



CENTRE FOR LAW
AND DEMOCRACY

Afghanistan

Comments on the Draft Access to Information Law

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Centre for Law and Democracy

info@law-democracy.org

+1 902 431-3688

www.law-democracy.org

The Centre for Law and Democracy is a non-profit human rights organisation working internationally to provide legal expertise on foundational rights for democracy

Introduction

These Comments contain an analysis by the Centre for Law and Democracy (CLD) of the Draft Access to Information Law that has been prepared in Afghanistan (draft Law).¹ The draft Law appears to be a merger of two previous versions, one prepared by civil society and one by government. The idea is to try to present a consensus version going forward, in the hope that this will assist in getting it adopted.

The aim of these Comments is to assist local stakeholders in reviewing the draft Law and in advocating for a strong right to information law. They outline the key features of the draft Law, assess them against international standards and better comparative practice and then provide recommendations for reform as relevant.

The draft Law has a number of strengths. It is broadly applicable to all public bodies, the procedures for accessing information are well developed, the regime of exceptions is reasonably narrow and it contains good promotional measures.

At the same time, there are some important problems with the draft Law. The aims are weak. There is no public interest override for the exceptions; instead, the national interest may justify withholding information. There is no independent administrative oversight body to hear appeals. And the draft Law fails to provide protection for good faith disclosures of information pursuant to its provisions.

These Comments are based on international standards relating to the right to information, as reflected in the *RTI Legislation Rating Methodology*, prepared by CLD and Access Info Europe.² They also reflect better practice in the laws of other democracies.³

Purpose and Scope

Article 2 of the draft Law sets out its aims, which include ensuring the right to information held by public bodies and by private bodies where this is necessary for the protection of any right, and providing citizens with “unbiased access to

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

² 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/?page_id=288. CLD and AIE have now rated all of the national right to information laws around the world. See www.RTI-rating.org.

³ See, for example, Toby Mendel, *Freedom of Information: A Comparative Legal Survey, 2nd Edition* (2008, Paris, UNESCO), available at: http://portal.unesco.org/ci/en/ev.php-URL_ID=26159&URL_DO=DO_TOPIC&URL_SECTION=201.html.

government information related to public interests”. This, in turn, aims to support “freedom of thoughts, transparency, accountability, and democracy for the country.”

These are positive aims but they could be further improved in a number of ways. First, the reference to “information related to public interests” should be removed. It might be interpreted to suggest that where information is not deemed to be related to a public interest, it does not have to be provided, whereas the right of access applies to all information. Second, the aims could refer to some of the key characteristics of how the right to information is to be implemented, such as that provision of information should be rapid, low-cost and subject only to a limited regime of exceptions which are necessary in a democracy. Third, the aims could also refer to some additional benefits of transparency, such as promoting participation, controlling corruption, fostering sustainable development and creating a positive environment for business. Finally, the draft Law could stipulate that it should be interpreted in a manner that best gives effect to its aims, thereby transforming them from statements of principle into operative parts of the law.

The right of access is provided for in Articles 4 and 5. Article 4 provides that every Afghan has the right to access information, subject to the provisions of the law. Article 5(1) expands upon this, providing that natural and legal persons have a right to be informed whether or not public bodies hold the information they have requested, or documents from which it may be extracted and, if so, to have access to that document, in accordance with Chapters 2 and 4 of the law (setting out procedures for accessing information and exceptions to the right of access). Article 5(2) provides that natural and legal persons have the right to access information held by private bodies where they want to “adjudicate a right”.

These are generally strong statements of the right of access. The restriction of this right to Afghans is unfortunate, and contrary to international standards, which guarantee rights to everyone. Article 5(1) appears to provide for a right of access to both records (documents) and information (which may be only part of a record or spread across several records). However the terminology, at least in translation, is not entirely clear, referring variously to information and documents. Only ‘document’, and not ‘information’, is defined in the law. Thus, Article 3(7) defines a document as any kind of recorded information, regardless of its type, source, date, official status, including classification, or the institution which holds it. This is a broad definition.

The draft Law is progressive inasmuch as it seeks to extend the right of access to information held by private bodies where this is necessary for the protection of a right, specifically through litigation. Careful consideration should, however, be given to whether or not this broad approach is advisable in Afghanistan at this point. Only one country, South Africa, has included private bodies *per se* in its law, and this has proven to be controversial and difficult to implement.

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On the other hand, if private bodies are to be included, it seems somewhat arbitrary to limit this to cases where the information is needed for the adjudication of a right, as opposed to for the “exercise or protection” of a right (the language used in the South African law). It may be noted that only a small strata of society in Afghanistan can be expected to engage in litigation, so that this rule would benefit only better-off citizens.

Furthermore, care needs to be taken with the definition of private bodies. Article 3(4) defines these as bodies which carry out a business or trade and which have a legal identity. This is a clear, if fairly narrow definition. However, Article 12(J) provides that any private body which “provides any kind of services to society” must respond to requests about the performance of their work and the provision of services. This appears to introduce a two-tier system for private bodies with some under an obligation to disclose information needed for the protection of a right through litigation and others under an obligation to disclose information about the services they provide. This is confusing and is likely to cause problems in the interpretation and implementation of the rules.

Public bodies are defined in Article 3(3) as bodies established by the Constitution or any law, bodies which form part of government at every level, bodies which are under the control of government or which are mainly funded by government, and bodies which are responsible for enforcing laws or public acts. This is a broad definition.

Recommendations:

- The aims of the law should not refer to “information related to public interests”, so as to avoid giving the impression that the law is somehow restricted to this type of information.
- The aims could be expanded to refer to the manner in which the right to information is to be implemented, as well as a wider set of benefits of the right, and specifically require that the law be interpreted so as to give effect to these aims.
- The right of access should apply to everyone, not just Afghans.
- The law should make it quite clear that individuals have a right to access both specific records (documents) and information.
- Careful consideration should be given to whether or not to include private bodies within the scope of the law but, if they are included, this should not be limited to cases where information is needed for litigation (adjudication) purposes. Furthermore, only one set of rules should apply to private bodies, and the provisions of Articles 3(3), 5(2) and 12(J) should be amended to achieve this end.

Requesting Procedures

Article 6 provides for the submission of requests for information both orally and in writing. Each public body shall develop its own request form, provided that these shall not “delay the requisition process”. Those with disabilities or who are illiterate may make oral requests, and the official receiving the request shall reduce it to writing and put his or her own name on it. Article 11(1)(B) also provides generally that individuals appointed as “general information providers” (information officers) shall help those seeking information. Where a request is made to a private body, the requester must indicate the right that he or she wishes to adjudicate.

These rules imply, but do not make it specific, that requesters do not need to provide reasons for their requests. It is also not clear from these rules whether or not requests may be made electronically, including by email. It is useful to require forms not to delay the process, but it would be preferable to indicate that public bodies may only require requesters to provide the basic details necessary for a request, namely a contact address for sending the information (which may be an email) and a description of the information sought. Requesters should have the option of using the form provided or submitting their requests in another form. It is not particularly efficient to require every public and private body to develop their own form. Rather, it would make better sense to develop a central form for this purpose. Requesters should be provided with a receipt or some other form of acknowledgement when they submit requests.

The rules on assistance could be made more specific and extended. Information officers should be required to reduce all oral requests to writing, not just those provided by disabled or illiterate requesters. Those who are disabled may require other forms of assistance than just reducing a request to writing. Furthermore, assistance should also be provided, where needed, to help requesters describe the information they seek in sufficient detail.

The draft Law does not address situations where a public body does not hold the requested information but is aware of another public body which does hold it.

Pursuant to Article 10, requesters may stipulate various forms in which they prefer to access information, including by obtaining a copy, inspecting documents or getting a transcript from an audio or video record. The public body must normally comply with the requester’s preferences, but may provide access in another form where this would harm the record or unduly divert the resources of the body. These are appropriate rules regarding form of access.

Requests must be responded to as soon as possible and in any case within twenty working days (Article 7). There is no provision for extension of this time limit. Where a request relates to information needed to save someone's life or liberty, it must be responded to within 48 hours. It might be preferable to require such requests to be responded to within two working days, so as to avoid a situation where the whole 48 hours fell within a non-working period.

According to Article 9, fees may be charged, but they should not exceed the real cost of searching for, preparing and providing information. Requests for personal information and in the public interest are not subject to any charges. These are generally progressive fee rules. However, in most countries requesters are not required to cover the cost of searching for and preparing information. This is in part because this can exert a chilling effect on requesters, and in part because these costs depend largely on the manner in which public bodies maintain their records and it is not fair to charge requesters more just because this is done poorly by a particular public body. It is also preferable to provide for a central set of fees, so as to avoid a patchwork of different fees in different public bodies, depending on how efficiently they undertake copying and other related tasks. It would also be useful if the law made it quite clear that no fee may be charged simply for lodging a request, although this seems to be implied by the language of Article 9. Consideration should also be given to waiving fees for requesters who are below the poverty line.

Article 8 provides for notice to be provided to requesters, stipulating different information depending on whether or not the request is being granted. These rules are in line with better practice.

Recommendations:

- The law should stipulate clearly that requesters do not need to provide reasons for their requests.
- Requests should be able to be submitted in different ways, including by email.
- The law should only require requesters to provide a contact address for sending information and a description of the information when making a request. A central form should be developed for making requests, but requesters should not be required to use this form, as long as they supply the necessary information.
- Requesters should be provided with a receipt upon making a request.
- Information officers should be required to reduce all oral requests to writing and to provide such assistance as may reasonably be needed by any requesters to make his or her request, including those who are disabled or illiterate.
- Where a public body does not hold requested information but is aware of another body that does hold it, the first body should be required either to transfer the request to the second body (preferable) or to inform the requester about the

second body.

- Consideration should be given to requiring requests relating to life or liberty to be responded to within two working days.
- The law should make it clear that no fee may be charged simply for making a request and that for provision of information, only the costs of reproducing and sending the information may be charged.
- Consideration should be given to providing for a centrally set schedule of fees and for waiving fees for requesters who are below the poverty line.

Duty to Publish

Section 12 imposes an obligation on public bodies to disclose a range of information on a proactive basis. This is generally in line with international standards, although it could be a bit more detailed and extensive in relation to financial information; there is a trend globally to publish far more financial information than was hitherto the case.

Consideration should also be given to the idea of giving public bodies a period of time within which to meet their proactive publication obligations, taking into account the fact that many of them lack the capacity to publish all of this information immediately. There are several ways in which this may be done. For example, they might be given five years to bring themselves into compliance with these rules, along with a requirement to report regularly to an oversight body on what they are doing in this regard (as is already generally required in Article 14; see below). Alternatively, the oversight body might publish an increasingly broad list of proactive publication obligations for all public bodies each year, reaching the full list of obligations in the law after say five years.

Recommendations:

- Consideration should be given to providing for more extensive proactive publication obligations regarding financial information.
- Consideration should be given to putting in place a system which allowed public bodies to reach their full proactive publication obligations over a period of time, such as five years.

Exceptions and Refusals

Article 30 of the draft Law provides generally that the right to information law trumps other laws that prohibit the disclosure of information. This is a progressive

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rule but it might be useful to make it perfectly clear that the only grounds for refusing to disclose information are the exceptions set out in the right to information law, notwithstanding anything that may be provided for in any other law.

The draft Law contains some exceptions that do not conform to international standards. Article 15 allows for the non-disclosure of information where this would damage the document. This is simply not a legitimate reason to refuse to disclose information, although it may require the information to be provided in a specific manner (for example, through a photocopy instead of via inspection of the document).

Article 17 provides for the non-disclosure of a document where it contains “information about a person or neutral third party”. This is supported by Article 3(6), which defines personal information as information which “belongs to a real person” or from which a person can be recognised. Both provisions are based on an overbroad definition of private information. In particular, they fail to refer to any notion of privacy or the unreasonable disclosure of personal information.

Most of the other exceptions include a harm test, often referring to serious damage, in line with international standards. However, the draft Law does not include a public interest override. This would require information to be disclosed where this is in the overall public interest, even if doing so would harm a protected interest. Instead, Article 15 appears to provide for the opposite, allowing information to be kept confidential where the “national interest is priority over the information”. This is directly contrary to international standards and would be open to abuse if passed into law. The exceptions should be set out in clear and narrow terms which protect all confidentiality interests as necessary. The public interest should only mandate disclosure of information, not secrecy.

Article 16 provides for partial disclosure of information where only part of a document is covered by the regime of exceptions, in line with international standards.

Article 23 states that the harm to the interests listed in the exceptions should be assessed at the time of a request. This is a useful provision. However, the draft Law does not provide for an overall time limit on exceptions, for example of 15 or 20 years.

Recommendations:

- The law should make it perfectly clear that the only grounds for refusing to disclose information are the exceptions it provides for, regardless of secrecy provisions in other laws.

- The exception to protect documents should be removed while the privacy exception should be substantially narrowed in scope so that only private information is covered.
- Article 15, allowing for information to be kept secret in the national interest, should be removed and replaced with a provision that requires the disclosure of information where this is in the overall public interest.
- An historical time limit, for example of 15 or 20 years, should be added to the law so that information may only be kept secret very exceptionally beyond that time.

Appeals

It is not very clear from the provisions of the draft Law exactly what sorts of appeals are envisaged if requesters do not believe that their requests have been dealt with in conformity with the law. Article 8(C) provides that public and private bodies must inform requesters about their right to appeal to the courts (presumably where their requests have been refused, in whole or in part). Article 8(D) provides for complaints to go first to the “directorate” of the relevant body and then to the courts. In this case, the court must deal with the matter as soon as possible, if necessary after consulting the Monitoring Committee.

This seems clear enough but a bit of confusion is introduced by Article 26(2), which lists the receipt of complaints from requesters as one of the responsibilities of the Monitoring Committee. It may be noted that the Monitoring Committee is comprised of 11 individuals, some of whom are independent of government and some of whom are not (such as the Deputy Minister of Information and Culture and representatives of other ministries and official offices) (Article 3(1)).

The provision for an internal appeal is welcome, but it is important to provide some sort of framework for the processing of these appeals, at least in terms of providing a timeframe for this.

Experience in other countries has clearly demonstrated that it is of the greatest importance for requesters to be able to appeal claimed failures to respect the right to information law to an independent administrative oversight body. Ultimately, requesters can always go to the courts, but these are too time consuming and costly, even with the exhortation to the courts to process requests quickly, to be useful for and accessible to most requesters.

We assume that the reference in Article 26(2) does not mean that the Monitoring Committee is meant to serve as an appellate body in the sense meant above (among other reasons because Article 8 makes it pretty clear that this is not what is

envisaged). In this case, our primary recommendation is that the law should establish an independent administrative oversight body before which appeals may be lodged.

Care must be taken to ensure that the oversight body is robustly independent and well protected against government interference. It must also be given adequate powers to conduct investigations (for example to review classified documents, to inspect the premises of public bodies and to compel witnesses to appear before it). It must also be given adequate powers to impose binding remedies, including by requiring public and private bodies to disclose information and/or to undertake other measures to ensure proper implementation of the law.

It may be noted that the Monitoring Committee has none of these characteristics. It is not independent, it does not have investigatory powers and it does not have the power to impose appropriate remedies. As a result, even if it is intended that this body should hear information appeals, our primary recommendation, namely that an independent administrative oversight body be established, remains the same.

Recommendation:

- The law should establish an independent administrative oversight body (such as an information commission) with necessary powers to investigate appeals and to impose appropriate remedies in case of non-compliance with the law. If this task is to be allocated to the Monitoring Committee, it needs to be transformed into an independent body and then given these powers.

Sanctions and Protections

Article 28 of the draft Law provides protection for whistleblowers. Although this is relatively brief, being only one article, it does provide a good framework for this sort of protection. Article 29, on the other hand, makes it a criminal offence wilfully to obstruct the right to information in any of a number of ways, including by obstructing access, by interfering with the work of the Monitoring Committee or by destroying records unlawfully. Once again, this is in line with international standards.

The draft Law fails, however, to provide protection to officials who, in good faith, disclose information pursuant to the law (even if they happened to have made a mistake). Experience in other countries demonstrates that the overriding problem is not that officials will give out information they should not, but that they will fail to disclose information even when they should. As a result, this sort of protection is

important to ensure that officials, who are used to working in a climate of secrecy, have the confidence to give out information, including in response to a request.

Recommendation:

- The law should provide protection for officials who disclose information in good faith pursuant to the law.

Promotional Measures

Pursuant to Article 11 of the draft Law, every public body must appoint a “general information provider” (information officer) with various duties, including to facilitate the requesting process. The Monitoring Committee is tasked, pursuant to Article 26(6), with publicising the law in order to increase general public awareness about it.

The information officer is also responsible for ensuring that the “best possible methods” are in place for protecting archives. This idea is developed in Article 13, which states that public and private bodies have a responsibility to manage their records so as to facilitate the right of access. Furthermore, the Monitoring Committee is tasked with preparing “terms of reference” for the protection and management of records. This is a robust system for promoting better record management. It might be improved by requiring all public bodies to conform to the standards (terms of reference) established by the Monitoring Committee.

There is no obligation on public bodies to maintain a list or register of the records they hold, or to make these public. Furthermore, the law does not place an obligation on public bodies to ensure that their staff are adequately trained on implementation of the law.

Pursuant to Article 14, every public body is required to provide quarterly reports on progress in implementing the law to the Monitoring Committee, including detailed information on requests, complaints, proactive disclosure of information and record management. This is laudable, but it might make more sense to limit this to an annual report, which it is more reasonable to expect public bodies to produce. This would also fit in better with the obligation of the Monitoring Committee, pursuant to Article 27(3), to produce an annual report and present it to parliament.

Recommendations:

- All public bodies should be required to manage their records in accordance with the standards set by the Monitoring Committee.

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- The law should require public bodies to maintain lists or registers of the information they hold, and to make these public.
- The law should require public bodies to provide adequate training to their staff on the right to information.
- Consideration should be given to limiting the reporting obligations of public bodies to producing a report on implementation just once annually, as opposed to on a quarterly basis.