessary, given that other Afghan laws already provide for punishment for this (indeed, Article 29(2) specifically refers to the Penal Code). It is also unfortunate inasmuch as it will send a clear signal to officials that while obstructing access may only lead to warnings and vague references to salary cuts, giving out information may lead to large and very specific fines.

The draft Law does not provide protection to whistleblowers, individuals who, in good faith, release information about wrongdoing. This is an important information safety valve, helping to ensure that information of public interest reaches the wider public.

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### Recommendations:

- A general clause providing for punishment for any wilful obstruction of access to information should be added to the law.
- The law should provide protection to officials who release information pursuant to the law in good faith.
- Article 29, providing for fines for releasing information contrary to Article 17, should be removed.
- Consideration should be given to providing protection to whistleblowers in the law.

## 7. Promotional Measures

Article 11 provides for the appointment of information offices by public authorities, to facilitate the making of requests for information. As noted above, public authorities are required to publish information about requests and how they have been responded to (Article 15), while information offices are required to report to the commission on a monthly basis (and provincial commissions are required to report to the central commission on a quarterly basis) (Article 23). Article 21 sets out various promotional roles for the commission, including giving advice to requesters, evaluating the reports of information offices, conducting training and providing an annual report on its activities to the President and National Assembly. Pursuant to Article 15, public authorities are required to “develop databases to make sure records and information are maintained”, so as to facilitate access by requesters.

This is a strong package of promotional measures. It is also important to make sure that awareness raising efforts are aimed at the public, so that they learn about, and then use, their right to information. To enhance the system for record management in Article 15, it would be useful to give a central body, such as the commission, the power to set mandatory minimum standards for record keeping. These standards could then be improved over time, as the capacity of public authorities to manage their records increases.

The system of reporting could also be reviewed. It is probably unrealistic to expect information offices to provide monthly reports to the commission. A better approach might be to require them to present a complete annual report to the commission, setting out all of the activities they have undertaken to implement the law, including detailed information about the requests they have received and how they have processed them. The commission could then be given the task of presenting an annual report to the President and National Assembly describing not

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only its own activities but also presenting a national overview of the state of implementation of the law.

#### **Recommendations:**

- The commission should have a mandate to undertake public awareness raising efforts.
- The commission, or some other central body, should have the power to set mandatory minimum record management standards for all public authorities.
- Consideration should be given to reforming the rules on reporting so that every public authority is required to present an annual report to the commission on what it has done to implement the law, and then the commission is required to present a consolidated annual report to the President and National Assembly on the overall status of implementation.