CENTRE FOR LAW AND DEMOCRACY

Sierra Leone

Comments on the Right to Access Information Bill

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1. Introduction

Efforts to prepare a right to information law giving individuals access to information held by public authorities have been ongoing for quite some time in Sierra Leone. Civil society groups have been working on a draft, while government has also produced its own draft. Towards the end of March 2010, a harmonised draft was developed, integrating elements of both the government and civil society versions. These Comments relate to the integrated draft Right to Access Information Bill (draft Bill), as provided to the Centre for Law and Democracy (CLD) on 29 March 2010.

Overall the draft provides a very solid framework for implementing the right to information. It establishes a wide presumption in favour of access, it has procedural mechanisms which should facilitate requests for information, it requires public authorities to publish a lot of information proactively, the exceptions are mostly clear and narrow and it establishes an independent oversight body to hear appeals against refusals of access and to undertake wider promotional activities.

The purpose of these Comments is to help ensure that the draft Bill is well constructed as a piece of legislation and also that it takes into account fully international standards and better practice in other States. The specific points made are mostly a matter of fine-tuning, although a few do also address more important concerns.

2. Comments

Right to information laws normally address seven main issues: the scope of the guarantee of the right; rules on proactive disclosure of information; provisions on the processing of requests; the regime of exceptions; appeals, including the oversight body; sanctions and protections; and promotional measures. These Comments are organised in accordance with these main issues.

An initial comment is that the draft Bill is inconsistent regarding where the main obligations and responsibilities for its implementation lie. In some cases, the obligation is on the public authority (see, for example, section 11 on notice where a request is refused), in some cases on a public official (see section 5 on transfer of requests), in some cases on the public information officer (see section 3(4) on reducing oral requests to writing) and in some cases on both the public authority and a public official (see sections 7 and 4, respectively, on timelines for responding to requests).

The draft Bill includes internal provisions on the responsibilities of public information officers and other officials (see, for example, section 26, on the appointment of public information officials). It is submitted that it makes more sense, in terms both of where the onus naturally lies and of giving effect to the right to information, to place most obligations directly on public authorities, rather than on specific individuals. If this

approach is taken, it is probably not necessary to include extensive and potentially contradictory definitions of both 'official' and 'public servant' as is currently the case in section 1.

Recommendations:

- The primary obligations spelt out in the right to information law should apply directly to public authorities, rather than to public officials or public information officers.
- Public officials or public information officers should, however, be allocated responsibilities regarding implementation of the law

2.1 Scope of the Guarantee of the Right

The scope of the right established in section 1 of the draft Bill is commendably broad in terms of information and authorities covered. The definition of information is, however, extremely detailed. Although the items listed are not exclusive (as evidenced by the term 'including' before the list), its length may give some officials the impression that it is exclusive. The length also makes it a bit confusing for lay readers.

The definition of a private body in section 1 as "any entity that is not a public authority" is too broad. This would potentially cover even individuals and certainly a very wide range of other bodies that could be considered to be 'entities', such as clubs, unincorporated associations and so on. Only the South African Promotion of Access to Information Act,[1] from among the many right to information acts adopted globally, gives a right of access to information held by private bodies, and it is restricted to natural persons or partnerships which carry on any trade, business or profession, or former or existing juristic persons.

Section 1 of the draft Bill contains definitions of information, records and public records. The latter only appears once in the law.

Recommendations:

- Consideration should be given to reducing the list of types of information covered by the law and just listing some main categories.
- The definition of a private body should be limited to bodies which carry on some form of business.
- The definition of 'public record' should be removed from the law and the reference to it replaced with one to a record.

[1] Act No. 2, 2000.

2.2 Proactive Disclosure

Overall, the proactive disclosure provisions in the draft Bill are extensive and far-reaching. However, they are also overlapping and repetitive. Specifically, section 9(1) provides a long list of categories of information that must be published proactively, which is largely repeated in section 25(3) (perhaps this was an unwanted outcome of the merging of the two drafts).

The draft Bill also refers to the power of the Commissioner to develop a publication scheme, but it does not integrate this idea into the wider system for proactive publication. One of the benefits of using a publication scheme system is that it allows proactive publication obligations to be levered up over time. Public authorities in most countries would have great difficulty meeting the section 9 obligations immediately and would need a period of years to reach the level of sophistication this requires. A publication scheme approach effectively allows the Commissioner to approve a plan to reach full disclosure of all of these types of documents, but over a period of time. This preserves the importance of proactive disclosure, and yet gives public authorities a realistic means of achieving this.

To do this, a system of linking proactive publications to publications schemes, for which approval may be time limited or withdrawn, is needed. The idea is that, over time, the extent of the proactive publication obligation will be increased. This may then be linked to the list by requiring all public authorities to meet these standards within a certain period of time.

Recommendations:

- The lists of information subject to proactive disclosure found at sections 9(1) and 25(3) should be integrated.
- The system for publication schemes should be reconsidered with a view to using them to give public authorities more time to reach the full package of proactive publication obligations, as described above.

2.3 Processing of Requests

The provisions in the draft Bill on processing of requests are comprehensive and provide a good framework for facilitating requests. At the same time, there are a number of provisions that could still be further improved, and a few that overlap.

Section 3(1) requires requesters to provide their name on a request. Although this is common in right to information laws, better practice would be to allow for anonymous requests, as long as an address (for example in the form of an email) is provided to deliver the information.

At least three provisions require assistance to be provided to requesters: section 3(6) (from the public information officer); section 23 (from the public authority); and section

26(3) (again from the public information officer). The primary responsibility regarding the provision of assistance should lie with the public authority, while this could be listed as one of the specific duties of the public information officer.

Pursuant to section 5(1), public authorities may transfer requests whenever requested information is held by another public authority. Ideally, this should only be allowed when the authority with which the request has been filed does not hold the information. At a minimum, transfers should only be allowed when either the original authority does not hold the information or the information is more closely connected with the work of another authority. Neither of these conditions are present in current section 5(1).

The draft Bill contains two, conflicting, provisions on timelines, namely sections 4 and 7. According to the former, requests must be responded to within 15 days, or 48 hours where the information concerns the life or liberty of a person, while the latter provides for timelines, respectively, of seven days and 24 hours. While short timelines are good, if they are too short, public authorities will constantly find themselves in breach of the law and, over time, this will undermine the quality of the law. It is suggested that the timelines in section 4 are more realistic for a country like Sierra Leone.

Section 6 sets out the rules on fees. It does not, however, specify what charges may be levied in the absence of ministerial regulations on this. It is suggested that only reasonable, cost-based fees for reproducing and sending information should be allowed. Section 6(4) also recognises the possibility of fee waivers but omits to list the circumstances in which they should apply. In many countries, impecunious requesters do not have to pay for their requests, while in some countries fees are waived for requests in the public interest.

Three provisions in the draft Bill address the question of form in which access may be granted, namely section 1, under the definition of 'access to information', section 2(1), which provides for access in various forms, and section 8(1), which also lists various forms of access. These different provisions include different forms of access (for example, some recognise a right to take samples of materials, while others do not).

Section 8 is the most detailed, and also recognises that provision in the form requested may not always be possible. But it requires provision in the preferred form only where this is "reasonably practical". Although some guidance is given as to the meaning of this term, it is still extremely vague and could be abused. It is suggested that more detail be provided as to the circumstances in which a preferred form may be rejected, such as harm to the record or the unreasonable diversion of the resources of the public authority.

Recommendations:

- Consideration should be given to allowing for anonymous requests.
- The provisions on assistance should be rationalised and the primary responsibility to provide such assistance should be on the public authority.
- A request should be transferred only when the public authority to which it was

originally directed does not hold the information.
- The timelines for responding to requests should be rationalised. Consideration should be given to using the longer timelines provided for in section 4.
- Public authorities should only be allowed to charge requesters reasonable, cost-based fees for reproducing and sending information.
- Consideration should be given to building into the law fee waivers for impecunious requesters and for requests in the public interest.
- The various provisions on form of access should be rationalised and the grounds for refusing a preferred form of access should be elaborated more clearly and narrowly in the law.

2.4 The Regime of Exceptions

The regime of exceptions is often the most difficult part of a right to information law to prepare, in part because of the need to strike an appropriate balance between protecting all legitimate confidentiality interests and ensuing that exceptions are narrowly drafted so as not to undermine the right of access. The exceptions in the draft Bill are overly broad in some areas, and also too narrow in others.

Systemically, many of the exceptions in sections 12-21 are based on a harm test that states that public authorities are exempted from applying section 2 (which provides for the right of access) when this is "required for the purpose of protecting, or is likely to prejudice" the protected interest (such as national security, relations with other States or economic interests). It may be noted that this is somewhat contradictory, since exemption from section 2 is either required to protect an interest or the absence of such an exemption would prejudice that interest. Also, this formulation does not clearly link the test to the specific information being requested. It is submitted that a better formulation would be to provide for an exception from the section 2 obligation where "to disclose the information would, or would be likely, to cause serious harm to" the interest. This is clear and simple.

The public interest test is also problematical and applies only where the public interest in accessing the information "grossly outweighs" the harm to the protected interest (section 10(2)). The vast majority of public interest overrides in other right to information laws simply require the public interest in the information to override the harm caused by disclosure.

Section 1 defines a historical record as one which becomes available after thirty years, but the draft Bill does not actually establish a system for the disclosure of historical records. This is an unfortunate lacunae, since such rules are an important part of most disclosure systems. Furthermore, thirty years is a very long time period for historical disclosure.

In terms of specific exceptions, section 13 protects national security and defence, as well as the "capability or effectiveness of the security forces". Most right to information laws just protect defence and security. The problem with going beyond this to protect the security forces directly is that it is likely to give the wrong impression that these bodies should themselves benefit from protection. Instead, it is the underlying interest they are supposed to serve, namely security, that warrants protection. It might be, for example, that the disclosure of certain information would expose corruption in the forces, while at the same time undermining, at least in the short run, their capacity. But security would be enhanced by providing that information, since only in this way would the corruption, which is harmful to security, could be addressed.

Section 14 protects relations with other States, but not intergovernmental organisations. Both are commonly referred to in other right to information laws.

Section 15 protects the economical or financial interests of Sierra Leone. Similar provisions in other laws have been used to refuse access to information highlights corruption or environmental problems – on the basis that this would undermine investment or tourism – which is clearly illegitimate. A preferable formulation would be to protect only the ability of the government to manage the economy, a protection found in many right to information laws.

Section 16 protects the determination of whether someone should be charged with an offence and whether, once charged, that person is guilty. This is rather narrow. Other right to information laws protect such things as the prevention and detection of crime, the apprehension and prosecution of offenders, and even the overall administration of justice.

Section 17 provides protection for the "privileges of Parliament". This is an exception that is found in very few, if any, other right to information laws. Inasmuch as other countries without this exception have not experienced problems of difficulties, it does not seem to be necessary.

Sections 18 and 21 apply to information provided by a third party which would constitute a breach of confidence or harm the commercial interests of that third party or of "any other person". In most right to information laws, only the interests of the party providing the information are protected. Otherwise, the provision would allow anyone to attempt to keep information secret, even though they had not provided it in the first place.

Section 1 provides a very long list of types of information deemed to be private. The problem with lists of this sort is that they are both over- and under-inclusive. They are over inclusive because in many cases information falling into the categories they list will not be private in any meaningful sense. Thus, in many contexts, gender, race, marital status and so on will be obvious, even if in some situations this may be private information. And they are under inclusive because it is not possible to describe in detail every type of private information.

Section 20(3) provides a long list of cases where the privacy exception will not apply. While mostly positive, some of these go too far. Section 20(3)(d) applies when the information will not cause harm to anyone's reputation. But reputational and privacy interests are different and even true (i.e. not defamatory) information may well represent an invasion of privacy. Section 20(3)(f) applies whenever the information does not fall into the scope of another exception. This would completely void the privacy exception of any meaning.

Recommendations:

- The standard test for applying exceptions should be amended so that exceptions apply where to disclose the information would, or would be likely, to cause serious harm to a protected interest.
- The public interest test should be amended to apply whenever, on balance, the overall interest is served by disclosure.
- A system for historical disclosure of information should be built into the law and consideration should be given to stipulating a timeframe for this of less than thirty years.
- Security bodies should not be directly protected by an exception (over and beyond protecting national security and defence).
- Consideration should be given to adding protection for relations with intergovernmental organisations.
- Consideration should be given to narrowing the exception in favour of the economical or financial interests of Sierra Leone to protect only the ability of the government to manage the economy.
- Consideration should be given to providing for wider protection for law enforcement.
- The exception in favour of the privileges of Parliament should be removed.
- The protection for commercial interests should apply only where harm would result to the party which provided the information.
- Instead of providing a long list of categories of private information, a general definition should be used which may then be applied on a case-by-case basis taking into account all of the circumstances.
- The exceptions to the privacy exception for information which does not harm reputation and for information which does not fall within the scope of another exception should be removed.

2.5 Appeals

The provisions on appeals, including as to the establishment of the Information Commissioner and his or her office, are a very strong part of the draft Bill. There is a minor overlap inasmuch as sections 28 and 41 both list the various powers of the Commissioner.

Recommendation:

- Sections 28 and 41 should be rationalised.

2.6 Sanctions and Protections

The provisions on sanctions and protections are similarly comprehensive and strong. One concern is with alignment of offences. Pursuant to section 44, acts such as destroying records with the intent of denying access and deliberately concealing or falsifying records in response to a request attract a fine of up to 2 million Leones, while merely failing to provide information upon request attracts a fine of 500,000 Leones per day. Thus, after four days, the fine for simply failing to provide information starts to exceed that for deliberately destroying information to deny a request.

Recommendation:

- Consideration should be give to better aligning the sanctions for the various offences under the law.

2.7 Promotional Measures

Section 25(2) of the draft Bill calls on the Commissioner to develop a Code of Practice regarding record management. This is useful but it would be helpful if it could be made clear that meeting the standards set out in the Code is obligatory for all public authorities.

Section 37 requires the Commissioner to prepare an annual report on the activities of his or her office and lay it before parliament. This is important but it would be preferable if the report also referred to wider implementation of the right to information law by all public authorities. In many countries, all public authorities are required to report to the Commission on what they have done to implement the law and, in particular, on the requests for information they have received and how they have dealt with them. The oversight body then summarises this information in one overarching report, which is tabled before parliament.

Section 37 calls on the government to bring the Official Secrets Act, the Public Order Act, other laws, and internal rules and general orders affecting the disclosure of information into line with the provisions and spirit of the right to information law. While commendable, it is not clear that an act can order the 'government' to amend other laws, although it can do this in respect of internal rules and orders. The right to pass and amend legislation is a prerogative of parliament, and one parliament cannot 'order' another parliament to act in this area.

Recommendations:

- Consideration should be given to making it clear in the law that the Code of Practice for record management is binding on all public authorities.
- All public authorities should be required to provide annual reports to the

Commissioner on the steps they have taken to implement the law, including the requests they have received and how they have dealt with them. The Commissioner should then be required to report on this in his or her annual report to parliament.

- The references to other laws in section 37 should be removed.