



Africa

Comments on the Draft Model Law for AU Member States on Access to Information

August 2011

Centre for Law and Democracy
info@law-democracy.org
+1 902 431-3688
www.law-democracy.org

Egyptian Initiative for Personal Rights
eipr@eipr.org
+(202) 2794-3606
<http://eipr.org/en>

Introduction

These Comments contain an analysis by the Centre for Law and Democracy (CLD) and the Egyptian Initiative for Personal Rights (EIPR) of the Draft Model Law for AU Member States on Access to Information (draft Model Law).¹ The draft Model Law is being prepared under the auspices of the Special Rapporteur on Freedom of Expression and Access to Information in Africa, in partnership with the Centre for Human Rights at the University of Pretoria.

The preamble to the draft Model Law notes that the *African Charter on Human and Peoples' Rights*,² as well as various other international human rights instruments, including the *International Covenant on Civil and Political Rights*,³ recognise a human right to access information. It also highlights the “dearth of access to information legislation in Member States”, and presents the model law “for adoption” by Member States of the African Union. Since it seems unlikely that many States will actually adopt the Model Law as such, we presume that important goals of preparing model legislation in this area include to raise awareness about better practice, to develop a uniquely African set of standards in this area, and to provide concrete drafting suggestions for those preparing national right to information laws.

The African Commission on Human and Peoples' Rights is calling for comments on the draft Model Law,⁴ and we are providing these Comments in response to that request. These Comments aim to provide the Commission and other interested stakeholders with an assessment of the extent to which, in our assessment, the draft Model Law conforms, or does not conform, to international standards and better comparative practice regarding the right to information. The Comments also include some technical observations and advice. They provide recommendations for reform as relevant.

The draft Model Law is an impressive document. Overall, it represents a very high water mark in terms of respect for the right to information.

At the same time, we have some concerns with the draft Model Law. In some cases, we call for less stringent standards, either because we deem the draft Model Law to be over-protective of the right of access to the detriment of other rights and interests, or because we question whether it is realistic to expect such strong procedures and standards to be implemented in practice. In other cases, we make more technical recommendations to improve the overall strength of the document.

¹ The draft is available at: <http://www.achpr.org/english/other/MODEL%20LAW%20FINAL.pdf>.

² Adopted 26 June 1981, 21 I.L.M. 58 (1982), entered into force 21 October 1986.

³ UN General Assembly Resolution 2200A (XXI), 16 December 1966, entered into force 23 March 1976.

⁴ See the announcement on their website: http://www.achpr.org/english/_info/news_en.html.

These Comments are based on a wide survey of international standards relating to the right to information, including African standards, for example as set out in the *Declaration of Principles on Freedom of Expression in Africa*,⁵ as well as global standards and standards from other regions. These standards, in turn, are brought together in the *RTI Legislation Rating Methodology*, prepared by CLD and Access Info Europe.⁶ These Comments are also based on better practice as reflected in the right to information laws of democracies around the world.⁷

1. General Comments

1.1 Oversight Mechanism

The provisions in the draft Model Law on the oversight mechanism are extremely detailed, running to nearly 20 pages. We believe that they are unnecessarily detailed; certainly they are far more detailed than analogous provisions in many right to information laws even though these laws allocate similar roles and powers to oversight mechanisms. In some cases, such as section 71, listing the information to be provided regarding implementation of the law, the detail could serve a useful awareness-raising role. In other cases, however, such as section 79, on the powers of the oversight mechanism, and section 89, on the rules regarding notification by the oversight mechanism, the rules are unnecessarily detailed. This is problematical because it renders the draft Model Law unduly long and complicated. In some cases, these provisions are difficult to understand, even for individuals who are legal experts on the right to information.

Adding to these problems, there are a number of sections relating to the oversight mechanism which appear to be overlapping and sometimes even contradictory. Thus, sections 81 and 82 describe when requesters and others may apply to the oversight mechanism for a review, while section 93 describes who may make an

⁵ Adopted by the African Commission on Human and Peoples' Rights at its 32nd Session, 17-23 October 2002.

⁶ This document, published in September 2010, reflects a comprehensive analysis of international standards adopted both by global human rights mechanisms, such as the UN Special Rapporteur on Freedom of Opinion and Expression, and by regional mechanisms in Europe, Africa and Latin America. It is available at: http://www.law-democracy.org/wp-content/uploads/2010/09/Indicators.final_.pdf.

⁷ See, for example, Toby Mendel, *Freedom of Information: A Comparative Legal Survey, 2nd Edition* (2008, Paris, UNESCO), available in English, Spanish and other languages at: http://portal.unesco.org/ci/en/ev.php-URL_ID=26159&URL_DO=DO_TOPIC&URL_SECTION=201.html and Toby Mendel, *The Right to Information in Latin America: A Comparative Legal Survey* (2009, Quito, UNESCO), available in English and Spanish at: http://portal.unesco.org/ci/en/ev.php-URL_ID=28958&URL_DO=DO_TOPIC&URL_SECTION=201.html.

“application” to the oversight mechanism. Section 79 describes the general powers of the oversight mechanism, while sections 91 and 92 describe its powers when carrying out investigations, which are very similar (including because section 79 refers to resolving “investigations”, as well as “matters”, “reviews” and “hearings”). It is not clear when the oversight mechanism might carry out an investigation. Section 86 seems to suggest this will only be in the context of an application (under one of sections 81-83), while other sections (including sections 79(1)(b), 91(2) and 93(3)) suggest that the oversight mechanism might investigate “any matter”.

As is already clear from the above, there is some terminological confusion in the draft Model Law, with different terms sometimes being used for apparently similar items, without being defined. Thus, sections 81 and 82 refer to “reviews”, while section 93 refers to an “application”. Even within section 93, section 93(1) refers to “applications”, while section 93(2) refers to “complaints”. Section 95 refers to the use of negotiation, conciliation or mediation to resolve “a matter before it”, but at least the latter two are normally associated with complaints or applications.

The powers allocated to the oversight mechanism are extremely extensive even on a plain reading of the text of the draft Model Law and certainly on a broader interpretation of the text. Thus, pursuant to section 96(1)(j), it may make “any other order it considers just and equitable”. As noted above, it would appear to have the power to investigate any matter at all, although presumably this would be limited to matters relating to the right to information. It can conduct audits of public bodies for compliance with the law (section 74), impose *ad hoc* reporting requirements (section 70) and fine public bodies for failing to meet these obligations.

Oversight mechanisms do need adequate powers to be able to be able to fulfil their roles. At the same time, they need to be held to account as well, and an important mechanism for doing this with any administrative body is granting it only clear and precisely limited powers. Furthermore, although strong attempts have been made to ensure the independence of this body, it is impossible to fully insulate it from different tendencies, which again argues for clearly circumscribed powers.

Recommendations:

- The provisions relating to the oversight mechanism should be reviewed with a view to reducing unnecessary detail, to eliminating overlapping, repetitive or contradictory provisions, and to ensuring precise and consistent terminology.
- Consideration should be given to reducing the powers of the oversight mechanism or at least to rendering these very clear and precise.

1.2 Inclusion of Private Bodies

The draft Model Law proposes to place obligations on ‘purely’ private bodies⁸ to disclose information where this “may assist in the exercise or protection of any right” (see, for example, section 2(1)(b)). Private bodies are defined to include all juristic persons, as well as other persons carrying on a trade, business or profession, but only in that capacity (section 1(1)).

We welcome this uniquely African approach, originally based on the South African Promotion of Access to Information Act.⁹ It appropriately reflects the significant influence of private actors over public life, as well as over individuals, and is a natural extension of the right to access information held by public authorities, which is widely recognised.

At the same time, care needs to be taken to not to place unreasonably onerous obligations on private actors. Many of these actors exist to make profits, while others serve various social goals. It would be counter-productive if an access to information regime obstructed their ability to achieve their (legitimate) primary objectives. This is not meant to suggest that these actors should not bear additional obligations under right to information laws, and they may need to make adjustments to their *modus operandi* or business model to fulfil these obligations. But a balance is needed here.

The standard for engaging the responsibility of private bodies, namely that the information “*may assist* in the exercise or protection of any right” is quite different than under the South African legislation, where the standard is that the information is “*required* for the exercise or protection of any right” (see section 50(1)(a)) of the South African law). [emphases added] We note that a significantly wider range of information would fall within the scope of the provisions of the draft Model Law than under the South African law, as ‘may assist’ represents quite a low threshold. While the South African standard may be too stringent, we believe the standard in the draft Model Law may be too permissive and recommend something more along the lines of “would be likely to be required” or “could reasonably be expected to be required”.

The draft Model Law makes a careful distinction between the obligations of public and relevant private bodies, on the one hand, and private bodies, on the other. This is consistent with not placing unduly onerous obligations on private bodies.

⁸ The draft Model Law describes three types of bodies: “public”, “relevant private” and “private”. Relevant private bodies are bodies which are subsumed within public bodies for most purposes of the law, because they are owned, controlled or funded publicly or undertake public functions. For purposes of these Comments, references to public bodies shall include “relevant private bodies” unless otherwise indicated, and shall include “private bodies” where relevant (i.e. where the same rule applies to private bodies).

⁹ Act No. 2, 2000. Available at: <http://www.gov.za/gazette/acts/2000/a2-00.pdf>.

At the same time, private bodies are given some quite important positive obligations under the draft Model Law, particularly in Division 3 – Monitoring, of Part VI – Oversight Mechanism. They are, among other things, required to provide any reports that the oversight mechanism may require of them (section 70(1)), and prepare information manuals which must be deposited in all places of legal deposit and updated at least every two years, and which must contain reasonably extensive information about information processes, consultation opportunities and remedies (section 72). They are also subject to audit by the oversight mechanism (section 74), as well as to the extensive general investigation and other powers of the oversight mechanism, and are obliged to follow the recommendations of the oversight mechanism in respect of training (section 77(2)(c)).

We believe that these are excessively onerous obligations. For example, we believe that they should be limited to matters directly related to disclosure of information (as opposed to wider issues such as opportunities for consultation), and that the remedial powers of the oversight mechanism should be limited to cases where a complaint reveals a problem (as opposed to *suo moto* audits, investigations and (binding) recommendations regarding training and the like).

Private bodies are also subject to the same fee rules as public bodies (section 34). This means that they cannot charge fees for searching for or assessing information, or for transcribing it, as necessary to provide it in the form preferred by the requester. They must also provide information for free where this is in the public interest or where the requester is indigent.

We believe that these rules need to be reconsidered. It is appropriate to require private bodies to cover searching and assessing costs, since these are directly related to their own internal systems and concerns (i.e. how well they keep their records and how sensitive they are vis-à-vis the exceptions). But the rationale for requiring them to expend time and money so as to provide a requester within information in the form he or she prefers is far less convincing. It is also not clear that it is appropriate for the burden to fall on private bodies, as opposed to the public purse, to cover the costs of information provision to the poor. Such a burden would not be imposed in relation to the realisation of other human rights (one would hardly expect private bodies to provide, on demand, housing, work or food, for example).

Finally, as a matter of style, the draft Model Law includes separate sections (namely Parts II and III) regarding the processing of requests by public (and relevant private) bodies and by private bodies. However, these sections are substantially similar. Merging them, and indicating clearly the few places where different obligations apply to the different types of bodies would substantially reduce the length of the document (by about six pages) and thus make it easier to read.

Recommendations:

- The standard for engaging the responsibility of private bodies to respond to requests for information should be amended to include a 'likelihood' or 'reasonableness' test.
- The positive obligations on private bodies should be reviewed and consideration should be given to narrowing them so as to focus on what is specifically needed to ensure their request-related obligations are effective.
- Consideration should be given to amending the fee rules for private bodies so that they are less onerous.
- Consideration should be given to merging Parts II and III so as to reduce the length and complexity of the Model Law.

2. Detailed Comments

2.1 Right of Access

The draft Model Law provides for a clear right to access information from both public and private bodies (see sections 2(1)(a) and (b), 10(1) and 24(1)). It also sets out clear principles and objectives governing the right of access (see sections 2 and 3), while interpretation of the law must be done in a manner that best gives effect to those principles and objectives (section 5).

Section 2(1)(c) of the draft Model Law, setting out its Principles, provides that the law shall be interpreted and applied on the basis of a duty to disclose and that non-disclosure shall be permitted only in “exceptionally justifiable circumstances”. No other principle relates to the issue of exceptions to the right of access. This is useful, but it is also excessively general. It would be preferable for this principle to refer to the idea of exceptions being limited to protecting an overriding public or private interest, and the need for exceptions to be specifically harm-based.

Section 3 sets out the objectives of the Model Law, which include giving effect to the right of access and maintaining records, as well as more general values such as promoting transparency, accountability and effective governance. This really includes two different levels of objectives: one very general referring to the wider benefits that the right to information delivers (accountability, effective governance) and one about the right to information benefits that the law aims to achieve (giving effect to the right to information, educating individuals about this right, ensuring good record management). It would be preferable to separate these two out, and perhaps include the latter under the

principles of the law and only the former under objectives. The former could also be widened to include objectives such as combating corruption, promoting participation and democracy, and so on.

Recommendations:

- Section 2(1)(c), setting out the principle for exceptions to the right of access, should refer to the need for exceptions to be limited to protecting overriding public and private interests against specific harms.
- Consideration should be given to moving those goals of the law relating directly to the right to information from the section on objectives to the one on principles.
- The objectives should be widened to include such issues as combating corruption, promoting participation and democracy, and so on.

2.2 Scope

The scope of the draft Model Law is, for the most part, admirably wide. Information is defined in section 1(1) as information “in the possession or under the control” of a public or private body. This is rather narrow and would not include information which a body had stored with another body but which was owned by the first body (and to which it had a legal right of access).

The draft Model Law distinguishes between pure public bodies and “relevant private bodies”, defined as bodies which are “owned, controlled or substantially financed” by public funds or which carry out a “statutory or public function”. In theory, this is a legitimate distinction but, in practice, the draft Model Law only makes a distinction between these two types of bodies in one provision, namely in section 75(3) regarding reporting to parliament.¹⁰ It would make the style of the draft Model Law far less cumbersome simply to merge these two definitions (i.e. to include “relevant private bodies” within the scope of “public bodies”), given that there is almost no substantive difference in the treatment of these two types of bodies. At a minimum, a more appropriate title should be found for “relevant private bodies”, since ‘relevant’ is not an appropriate qualifier in this context; a possibility might be “quasi-public bodies”.

“Third party information” is defined as including “personal information or commercial and confidential information of a third party”. This is not an appropriate definition since it mixes up the issue of exceptions to the right of access, which should be defined by reference to harm, and definitions. In other words, the issue of whether or not information

¹⁰ There are two other places where this is the case – namely sections 32(1)(c) and 88(1)(b) – but both would appear to be mistakes.

is confidential should not be a matter of definition but should be addressed through the application of a harm test at the time of a request. A better definition would simply be information that is personal or that is of a potentially sensitive commercial nature.

Recommendations:

- The definition of information should be expanded to include information which is accessible to a body.
- Consideration should be given to merging the categories of “public body” and “relevant private body”. At a minimum, the title of the latter should be amended.
- The concept of confidentiality should be removed from the definition of third party information and replaced with the idea of potentially sensitive information.

2.3 Requesting Procedures

As with other parts of the draft Model Law, the procedures for making requests are progressive and comprehensive. At the same time, we have a number of comments and recommendations that could still further improve them.

Section 11(1) provides that requests may be made in writing. It would be useful to clarify that this may be done by way of letter, in person, fax or electronically. Section 11(4) outlines what a request should include; it does not require requests to provide an address for delivery of the information (or a response), and yet this is necessary. Section 11(4)(c) provides that a request ‘shall’ identify the “nature of the form in which the requester prefers access”; it should be made clear that this is not a mandatory requirement for a request (i.e. the requester *may* stipulate a preferred form of access but is *not required to*). Information officers must acknowledge receipt of requests (section 11(5)), but no timeframe is stipulated within which this must be done.

Section 12, requiring assistance to be provided to requesters, appears to require information officers to provide such assistance whenever a person wishes to make a request. This is unnecessary. The provision of assistance should be required only where the person is unable to make a proper request without it.

Sections 13, 14 and other sections dealing with time limits normally specify a maximum number of days within which something needs to be done (in this case, responding to a request); they should make it clear that this refers to calendar days, not working days (or working days, if that is what is intended, although in that case

we note that 30 working days for responding to a request is unnecessarily long). In a similar vein, we wonder whether it is realistic to provide for a 48-hour turn-around for urgent requests under section 13(2); this would require a response to a request lodged at midnight on Friday by midnight on Sunday, although this period falls entirely outside of working hours in many countries. It might be more realistic to provide for a two working day time limit for such requests.

We are aware that other laws which provide for a 48-hour turn-around for requests often limit the scope of this rule to information needed to safeguard life and liberty. However, we believe that in practice such requests are extremely rare. It might make more sense to expand the scope of this to include other urgent request situations, such as where the information is required to expose the commission of a crime, human rights abuse or other serious wrongdoing.

Section 13(6) provides that where third party information is involved, the information may not be released until any rights of that third party to appeal have been exhausted. The analogous provision under section 55(3), regarding notice to be provided after an internal appeal, refers instead to the right to appeal under section 81 (appeals to the oversight mechanism), rather than appeals in general (which would include court appeals; see section 99). We believe that it is appropriate to delay release of third party information until the exhaustion of any right to appeal to the oversight mechanism, but that allowing a third party to prevent release until any judicial appeals have been exhausted would introduce unduly delays regarding the release of this sort of information. We note that this does not leave the third party without any remedy, since they might still try to obtain financial compensation for release of information in appropriate cases.

Section 15(1)(b) allows for transfers of requests from one body to another where the subject matter of the information “is more closely connected with the functions” of the other body. There are certain protections in this case, including that the requester must be notified of the transfer immediately by both the transferring and receiving bodies, and that the timeframe for responding to the request continues to run from the date the original body received it.

At the same time, the practice of transferring requests can introduce a number of problems. It adds significantly to the bureaucracy surrounding a request, which can be inconvenient for the requester and cumbersome for public bodies, it can lead to delays notwithstanding the fact that the formal rules prevent this, and it can even lead to requests being lost or forgotten. It also introduces an opportunity for bodies to obstruct access, for example by transferring requests unnecessarily, perhaps more than once. We suggest that the power to transfer requests be limited to cases where the original body with which the request is lodged does not hold the information. Where the information is more closely connected with another body, it is always open to the original body to consult with that body.

Section 16 provides that a failure to respond to a request within the prescribed timeframe shall be a deemed refusal of the request. It might be useful to make it clear that this is to allow the requester to move forward with an appeal and that it in no way relieves or absolves the information holder from their responsibilities under the law.

Section 17 deals with situations where information cannot be found or does not exist, and, in such cases, it requires information officers to provide an affidavit containing detailed information about the efforts that have been made to locate requested information. This is an innovative and useful approach but it may impose a heavy burden on information officers. In many countries, poor record management is a very serious obstacle to realising the right to information. It is not clear that this is the most effective use of resources in such cases. Rather, it might be preferable to try to direct any resources towards efforts at better record management.

Section 19(4) allows public bodies to refuse to provide access in the form requested where this would, among other things, not be “appropriate” given the physical nature of the information or involve an infringement of copyright subsisting in a person other than the body or the State. The former is rarely, if ever, found in national right to information laws and it is not clear why it should be necessary. The latter is quite problematical. It might be relied upon to refuse to provide electronic access to information in which external copyright existed. This, in turn might substantially undermine the right of access where a requester was provided with a physical copy instead of an electronic one, for example by imposing heavy copying costs or delays for physical delivery of the information, or by depriving the requester of the ability to use electronic means to manipulate the information (for example in the case of databases). We note that in the commercial sector, companies have had to address the problem of copyright abuse while still providing electronic versions of information (such as CDs or DVDs) and we do not believe it is appropriate to refuse such versions in the right to information context. Instead, requesters should be provided with clear notice that the information is protected by copyright and that this imposes limitations on what they may do with it.

Section 21(3)(b) provides that no reproduction fee shall be payable when disclosure of requested information is in the public interest. This is positive but it might be useful to add some indicative examples of when this might be the case, to provide greater clarity. Such a list might, for example, include cases where the information is sought with a view to general publication.

Section 52(2)(b) provides that notice to third parties should include the name of the requester. This appears to be analogous to asking for reasons for a request and it is not appropriate. We note that once information has been provided to a particular

requester, he or she may publish it to the world, so that his or her identity is not relevant to determining whether or not the information falls within the scope of the regime of exceptions. In any case, a requester does not need even to disclose his or her identity when making a request (see section 11), which we believe is appropriate. On the other hand, providing the name of the requester to a third party may lead to negative results in terms of the right to information. A third party might, for example, illegitimately delay release of the information where the requester was a media outlet.

Recommendations:

- The law should specify that requests in writing may be made electronically, via fax or mail, or delivered in person.
- Requesters should be required to provide an address for providing information or responding to requests (which may be an email, physical address, etc.) and they should be able but not required to specify the form in which they prefer to access information.
- Information officers should be required to acknowledge receipt of requests within a set maximum timeframe, for example of five working days.
- The duty to provide assistance to requesters should be limited to cases where the requester requires such assistance.
- The law should make it clear that timeframe expressed in days refer to calendar days.
- Consideration should be given to changing the 48-hour time limit for urgent requests to a two working day limit. At the same time, consideration should be given to expanding the scope of urgent requests to cover such issues as the commission of a crime, human rights abuse or other serious wrongdoing.
- Third parties should only be able to delay the release of information until their rights to appeal to the oversight mechanism, rather than to the courts, have been exhausted.
- Public bodies should only be able to transfer requests where they do not hold the information themselves.
- Consideration should be given to adding a clause to section 16, dealing with deemed refusals, to make it clear that these do not relieve or absolve information holders from their responsibilities.
- Consideration should be given to lightening the notice obligations on information officers in cases where information cannot be found or may not exist.
- Public bodies should not be able to refuse requesters preferences in terms of form of access based on the physical nature of the information or simply because the information is protected by a third-party copyright.
- Consideration should be given to providing some examples of situations where the public interest may justify waiving the reproduction fee, for

example where requested information is sought for purposes of general publication.

- Notice to third parties regarding potentially sensitive information should not include the name of the requester.

2.4 Duty to Publish

The main provision in the draft Model Law on the duty to publish, or proactive disclosure, is section 6. In terms of the scope of information subject to proactive publication, this is extended by section 72(4), which provides a list of information to be included in the “information manuals” which shall be prepared within two years of the law coming into force.¹¹ Even taken together, the list of information subject to proactive publication under the draft Model Law can only be described as modest.

We note that proactive publication is an area where modern right to information laws have made great strides over their predecessors, to some extent based on technological advances and to some extent based on the recognition that proactive publication is an extremely important component of the right to information. At the same time, in many countries public bodies have experienced serious challenges in meeting (onerous) proactive publication requirements, which undermines the right to information law.

We propose a solution to this conundrum which involves a system for leveraging up the amount of information subject to proactive publication over time. According to this approach, the law sets ambitious proactive publication targets, but gives public bodies a period of time – say seven or ten years – to meet these targets fully. To avoid situations where nothing is done until the last moment, interim measures should be put in place, subject to monitoring by the oversight mechanism. These might involve specific phasing of the targets within the time frame (i.e. lists of information which must be published after one, two, three years and so on), or internal setting of targets by each public body, perhaps subject to approval by the oversight mechanism.

We note that section 6(e), alongside section 72(2)(d), allows the oversight mechanism to increase the amount of information subject to proactive disclosure over time. This is a very nascent version of the system we are proposing above, but we believe that far more detail, including more ambitious longer-term targets, are required to make this system effective.

¹¹ These are apparently different from the information manuals required to be published, pursuant to section 71, which are to be prepared within 18 months of the law coming into force.

Section 6 does not include any obligations regarding the manner in which information subject to proactive publication should be disseminated. Section 72(2) allows the oversight mechanism to “determine” the measures undertaken to ensure accessibility of information subject to proactive disclosure, including as to “medium, format and language”, but it is not clear what ‘determine’ means in this context. The law should make it clear that while the main system for proactive publication will be via the Internet, public bodies are under an obligation to go beyond this in certain cases, particularly where information is of particular to certain communities. This should then be linked to clear powers on the part of the oversight mechanism to set rules in this area.

Recommendations:

- Consideration should be given to introducing far more ambitious proactive publication targets, alongside a system which gives public bodies a period of time to meet these targets.
- Public bodies should be under clear obligations regarding the manner in which information subject to proactive publication is to be disseminated, and the oversight mechanism should have the power to set more detailed rules in this area.

2.5 Exceptions and Refusals

The regime of exceptions in the draft Model Law is sophisticated and strongly protective of the right to information. Indeed, in some cases we believe this part of the draft provides undue protection for the right to information, while in other cases we believe the language needs to be strengthened. As an initial semantic point, we would recommend that the term ‘exceptions’, rather than ‘exemptions’, be used. These represent restrictions on a human right, and we believe that the term exemptions is more evocative of an administrative level of rule.

Section 36 provides that a request must be granted where the “public interest in the disclosure of the information outweighs the harm to the interest protected under the relevant exemption”. We believe that, consistent with idea of exceptions as restrictions on human rights, this test should be reversed, so that information must be disclosed unless the harm to the protected interest outweighs the public interest in the information.

Section 37 provides that access may not be refused simply on the basis of the classification status of requested information. We believe that this should be stated in even stronger and clearer terms, to the effect that classification status *per se* (as

opposed to the underlying reasons for classifying it in the first place) is not relevant in the context of an information request.

Section 38(2)(f)(i) provides that personal information of a deceased person may not be withheld from his or her “next of kin or legal personal representative”. We believe that this is stated too broadly and that it should only apply to information in which these individuals have a legitimate interest. For example, a person may not wish his or her spouse to access sensitive medical information after his or her death, and there is usually no reason they should (but if there were, they the spouse should be able to access it).

Section 39(2)(b) provides that access to commercially sensitive information must be provided where the information “relates to expenditure of public funds”. We believe that this is too broad. A private company should not be required to provide sensitive commercial information, for example about its business plan, to its competitors simply because it is implementing a public contract. Perhaps this exception to an exception could focus more specifically on a legitimate public interest, such as accountability regarding the expenditure of public funds.

Section 42, referring to international relations, defines this as including, among other things, information that constitutes diplomatic correspondence (see section 42(2)(d)). This is too narrow. It is often the case, for example, that officials who are not diplomats conduct sensitive exchanges with representatives of other States, and this may even be the case with representatives of private bodies working under a public contract. Of course such information should still always be subject to the requirement of harm, set out in section 42(1).

Section 47(1) defines an exception relating to free and open advice by reference to information “relating to the deliberative processes” of a public body, where the granting of the request would be contrary to the public interest. We have two key problems with this exception. First, we believe that it is very problematical to start with such a very wide definition as the ‘deliberative process’, which would potentially include a large proportion of the information held by many public bodies. This exception is often given a significantly overbroad interpretation by officials and using such open language is almost an invitation to abuse.

Second, the term ‘public interest’ is too vague to provide effective limitations on this exception. The term may be understood in very different ways in different contexts and by different people, and officials may often see a strong public interest in protecting the secrecy of what they are doing, to the detriment of other public interests, such as holding them to account. Furthermore, we believe that the public interest should be used exclusively to promote openness. Using it as a trigger for secrecy is confusing and runs counter to its use as a trigger for openness.

Instead of this approach, we recommend that the scope of this exception be limited to certain kinds of information, such as advice and opinions, and that the specific interests to be protected be listed, including the free and open provision of advice, or the success of policy (which might be harmed by premature disclosure of the policy).

Section 49 provides for an overall time limit of ten years for exceptions, “unless the reason for the exemption continues to exist”. This is useful but it essentially fails to establish any real historical time limit, since an exception should always cease to apply unless the reason for it continues to exist. We believe that a distinction should be made here between the protection of private interests (such as privacy, commercial confidentiality and legally privileged information) and public interests (such as security, law enforcement, free and open advice and so on). No overall time limit is needed for the former, which should simply be assessed against the harm identified.

Regarding public confidentiality interests, we believe that a strict time limit, such as the ten years proposed in the draft Model Law, should be applied and that a special process should be required to be gone through before information older than that may be withheld. This process may require the approval of the oversight mechanism (as is the case in Mexico), or an internal process may be put in place, such as specific approval of the head of the body or a committee established for this purpose.

Recommendations:

- Consideration should be given to using the term ‘exceptions’ rather than ‘exemptions’ in the Model Law.
- Consideration should be given to reversing the public interest override so that the harm to the interest protected by the exception must outweigh the public interest in disclosure before access may be refused.
- The law should provide that classification status *per se* is not relevant in the context of a request for information.
- Personal information about a deceased person should be provided to their next of kin or legal representative only where these individuals have a legitimate interest in this information.
- The exception for sensitive commercial information should not be waived simply because the information relates to the expenditure of public funds; instead, the waiver should be conditioned on a clearly stated public interest, such as accountability regarding those expenditures.
- The definition of information on international relations should not be limited to diplomatic correspondence but should include other sensitive exchanges.
- The “free and open advice” exception should be reworked so as to be limited to advice and opinions and to include a list of the specific interests to be

- protected, such as ‘free and open advice’.
- The provision on overall time limits should be revised to distinguish between private and public exceptions and to impose special procedural rules on the withholding of sensitive information in the latter category beyond the time limit.

2.6 Appeals

Internal Reviews

The right to lodge an internal review under section 53(1) does not appear to include cases where public bodies fail to respond to requests within the established time limits.

Section 56 provides that the head of a public body must personally make decisions on internal reviews and that this responsibility may not be delegated. This is not realistic, especially for larger public bodies, which may have to deal with a very large number of such reviews. Furthermore, it is simply not an appropriate use of the resources of the public body. Instead, provision should be made for an appropriately senior person or committee within the body to deal with an internal review.

Appointments to the Oversight Mechanism

Section 60(1) sets out a number of conditions to which the process for selecting members of the oversight mechanism must conform. While useful, these are also rather vague. We recommend that these be made more detailed, as is the case with other parts of the appointments process. For example, section 60(2) provides that members shall be appointed by the head of State on the nomination of a stakeholder committee. This will not necessarily be the most appropriate model for all countries, as so should be understood as one example of how this may be done. The same assumption could be made for section 60(1), allowing for more detail to be provided here. Examples of possible rules here could include a requirement to allow established civil society groups to nominate members or a requirement to publish a shortlist of names of nominees and to allow a period of public comment on these individuals.

Section 60(3)(b) provides that members of the oversight mechanism must be “recognised human rights advocates”. This is too narrow; it is appropriate to appoint individuals with other sorts of experience, who may well bring important expertise and balance to the mechanism.

Section 61(4) allows for members of the oversight mechanism to be removed on various grounds, including “such other grounds considered appropriate”. Given that

the other grounds already include gross misconduct, this is unnecessary and also far too open to wide interpretation.

Applications

Section 81 provides for a number of grounds for lodging an application with the oversight mechanism, several of which overlap with the grounds for applying for internal reviews, as provided for in section 53. Only section 81(1)(b), however, refers to an internal review, in the context of a refusal to provide access to information, which is also separately provided for in section 81(1)(a), without any reference to an internal review. The law should make it clear whether, for matters which may be dealt with during an internal review, it is mandatory or discretionary to apply for internal review before going to the oversight mechanism. We believe that, given that internal reviews must be completed within 15 days, (section 55(1)), they should be mandatory before an application may be made to the oversight mechanism.

Section 81(1)(n) allows for applications to be made regarding “any other matter under this Act”. This is a very broad power indeed and may be subject to abuse. We believe that applications by requesters should be limited to clearly defined failures on the part of public bodies to abide by their information disclosure obligations under the law.

Section 84 sets out a number of considerations to be taken into account regarding timeframes in general. It is not clear why the draft Model Law does not simply provide for timeframes, as it does in other instances. In any case, the current approach is rather confusing.

Section 85(3) provides that the “standard of proof” with regard to the exceptions shall be as stated in the various sections in the relevant part of the draft Model Law. We note that these sections do not stipulate a standard of proof at all, but, rather, provide for a standard of harm, such as “substantially prejudice” (section 39(1)(b)) or “would be likely to endanger” (section 40). We believe that the standard of proof for exceptions should be by way of clear and convincing evidence, which may be understood as something more stringent than the ‘balance of probabilities’ test usually used in civil cases, while far less stringent than the ‘beyond all reasonable doubt’ standard in criminal cases.

Section 88(1)(c) provides for third parties to be given the right to make representations regarding complaints (which we understand to mean applications by requesters) only where the oversight mechanism intends to recommend release of information subject to a third party exception or which may unfairly prejudice the third party. This seems odd given that in many applications involving third party information, the subject matter of the application will be precisely to determine whether or not the information is subject to a third party exception. Furthermore,

pursuant to section 90, the public body is required to provide notice to third parties “to whom the information relates”. We believe that the latter is the proper standard for allowing representations from third parties.

Recommendations:

- The grounds for applying for an internal review should include cases where the public body initially fails to respond to a request within the established time limits.
- The head of a public body should not be required to process internal reviews personally. Instead, this responsibility should be required to be discharged by an appropriately senior person or committee.
- More precise criteria should be elaborated regarding the process of appointing members to the oversight mechanism.
- Members should not be required to be human rights advocates; wider expertise should also be recognised as a legitimate basis to sit on the oversight mechanism.
- Members should not be able to be removed for any grounds considered appropriate; instead, precise grounds for removal should be listed in the law.
- The law should make it clear whether or not requesters must first apply for internal reviews before they may make applications to the oversight mechanism. Consideration should be given to requiring this, at least for matters which may be the subject of an internal review.
- The grounds for lodging applications should be limited to clearly defined failures by public bodies to abide by their information disclosure obligations under the law.
- Consideration should be given to replacing the factors regarding timeframes set out in section 84 with specific time limits, as is done in other parts of the draft Model Law.
- The reference to internal standards of proof in Part IV of the draft Model Law should be replaced by a requirement to prove that exceptions apply on the basis of clear and convincing evidence.
- Third parties should be allowed to provide representations to the oversight mechanism in all cases potentially involving sensitive information relating to them, as determined in the original decision-making process by the information officer.

2.7 Sanctions and Protections

The draft Model Law contains provisions protecting the oversight mechanism and its staff from criminal or civil proceedings in relation to acts done in good faith in

the exercise of a power, duty or function under the law (section 68). It also protects everyone against criminal or civil liability, as well as employment detriment, for the disclosure of information in good faith pursuant to the law. Consideration should be given to adding protection against administrative sanctions to these lists of protections.

The oversight mechanism is given various powers to impose sanctions for non-compliance with the law. Pursuant to section 73, it may impose fines on public bodies that fail to meet their reporting obligations under Division 3 of Part VI of the law. Pursuant to section 79(1)(c), it may impose “such fines, recommendations and/or penalties in matters before it as it considers appropriate”. It is not clear whether or not this extremely broad power is aimed at public bodies or at individuals.

The section 79(1)(c) power may be contrasted with the far more precise and limited power, provided for in section 96(1)(e), to impose fines and an order to comply on public bodies in cases of “repeated, egregious or wilful failures to comply with an obligation under the Act”. Pursuant to sections 96(1)(g) and (h), the oversight mechanism has the power to make contempt orders and to order the payment of costs. The former is a power that is normally reserved for the courts and it is not clear why the latter would be necessary as applications should normally be either free or very low cost. Section 96(1)(j) allows the oversight mechanism to make any other order “it considers just and equitable”. Finally, the oversight mechanism has the power to order daily fines until the problem is resolved for various failures to process requests (pursuant to section 104(2)). Once again, it is not clear whether these are directed at individuals or public bodies.

Recommendations:

- Everyone should be protected not only against criminal and civil liability, but also against administrative sanction, for disclosing information in good faith pursuant to the law.
- The powers of the oversight mechanism to impose fines and other penalties should be clearly circumscribed, and it should be made clear whether these are aimed at public bodies or individuals or both. It should not have the power to make contempt orders or to order payment of costs.

2.8 Promotional Measures

The draft Model Law provides for an extensive set of promotional measures, with the oversight mechanism at the centre of this system. These include detailed reporting obligations for public bodies, the ability of the oversight mechanism to undertake research and to make recommendations for legislative reform, and monitoring, by the oversight body, of training, public outreach and so on.

Overall, this is an impressive set of measures. One concern, however, is that it is not always entirely clear where the locus of responsibility for an activity lies. Thus, section 71(2)(f) requires public bodies to include in their information manuals “clear plans for community outreach, information sharing and awareness raising”. Pursuant to section 77(1), responsibility for public outreach “shall rest with the oversight mechanism and shall include information holders in terms of the directives of the oversight mechanism”. This leaves it very unclear as to exactly who is responsible for what in this area.

Similarly, pursuant to section 77(2)(d), the oversight mechanism shall monitor internal training and issue “notices for mandatory training where necessary”. However, the law does not set out any primary obligations for public bodies regarding training. This leaves them largely to the apparently unfettered discretion of the oversight mechanism to determine whether or not more training is necessary.

Section 79(2)(a) requires the oversight mechanism to report annually to parliament and various provisions require certain information to be included in this annual report (such as recommendations for reform and information on research undertaken; see section 78(6)). Furthermore, public bodies are required to present an annual report to the oversight body with a lot of detail on their processing of requests (see section 75), and to include this report in their annual reports to parliament (section 75(3)). The draft Model Law does not, however, require the oversight mechanism to present a consolidated report on overall progress in terms of implementation of the law.

Recommendations:

- Greater clarity should be introduced into the law regarding the precise locus and nature of responsibility for such promotional measures as public awareness raising and training.
- The oversight mechanism should be required to present an annual report to parliament providing an overview of overall progress in terms of implementation of the law.