



CENTRE FOR LAW
AND DEMOCRACY

Mongolia

Comments on the Draft Law of Mongolia on Information Transparency and Freedom of Information

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Introduction

These Comments contain an analysis by the Centre for Law and Democracy (CLD) on the Draft Law of Mongolia on Information Transparency and Freedom of Information (draft Law).¹ The draft Law was prepared by the Ministry of Justice and submitted to the Parliament on 20 January 2011.² There have been discussions on and off for many years now about adopting a right to information law in Mongolia, so these developments are very welcome to the extent that they represent a serious attempt to actually adopt legislation in this area.

These Comments aim to provide interested stakeholders with an assessment of the extent to which the draft Law conforms, and does not conform, to international standards and better comparative practice regarding the right to information. They provide recommendations for reform, as relevant, with a view to helping to ensure that the law which is finally adopted gives effect, as fully as possible, to this fundamental right.

The draft Law has a number of strengths. It defines public bodies quite widely, it has good rules on the processing of requests for information and it puts in place a very broad and progressive set of obligations regarding proactive publication. At the same time, there are some significant problems with the draft Law. The regime of exceptions is particularly problematical. It is both too wide and too narrow, failing to protect key confidentiality interests while throwing a veil of secrecy over some matters which should be open. Furthermore, it is not based on the idea of preventing harm to protected interests, and it does not include a public interest override. Other problems including the narrow definition of information, sanctions for disclosing confidential information and a rather limited set of promotional measures.

These Comments are based on international standards regarding the right to information, as reflected in the *RTI Legislation Rating Methodology*, prepared by CLD and Access Info Europe.³ They also reflect better legislative practice from other democracies around the world.⁴

¹ These Comments are based on an unofficial translation of the draft Law into English. CLD regrets any errors based on translation.

² See <http://www.globeinter.org.mn/?cmd=Record&id=836&menuid=204>.

³ This document, published in September 2010, reflects a comprehensive analysis of international standards adopted both by global human rights mechanisms, such as the UN Human Rights Committee and Special Rapporteur on Freedom of Opinion and Expression, and by regional courts and other mechanisms in Europe, Africa and Latin America. It is available at: http://www.law-democracy.org/wp-content/uploads/2010/09/Indicators.final_.pdf.

⁴ See, for example, Toby Mendel, *Freedom of Information: A Comparative Legal Survey*, 2nd Edition (2008, Paris, UNESCO), available in English and several other languages at:

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1. Purpose and Scope

A number of provisions in the draft Law relate to its purposes. Section 1 states that the objective of the draft Law is ensuring State transparency and guaranteeing the right of citizens and legal entities to seek and receive information. Section 5 sets out a number of principles which should underpin implementation of the law, which include respect for the rule of law, respect for lawful interests, independence and the correctness of information. Finally, section 4.1.6 provides that the term “avail information in an easily accessible manner” means that there is a “full possibility” for people to access it. This is used in many of the provisions on proactive disclosure (see part three of these Comments).

These are all helpful provisions, but they do not really provide a strong description of the purpose of the law, or a basis for interpreting it broadly. They do not, for example, refer to the underlying social values it is supposed to promote, like controlling corruption, promoting accountability and fostering participation. They also do not provide a concrete set of operational principles for implementing the law. The rules in section 5 are very vague and general. It would, for example, be preferable to indicate that the law should be implemented in a timely manner which facilitates access to information.

The definition of the scope of information covered by the law is contained in section 11.1. This starts by indicating that the right of access does not apply to information relating to human rights, national security and the lawful interests of others. This is problematical because these categories are very vague and broad, encompassing both appropriate and illegitimate grounds for refusing to provide access to information. Furthermore, even to the extent that they do cover legitimate grounds for refusing access, this should be included in the regime of exceptions, and subject to a harm test and public interest override, rather than being excluded from the ambit of the law on a *prima facie* basis.

The rest of 11.1 also imposes unnecessary limitations on the scope of information covered by the law. Section 11.1.1 refers to information pertaining to contracts and agreements, while section 11.1.2 covers information pertaining to the “goods and items” that a body possesses. Both of these are very limited in scope. Section 11.1.3 is a bit broader, but even it is limited to information pertaining to the functioning of the organisation. It is not difficult to see how this might be used by an official to deny access to information even when there is no serious question of confidentiality. Instead, a right to information law should cover all information held by public

http://portal.unesco.org/ci/en/ev.php-URL_ID=26159&URL_DO=DO_TOPIC&URL_SECTION=201.html.

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bodies, whatever its form or purpose, subject only to the regime of exceptions (which should only protect legitimate interests from harm).

The public bodies covered by the law are defined in sections 3.1 and 3.2. This covers the legislative, executive and judicial branches of government, local government, legal entities funded, in whole or in part, by the State and NGOs fulfilling certain executive functions. This is generally a broad definition. However, the Cabinet is specifically excluded (section 3.1.7), and it is not entirely clear that bodies which are owned by the State, but not necessarily funded by them, like State owned enterprises which make a profit, are covered. Furthermore, while NGOs carrying out executive functions are covered (section 3.1.10), it is not clear that other bodies which carry out such functions are included. International law requires all bodies which are part of the State, in law or in fact, to be subject to openness obligations.

Section 4.1 of the draft Law defines a citizen as a citizen or someone residing lawfully in Mongolia, whether a foreign citizen or a stateless person. Pursuant to section 11.1, only citizens and legal entities have the right to request and receive information. Better practice is to allow anyone to make a request for information. Experience in other countries clearly demonstrates that this does not impose costs or other burdens on States, while in many cases external requesters are undertaking research or other activities that benefit the State in question and its citizens.

Recommendations:

- References to the underlying purposes of the law – in terms of promoting accountability and so on – as well as to general operational matters – such as the need to make access to information simple and timely – should be added to the draft Law.
- The definition of information should be revised so that it covers all recorded information held by a public body.
- The definition of a public body should be expanded to make it quite clear that the Cabinet and State owned enterprises are included, as well as all bodies which undertake public functions.
- Anyone, rather than just citizens, should have a right to make a request for information.

2. Requesting Procedures

Pursuant to section 11.3 of the draft Law, a request from a citizen shall include his or her name, address (which may be an electronic one), national identity card and signature. For legal entities, the identity card is replaced with the State registration number. In both cases, no reasons are required to be provided (section 11.2). Apart from the need to provide an identity card or State registration number, which

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should be removed along with the limitation of the scope of the law to citizens, these are reasonable requirements. However, it may be noted that there is no requirement to define the information sought, which is found in most laws.

For electronic requests, section 14 establishes a complex set of requirements relating to digital signatures, which apply to both the making of requests and the provision of information electronically. This is cumbersome and unnecessary. Requests for information should not be treated in the same way as commercial transactions over the Internet. Many countries operate very 'light' systems for electronic requests for information.

Where a request does not conform to the requirements, it shall be returned to the requester (section 12.2.1). There is no requirement for public bodies to provide assistance to requesters, although a person who cannot sign a request may have it signed by someone else (section 11.3.1). Better practice laws require public bodies to provide such reasonable assistance to requesters, including where they are illiterate or disabled, as may be necessary to help them submit requests which meet the requirements. Assistance is often particularly necessary to help requesters describe precisely the information they seek, so that officials may identify it.

Section 13.2 of the law provides for the release of information "verbally, in writing or electronically". This is rather limited. Other forms of access should include an opportunity to inspect the information, to receive a true copy in other forms (such as on a videotape), and to receive a transcript of the information, for example where access requires equipment that the requester does not have. The law should also provide for requesters to specify the form in which they would like to receive the information, and impose an obligation on public bodies to provide it in that form unless this would harm the integrity of the information or impose an undue burden on the public body.

Public bodies are, pursuant to section 13.3, given seven working days to respond to requests. This may be extended for another seven working days where this is "absolutely necessary" (section 13.4). These are short timeframes, but the grounds for extending them are vague and should be clarified. For example, many laws permit extensions only where there is a need to consult with other parties or where the request requires a public body to search through many records. Furthermore, it should be quite clear that the seven days is a maximum, and that requests should be processed as soon as possible.

Section 15 of the draft Law allows certain fees to be charged for granting access to information, and also provides that matters regarding these fees (calculating the amount, fixing the manner of payment and applying any discounts or waivers) shall be regulated by the government. This should be read in conjunction with section

4.1.7, which provides that fees may only be charged for photocopying, copying, postage and “other expenses” relating to the release of information.

These are reasonably progressive fee rules but they could be made more clear. It should be clear, for example, that the only costs contemplated under section 4.1.7 are the costs of copying and sending the information. It would be preferable to indicate directly in the law when fee waivers should apply, for example for requests for personal information or information in the public interest, as well as for impecunious requesters.

Recommendations:

- The law should require requesters to provide a description of the information sought.
- The requirement to add digital signatures to electronic requests for information should be removed.
- The law should require public bodies to provide such reasonable assistance to requesters as they may require.
- Requesters should have a right to indicate the form in which they would like to receive information, and the allowable forms should be significantly broader than those currently provided for.
- The grounds for extending the time limit for responding to a request should be spelt out clearly in the law and it should be quite clear that requests should always be dealt with as soon as possible.
- The rules regarding fees should be spelt out more clearly in the main law, including by restricting charges to copying and sending the information, and by describing the situations in which fee waivers apply.

3. Duty to Publish

The rules in the draft Law on proactive disclosure, or the duty to publish, are very progressive. The scope of information covered in these provisions, which are found in sections 7-10, is very extensive indeed, including a lot of financial and budget information, as well as more general information on services, participation and decision-making. Indeed, our main comments are about how they may be too extensive.

The rules in sections 7-10 refer repeatedly to the need to maintain and/or update information. These terms are defined, respectively, in sections 4.1.4 and 4.1.5 as renewing information at least every 14 days and updating information after a change within three days. These are excessively onerous obligations. It should generally be enough to update information two weeks to a month after a specific change, and to undertake a general update of the information about once a year.

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The rules also often refer to making information available on the website and/or the information board. Consideration should be given to creating more of a push in the law to enhance the availability of information over the Internet, while not necessarily reducing information on boards. This could be done, for example, by requiring all public bodies to develop websites within a fixed period of time, say two years, and to post all the section 7-10 information on those websites.

Section 7.1.7 outlines a rather limited set of obligations for NGOs covered by the law. However, all of the section 7-10 obligations apply fully to section 3.1 bodies, which includes these NGOs. This is confusing and creates uncertainty as to whether NGOs are subject only to the section 7.1.7 obligations or to all of the section 7-10 obligations. It is not necessarily inappropriate to create a more limited set of obligations for private bodies which are covered by the right to information law, but the section 7.1.7 obligations are too limited.

Finally, it may be difficult for many public bodies to manage to disclose all of the sections 7-10 information on a proactive basis immediately, due to capacity constraints. Consideration should be given to building in a reasonable timeframe for this, for example of four or five years. To make sure that this time is spent working towards the target, instead of rushing to do it all at the last moment, interim targets should be set by some central body, such as the oversight body.

Recommendation:

- Public bodies should not be required to renew or update information as frequently as required under the draft Law.
- Consideration should be given to including rules which push public bodies to disseminate information over the Internet, for example, by requiring them to create websites within two years of the law coming into force.
- The system of proactive publication obligations for NGOs should be reviewed to clarify what these obligations are, and to make sure that they are appropriately broad for NGOs performing public functions.
- Consideration should be given to creating a system whereby public bodies are required to reach progressively higher annual targets on proactive disclosure, fulfilling all of the requirements of the law over a period of four or five years.

4. Exceptions and Refusals

If the draft Law is very progressive in terms of proactive disclosure, it really falls down in terms of the regime of exceptions, which is overbroad and lacks the basic structural features of a system which complies with international standards.

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To start with, it is quite clear that secrecy laws continue, for the most part, to continue to apply, even though some Mongolian secrecy laws are not consistent with international standards on openness. Thus, section 2.1 makes it clear that, among others, the laws on State Secret, on State Secret List and on Personal Secret continue to apply. However, the Law on Organization Secret does not apply (section 3.3) and applicable treaty rules override the right to information law (but apparently not secrecy laws) (section 2.2). This is supported by section 11.1, which again makes it clear that the law does not cover information rendered secret by other laws, section 13.1, which repeats the same, and section 17.1.6, which establishes secrets spelt out in other laws as a specific exception to the right of access.

Better practice right to information laws override secrecy laws to the extent of any inconsistency, rather than vice-versa. There are very good reasons for this, namely that in almost every country, secrecy laws are not designed with openness in mind and they do not conform to international standards of openness. As a result, leaving them in place fails to meet the international transparency obligations of the country. Furthermore, in many cases, leaving existing secrecy laws in place effectively means that a new right to information law will have little impact, as these (secrecy) laws grant a wide measure of discretion, either explicitly or due to vague provisions, to officials to refuse to disclose information. This is the case, unfortunately, with the Mongolian secrecy laws.

The main specific secrecy rules are set out in sections 17-20. However, as noted above, section 11.1 provides that information relating to human rights, national security and the lawful interests of organisations may not be released. With the exception of national security, these do not protect legitimate interests. While it is necessary to protect certain human rights through confidentiality, in particular privacy, the category of information relating to human rights is vastly too broad. Indeed, in many countries, public bodies may not refuse to release information which includes evidence of human rights abuse. Similarly, in the vast majority of cases, the lawful interests of organisations have little or nothing to do with confidentiality. None of the section 11.1 interests is subject to a harm test.

In a similar vein, it is not legitimate according to international standards to protect several of the other secrecy interests listed in the draft Law. Section 17.1.1 refers to the protection of the reputation of the country. This is irrelevant to the question of releasing information. Many of the wider public interests promoted by openness, such as controlling corruption and promoting accountability, may somehow appear to harm the reputation of the country, but there is no reason not to release this information. Indeed, increasing openness usually increases confidence in a country, which is good for development. We are not aware of any other right to information law which includes such an exception.

Section 17.1.2 refers to national security, which is a legitimate ground to refuse disclosure, but also to “public interests”. This is far too vague a reason to deny access to information and it is likely to be abused by officials, whose notion of what is in the public interest may not always be objective. Indeed, better practice is to use the public interest in precisely the opposite way in right to information laws, namely to trump the exceptions, as outlined below.

Section 17.1.3 refers to information relating to matters under review by certain regulatory agencies working in the financial sector, such as the Financial Regulatory Commission. This does not describe any interest which might be worthy of protection. Criminal and other investigations, the ability of the government to manage the economy and sensitive commercial information provided by third parties are all interests which should be protected that might affect the release of the section 17.1.3 information. But defining an exception in this way is not appropriate.

Section 17.1.5 renders secret information relating to the ratification of an international treaty. Again, this is not an exception found in other laws. Instead, good relations between the State and other States and international bodies should be protected.

On the other hand, a number of important interests are either not protected or not sufficiently protected. These include international relations, mentioned above, public health and safety, public economic interests and the ability of the government to manage the economy, a range of interests relation to the investigation and prosecution of crime, and information covered by legal privilege. Furthermore, the protection of privacy, in section 19, is too narrow as it lists only some privacy interests which might need protection (for example, it does not cover private medical information).

Several of the protected interests are not subject to a harm test. Such a test ensures that it is only where disclosure of the information would pose a risk of harm to the protected interest that disclosure may be refused. These include the exception on regulatory agencies in the financial sector, the exception in section 17.1.4 on investigations and prosecutions, and section 17.1.5 on ratification of international treaties.

The regime of exceptions is missing several important features. There is no severability rule, so that where only part of the information contained in a record is covered by the regime of exceptions, the rest may still be released. There is no public interest override, as found in the majority of right to information laws around the world. This provides for the disclosure of information even if it is covered by the regime of exceptions, where the overall public interest in receiving the information is greater than the harm disclosure of the information may be expected to cause to

the protected interest. This might be the case, for example, where otherwise private information revealed a case of corruption.

Finally, there are no overall historical time limits on the application of the exceptions. Certain exceptions should cease to apply after a set time period, for example of 20 years. This is to prevent this information from remaining secret long beyond the time when any real harm may be expected to result from its release.

Recommendations:

- The right to information law should override secrecy provisions in other laws to the extent of any inconsistency, rather than being overridden by them, as is the case in the draft Law as it now stands.
- The whole regime of exceptions should be reviewed to bring it into line with international standards. Section 11.1, establishing various categories of information that are not to be disclosed, should be removed. Several other exceptions should be removed as described above, while others should be added. And all exceptions should be subject to a harm test.
- Rules providing for severability, a public interest override and overall time limits on secrecy should be added to the draft Law.

5. Appeals

The system of appeals is set out in section 16 of the draft Law. It involves internal appeals, appeals to the National Human Rights Commission and appeals to the courts. The draft Law does not establish specific rules for the processing of appeals, but instead refers to other laws where these rules are set out.

We have not been able to study all of these laws, but we have assessed the law governing the National Human Rights Commission. It grants the Commission appropriate powers to investigate complaints, and also imposes reasonable procedural guarantees on this process. It would appear, however, that the Commission does not have sufficient powers to order public bodies to provide information to requesters and to take other measures necessary to redress problems in the area of openness. Article 17.1.3 of the Law on the National Human Rights Commission does give the Commission the power to order public bodies or officials to stop acting in ways which contravene human rights. It is not clear whether that fully covers the needed powers in this area.

There is another concern with nominating the National Human Rights Commission as the administrative appeals body for access to information complaints. In countries where this has been done, the result is often to overburden the human

rights commission with tasks which it was not designed to perform, to the detriment of both the right to information and other rights. Furthermore, the broad mandate of a human rights commission means that it is unlikely to become really expert in the matter of overseeing the right to information.

As against these concerns, there is the cost for a small country like Mongolia of establishing a new oversight body for the right to information. There is a financial cost, but also a cost in terms of these bodies absorbing competent people, leaving a smaller pool of them for other worthy social activities.

Recommendation:

- Serious thought should be given to whether or not Mongolia can afford to create a new, specialised body to oversee the right to information. There are significant advantages to having a dedicated body perform this task, but there are also important cost considerations.
- If the National Human Rights Commission is retained as the oversight body, its powers should be reviewed to make sure that they are sufficient for enforcing the right to information and, if not, they should be enhanced through the right to information law.

6. Sanctions and Protections

The main rules on sanctions in the draft Law are found in section 24. This provides for fines for both individuals and legal entities that fail to release information in time (section 24.1.1), that fail to meet the proactive publication rules (section 24.1.2), that fail to establish logs recording information activities (section 24.1.5), that tamper illegally with information (section 24.1.6) and that refuse to implement the orders of oversight bodies (section 24.1.7). There are also fines for disclosing secrets protected by sections 17-20 of the law (sections 24.1.3 and 24.1.4). The fines in these cases range from three to ten times the minimum wage, with the heavier fines being imposed for revealing secrets.

A civil servant who repeatedly or seriously violates the law – defined in sections 4.1.8 and 4.1.9, respectively, as violating the law more than three times or having concealed or destroyed information that has resulted in a significant loss – may be discharged from his or her job (section 24.2). Finally, officials who conspire to conceal violations of the right to information law, or to release protected secrets, shall be penalised in accordance with other laws.

These provisions are, for the most part, welcome, but there are also some problems with them, and they are also unnecessarily complex. First, while they cover a number of discrete forms of violation, they do not cover all forms of obstruction of

the right of access. For example, they do not appear to penalise destruction of records that does not result in serious loss, or even a simple bad faith failure to disclose information. Second, the fines are, for the most part, very low and are unlikely to exert a sufficiently strong deterrent effect. Third, the rules fail to distinguish between failures occasioned by incompetence and wilful efforts to thwart the law.

It would be preferable to establish a dual system of sanctions. The National Human Rights Commission, or perhaps another body, could be given the power to impose smaller fines on officials or public bodies which had acted in ways which had undermined the right to information. In parallel to that, the law could make it a serious offence to wilfully obstruct implementation of the law, for example by destroying records or hiding information, which might be punishable by more serious sanctions, including imprisonment.

Another problem with this system of sanctions is that it imposes sanctions on individuals for wrongfully releasing information, while failing to provide protection for those who, in good faith, release information even though they should not have. It is appropriate to impose sanctions on those who wilfully breach the law by making confidential information public. However, this is already more than adequately catered for by other, secrecy laws in the Mongolian context. To include provisions on this in the right to information law sends the wrong signal to officials. This is all the more so as the fines for releasing secret information are greater than those for refusing to release public information, providing an indication of what the State considers to be more important.

Where officials act in good faith,, it is important to provide them with protection for releasing information. Absent such protection, and given the overwhelming culture of secrecy within government, which has hitherto been backed up by a system of rules which made it a crime to release a wide range of information, officials can be expected to be very reluctant to release information. Everything in their training and experience has shown them that this can be risky, and so they will avoid it. With such protection, it is possible to start to move towards a culture of openness whereby officials release information as appropriate and yet protect secrets.

Recommendations:

- Consideration should be given to replacing the current system of sanctions for obstruction of the right to information with a simplified dual system of administrative fines imposed by the oversight body for undermining the right to information, along with criminal sanctions for more serious acts involving wilful obstruction of the right of access.
- The rules providing for sanctions for officials who release confidential information should be removed and replaced with rules providing for

protection for officials who release information in good faith pursuant to the law.

7. Promotional Measures

The draft Law contains just a few provisions with promotional measures. Section 21 empowers the State body responsible for information to develop a regulation for the whole public service on record management and related issues, to be approved by the government. The same body is tasked with providing technical assistance to other public bodies in this area. This should help improve overall record management practices. It might be useful to specify that the regulation shall set out binding minimum standards relating to record management.

Section 22 requires all public bodies to keep 'logs' to ensure proper monitoring of the implementation of this law. These shall contain information about requesters, the processing of requests and other matters. This is very useful, although it might be useful for the law to spell out in more detail exactly what should be contained in these logs (the provisions are currently rather general in nature).

Public bodies should also be required to go beyond just keeping logs, and be tasked with providing annual reports to a central body – either the National Human Rights Commission or the ministry responsible for information matters. This body, in turn should be required to produce a central report, on an annual basis, detailing overall performance in terms of implementing the law, and identifying strengths and weaknesses, along with recommendations for reform. This report should be formally laid before parliament, so as to provide an opportunity for legislative oversight of the system.

Pursuant to section 23, “upper level instances” within public bodies, the National Human Rights Commission and the courts shall be responsible for legal monitoring of implementation. Transparency shall also be integrated into the results-based system within government, and shall be one of the “evaluation criteria points”.

A number of other important promotional measures are missing from the draft Law. No central body is given responsibility for promoting overall implementation of the right to information. To some extent this is implicit in the wider functions of the National Human Rights Commission, but it would be useful to elaborate on this role explicitly in the law, both to make it clear and to specify the precise tasks that the Commission is expected to undertake. If a dedicated oversight body, such as an Information Commissioner, is appointed, then it would be natural to allocate this function to that body.

Closely related to this, no body is tasked with raising public awareness about the new law and the individual rights it recognises. This is essential to ensure that the public make use of the law and that it does not remain simply a formal right. This task should logically be given to the body which bears overall responsibility for implementation, described above.

Similarly, there is no obligation on public bodies either to appoint dedicated information officers, or to ensure that their staff receive appropriate training on the right to information (which should include some awareness raising for all staff, as well as more focused training for information officers). The central body responsible for implementation of the law can assist with this training, but the main responsibility for this should lie with individual public bodies, since it is ultimately their obligation to implement the law.

Recommendations:

- The law should make it clear that the regulation to be adopted on record management will set out binding minimum standards in this area.
- The law should elaborate in greater detail on the precise information that is required to be kept in the logs.
- Public bodies should be required to report annually to a central body on their progress in implementing the law, and this central body should be required to present a consolidated report on overall implementation of the law to parliament for its consideration.
- A central body – for example the National Human Rights Commission or an information commissioner – should be given overall responsibility for implementing the right to information, including through raising public awareness about this right.
- Public bodies should be required both to appoint dedicated information officers and to provide appropriate training on the right to information to their staff.