MEMORANDUM ON THE DRAFT FREEDOM OF INFORMATION BILL OF BOTSWANA

May 2011

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CONTENTS

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Summary of Recommendations

- All references, including in the title, to the "freedom of information" should be replaced by the "right to information".
- A preamble to the draft law should be included which introduces the draft law as "an Act to promote transparency and maximum disclosure of information in the public interest, to guarantee the right of everyone to information and to provide for effective mechanisms to secure that right".
- The preamble should indicate that the draft law shall be interpreted in accordance with the Constitution, the international legal obligations, including those under the UDHR, the ICCPR and the ACHR.
- A provision should be added to the beginning of the draft law stating that its goals are to (a) to provide a right to information held by public bodies in accordance with the principles that such information should be available to the public, that necessary exceptions to the right of access should be limited and specific, and that decisions on the disclosure of such information should be reviewed independently of government; and (b) to provide a right of access to information held by private bodies where this is necessary for the exercise or protection of any right, subject only to limited and specific exceptions.
- The draft law should state the presumption that all information held by public bodies is subject to disclosure and that this presumption may be overcome only in very limited circumstances according to the provisions of the legislation.
- The draft law should be amended to provide everyone with a right to "information" (rather than the right to obtain access to an official document).
- The draft law should state that information is defined as any recorded information, regardless of its form, source, date of creation, or official status, whether or not it was created by the body that holds it and whether it not it is classified.
- The draft law should indicate that it covers all branches and levels of government, as well as private bodies carrying out public functions or receiving public funds.
- It should indicate that it covers the all branches of government including the executive (including the President), the legislature and the judiciary; Commissions of Inquiry; all administrative bodies; municipal bodies and authorities; autonomous public bodies/quangos; administrative courts; public broadcasters and state owned media; intelligence agencies; the armed forces; the police; public universities and institutions of higher education; state owned corporations; corporations and companies partially owned by the state; political parties; any private organisation that receives public funds; any private organisation that conducts public functions; any private organisation when information is needed to protect another right; monopolies; privatised organisations; regulated public utilities (such as electricity services); health insurance companies; labour unions when they receive public funds.
- The draft law should be amended to state that everyone has the right to information without distinction of any kind such as sex, race, ethnic origin, colour, sexual orientation, language, religion, political or other opinion, national or social origin, property, birth or other status.
- The draft law should be amended to repeal official secrets legislation and other legislation that conflicts with it.
- Part III of the draft law should be amended to state that all exemptions are provided for in this law itself.

- Provisions on exemptions in the draft law should be amended to contain a harm test limiting disclosure only when its dissemination would substantially harm a specified legitimate interest.
- Provisions exemptions in the draft law should be amended to state that all exemptions are subject to a public interest test where information may not be withheld unless the legitimate interest protected is greater than the public interest in disseminating the information.
- The draft law should be amended so that there is no general exemption for cabinet documents. The draft law should state that information or records may only be classified *for as long as the reason for their exemption exists* and for no longer than 10 years.
- The draft law should be amended to indicate that there is no general exemption for documents relating to national security and defence. The draft law should state that information may be withheld on national security grounds only if the government can demonstrate that the restriction is prescribed by law and is necessary in a democratic society to protect a legitimate security interest.
- Section 35 should be deleted.
- The draft law should state that information relating to human rights violations and crimes against humanity cannot be restricted.
- The draft law should be amended to provide that requests may be made in person, submitted in writing, verbally or electronically, by post (or mail) or through a lay or legal representative.
- The draft law should clearly state that it is not necessary to demonstrate the identity of the requester to submit a request for information and that the requester need not justify the request.
- The draft law should clearly state that bodies are required to provide applicants with reasonable assistance where they cannot make a written request either because of illiteracy or disability.
- The draft law should provide for access to information in the language preferred by the applicant if the record exists in that language.
- Section 14 should be amended to clearly state that fees should not be payable when filing an appeal against a refusal of a request for information or for the time taken to consider whether to disclose the information.
- Section 14 should be amended to indicate that fees should also not be charged for individuals on a low income and should be set by a central authority.
- Section 7 (on situations where a person's access to an official document shall not be obtained) should be deleted.
- Section 12 should be amended to state public authorities should respond within 15 days after the request has been made.
- Section 16 (on deferral of access) should be deleted.
- The draft law should be amended to include provisions on the requirements for filing appeals. The draft law should state that a refusal of a request for information may be appealed in writing, by electronic means or by other means. It should state that the name and address of the requester of information is not necessary for filing notification.
- In terms of time limits, the draft law should state that an applicant should have at least 40 days to an appeal for review. The public authority must complete a review within 20 working days. The public authority has up to 40 days to provide information that was not made available.
- The draft law should also establish the procedure for the resolution of appeals. It should establish the presumption in appeal in favour of the requester. In other words, the burden

of proof shall be on the public authority to show that it acted in accordance with its obligations.

- The draft law should provide for a body, called the Information Commissioner or Ombudsman, specialized in transparency and access to information to resolve disputes concerning the right to information. The body should be independent and impartial, and have budgetary, operational and decision-making autonomy. Its powers should include: the authority to hear and to determine appeals from persons whose requests for information have been denied; the power to issue binding decisions which are final for bodies; the authority to monitor and follow up on compliance with its decisions; the authority to receive and hear the facts on violations of access to information legislation; have the full powers to gather information and demand testimony; the authority to evaluate the actions of the bodies covered by the law; the authority to review and order declassification of information; the authority to provide general guidelines; the authority to verify compliance with rules on transparency.
- In terms of appointment, the draft law should set out that the process of nomination for appointment must be open and transparent, the minimum qualifications for appointment; that the appointment must be approved by the legislature and that the appointment is for a fixed term of five years with the possibility of renewal.
- The draft law should state that the Information Commissioner or Ombudsman should report and be accountable to the legislature, who can remove the post-holder (for criminal violation, serious dereliction of duties, or a clear inability to conduct the job).
- The draft law should clearly state a person who has made a request for information may apply to the Information Commissioner (or Ombudsman) for a decision that a public or private body has not complied with the terms of the law by failing to (1) indicate whether or not it holds a record, or to communicate information; (2) respond to a request for information within the time limits; (3) provide a notice in writing of its response to a request for information; (4) communicate information; (5) charged an excessive fee; or (6) communicate information in the form requested.
- Part III of the draft law should be amended to indicate that public bodies should release information about the internal structure of their organisation including information relating to the functions of each unit, a directory of individual civil servants, a catalogue of documents kept, all laws and regulations, and concessions, licenses, permits and authorisations granted to the body.
- Part III should be amended to indicate that public bodies should release information regarding their decision-making including information on the body's aims and objectives, its internal regulations, decisions, management indicators, reports generated by it or its agents, services, programmes administered, procedures, mechanisms for civic participation and location.
- Part III should be amended to specify that financial and budgetary information should be released by public bodies. This should include the full detailed budget, the gross and net remuneration, benefits and compensation schemes of all civil servants, the results of audits and other reviews, announcement of procurement of goods and services, all contracts issued and the design, implementation and criteria for access to subsidy programmes.
- The draft law should state that bodies should affirmatively release information on the internet, through the provision of reading material and reading opportunities at their location, among other methods.
- The draft law should state that bodies are required to use language which is clear, accessible and comprehensible for users. Bodies should, among other things, ensure that the information is regularly updated, indicates the date of the update, the administrative

body responsible for the update, the official responsible for generating the information for each item, the provision of information in indigenous languages.

- The draft law should also provide a complaints procedure for failure to comply with the principle of transparency.
- The draft law should also provide for specific types of information for different groups such as pregnant women, persons with disabilities and minorities.
- The draft law should also provide for a system for increasing the requirements for proactive dissemination of information.
- The draft law should state that adequate resources should be set aside for the promotion of the goals of the legislation through public education and the dissemination of information about RTI through, among other things, electronic and broadcast media.
- The draft should provide for protection against any legal, administrative or employment related sanctions for individuals who release information on wrongdoing, or which would disclose a serious threat to health, safety or the environment. This protection should apply where the individual acted in good faith and in the reasonable belief that the information was substantially true and disclosed evidence of wrongdoing or a serious threat to health, safety or the environment. Wrongdoing should be defined to include the commission of a criminal offence, failure to comply with a legal obligation, a miscarriage of justice, corruption or dishonesty or serious maladministration regarding a public body.
- The Government should consider the adoption of a comprehensive whistle-blower protection act such as has been adopted in South Africa, Uganda, and Ghana.
- The draft law should provide for administrative and civil sanctions, including fines, for deliberate violations of the law.
- The draft law should provide that it is a criminal offence to wilfully – (a) obstruct access to any information contrary to the provisions of the act; (b) obstruct the performance by a public body of a duty under the act; (c) interfere with the work of the oversight body; or (d) destroy records without lawful authority. It should go on to state that anyone who commits such an offence shall be liable on summary conviction to a fine not exceeding an appropriate amount and/or to imprisonment for a period not exceeding two years.
- The draft law should provide for sanctions against bodies for failure to proactively disseminate public information.
- Legal fees and damages should be available to requestors when the oversight body finds that information is being unlawfully withheld.
- The draft law should provide that sanctions may be directly issued by the oversight body for the law.

1. Introduction

This is Memorandum examines the draft Freedom of Information Bill of Botswana (the "draft law") that was published in September 2010 and is due to be presented to the Botswanan Parliament at its July sitting by the president of the Botswana Congress Party and member of parliament for Gaborone Central, Dumelang Saleshando.[1] The purpose of this Memorandum is to examine this draft law from an international and comparative law perspective in order to assess whether the draft law is a progressive piece of legislation that will ensure the right to information (RTI) in Botswana. In doing so, the Memorandum draws upon international law, standards[2] as well as best practices of other states on RTI.[3]

ARTICLE 19 considers the draft law as a positive step towards the effective protection of RTI in Botswana. We welcome a number of features of the draft law. In particular, we welcome the attempt to create a general right of access to information and Part III of the draft law on the affirmative publication of "certain documents and information" by public authorities. However, as this Memorandum highlights, the draft law has a number of deficiencies which should be addressed before it is adopted. The most glaring shortfall is the complete absence of any provisions establishing institutional mechanisms which would support the implementation of the draft law – an oversight body such as an Information Ombudsman or Commissioner, but also information officers and an internal review body within every public authority who would be responsible for receiving requests for information and reviewing decisions to withhold information. The other major weaknesses of the draft law are the long and elaborate list of documents that are exempted and its narrow scope of application to certain public authorities only. We note that the draft law has already been criticised in the Botswanan press because it does not apply to the judiciary, the President and Commissions of Inquiry appointed by the President.[4]

In the run-up to discussions of the draft law in the Botswanan parliament in July 2011, ARTICLE 19 urges the government as well as stakeholders to foster broad public understanding of the draft law, as well public participation in the nationwide consultations on the draft law that are due to take place. ARTICLE 19 encourages the parties to incorporate the changes in this memorandum into any draft law on RTI that is eventually adopted.

2. The Right to Information: Legal Background

While Article 12 of the Constitution of Botswana of 1966 protects freedom of expression and encompasses the "freedom to receive ideas and information without interference", Botswana does

[1] Draft Freedom of Information Bill 2010, Draft K.B.R./N.S.D. 17.09.2010.
[2] The Johannesburg Principles on National Security Freedom of Expression and Access to Information http://www.article19.org/pdfs/standards/joburgprinciples.pdf; Ten Principles on the Right to Know http://portal.unesco.org/ci/en/ev.php-URL_ID=29655&URL_DO=DO_PRINTPAGE&URL_SECTION=201.html;; and the Atlanta Declaration and Plan of Action for the Advancement of the Right of Access to Information http://www.cartercenter.org/news/pr/ati_declaration.html; ARTICLE 19, *The Public's Right to Know: Principles on Freedom of Information Legislation* ("ARTICLE 19 FOI Principles") (London: June 1999); ARTICLE 19, *A Model Freedom of Information Law* ("ARTICLE 19 Model FOI Law") (London: July 2001).
[3] See ARTICLE 19, *Global Right to Information Index* http://www.article19.org/pdfs/press/rti-index.pdf (released 21 September 2010).
[4] "Freedom of Information Act consultations begin", The Botswana Gazette, 27 April 2011

not currently have a legislation implementing RTI.[5] ARTICLE 19 strongly recommends the adoption of legislation that properly guarantees and implements RTI in Botswana for several overlapping reasons.

First, RTI is a fundamental human right that is crucial to the protection of other rights. As the UN General Assembly indicated at its first session in 1946: "Freedom of information is a fundamental human right and … the touchstone of all the freedoms to which the UN is consecrated".[6]

Second, legal protection of RTI is essential for achieving a more meaningful democracy and for fighting corruption. In doing so, such protection would also increase a sense of trust amongst the population about governmental and public authorities, whether at the national or local levels. ARTICLE 19 notes that, critics have accused the Botswanan government of excessive secrecy and declining levels of transparency in recent years.[7] 2010 saw a number of high-profile corruption scandals in the country[8] - even though Botswana has a relatively good record as compared with other African countries when it comes to corruption.[9] Moreover, an effective RTI law would support Botswana's development goals, including Vision 16 which is a strategy to achieve the country's socio-economic and political development.

Third, the adoption of effective RTI law by Botswana would also address the gap between Botswana's domestic legal protection and practice, on the one hand, and international legal obligations on the right to information, on the other. Botswana has both signed and ratified the International Covenant on Civil and Political Rights (ICCPR) – which protects freedom of expression and the right to information – on 8 August 2000. We note, however, that Botswana has neither signed nor ratified the UN Convention Against Corruption (UNCAC).[10]

Fourth, through the adoption of a progressive RTI law, Botswana would also meet *regional* human rights standards, more specifically the African Charter on Human and Peoples' Rights[11] (ACHPR) and the African Declaration of Principles on Freedom of Expression in Africa which endorses freedom of information.[12]

Principle IV on the Freedom of Information states:

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[5] Article 12(1) of the 1966 Botswanan Constitution states: "Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with his correspondence."

[6] UN GA Res 59/1 14 December 1946.

[7] See eg "Freedom of Information Act and Transparency" *Botswana Gazette* 4 May 2011.

[8] Most notably, in January 2010, Defence Minister (and cousin of President Khama) Ramadeluka Sereste was accused of corruption for failing to disclose his position as a shareholder in company—owned by his wife—which won a massive defence contract in 2009. Sereste resigned in August and was charged in September. See Freedom House, Freedom in the World Report 2011. http://www.freedomhouse.org/template.cfm?page=22&year=2011&country=8002

[9] Botswana ranked 33 out of 178 countries on Transparency International's Corruption Perceptions Index in 2010, the highest scoring African country. Transparency International, Corruption Perceptions Index 2010 http://www.transparency.org/policy_research/surveys_indices/cpi/2010/in_detail

[10] The UN Convention Against Corruption, which entered into force on 14 December 2005, has 151 States parties including many African states.

[11] Adopted by the eighteenth Assembly of Heads of State and Government in Nairobi, Kenya, 26 June 1981, entered into force 21 October 1986.

[12] Adopted at the 32nd Ordinary Session of the African Commission on Human and Peoples' Rights in Banjul, The Gambia 17 to 23 October 2002.

1. Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law.

2. The right to information shall be guaranteed by law in accordance with the following principles:

- everyone has the right to access information held by public bodies;
- everyone has the right to access information held by private bodies which is necessary for the exercise or protection of any right;
- any refusal to disclose information shall be subject to appeal to an independent body and/or the courts;
- public bodies shall be required, even in the absence of a request, actively to publish important information of significant public interest;
- no one shall be subject to any sanction for releasing in good faith information on wrongdoing, or that which would disclose a serious threat to health, safety or the environment save where the imposition of sanctions serves a legitimate interest and is necessary in a democratic society; and
- secrecy laws shall be amended as necessary to comply with freedom of information principles.

3. Everyone has the right to access and update or otherwise correct their personal information, whether it is held by public or by private bodies.

The African Commission on Human and Peoples' Rights is also currently developing model legislation on the right to information. In addition, the Economic Community of West African States (ECOWAS) approved a Supplementary Act for a Uniform Legal Framework on Freedom of Expression and Right to Information in West Africa in January 2011.

The right to information is accorded even more enhanced protection in other regional systems of human rights protection, most notably the Inter-American Convention on Human Rights (ACHR)[13] and the system of the European Convention on Human Rights (ECHR), through the jurisprudence of regional human rights courts and the adoption of regional instruments. Most notably in 2006, the Inter-American Court of Human Rights held that the general guarantee of freedom of expression contained in Article 13 of the American Convention on Human Rights protects the right to information held by public bodies.[14] In 2009, in a case concerning the Hungarian Civil Liberties Union, the European Court of Human Rights recognised that when public bodies already hold information that is needed for public debate, the refusal to provide it to those who are seeking it is a violation of the right to freedom of expression and information as

[13] At the same time, there were earlier developments recognising the right to information in the region, including the *Inter-American Declaration of Principles on Freedom of Expression*, 108th Regular Session, 19 October 2000, the *Lima Principles*, adopted in Lima, 16 November 2000, the *Declaration of the SOCIUS Peru Access to Information Seminar*, 28 November 2003, as well as the Resolution of the General Assembly of the Organisation of American States AG/RES. 1932 (XXXIII-O/03), of 10 June 2003. In terms of regional standards, the *Model Inter-American Law on Access to Information* which was presented on 29 April 2010 provides an important guide for the implementation of the right to information within the domestic laws of states parties to the ACHR. *Model Inter-American Law on Access to Information*, 29 April 2010 OEA/Ser.g CP/CAJP-2940/10 Corr.1.

[14] In *Claude Reyes et al v Chile*, the court stated that Article 13 of the ACHR "encompasses the right of individuals to receive ... information and the positive obligation of the State to provide it, in such form that the person can have access in order to know the information or receive a motivated answer when for a reason recognised in the Convention, the State may limit the access to it in the particular case."[14] This remains an extremely important decision and showed the Inter-American Court leading the way for other regional human rights courts on the recognition of the right to information. *Claude Reyes et al v Chile* Judgement of the Inter-American Court of Human Rights of 19 September 2006 Series C.

protected by Article 10 of the ECHR. [15] Furthermore, the Council of Europe adopted the Convention on Access to Official Documents in June 2009.[16]

Fifth and finally, the adoption of such legal protection would allow Botswana to join the international community of nearly 90 states who have adopted legislation or national regulation on RTI to date, with over 80 states recognising the right to information as a constitutional right.[17] This collection of states includes countries as diverse as Chile,[18] Sweden[19], Jordan,[20] and Indonesia[21], as well as a growing number of states on the African continent. The countries which currently have RTI laws are South Africa (2000),[22] Angola (2002),[23] Uganda (2005),[24] and most recently Liberia (2010).[25] (Zimbabwe's Access to Information and Protection of Privacy Act of 2002 is widely viewed as a regressive piece of legislation and has been relied upon to suppress information in the name of privacy than to make information available.[26]) In addition, Niger recently adopted a binding ordinance on access to information.[27] ARTICLE 19 notes that there appears to more legislative interest in adopting RTI legislation in Africa with bills on the right to information currently being considered in countries such as Ghana, Nigeria[28] and Rwanda, amongst others.[29]

3. General Provisions

a. Title

The title of the draft law, "Freedom of Information Bill", frames RTI as a negative freedom rather than as a positive right which requires action on the part of the state. ARTICLE 19 recommends that the draft law embrace the term the "right to information" in the title and throughout the text to highlight that the state has a duty to proactively disseminate public information and promote transparency.

b. Preamble

We recommend that the draft law include a broad purpose as well as relevant sources in a formal preamble, rather than in a memorandum at the beginning of the draft law as it currently does. Such a memorandum may or may not form part of the adopted version of the draft law. A preamble, on the other hand, would provide a clearer interpretive guide and would be an integral part of the legislation once it is adopted. Whilst we do not suggest that the draft law requires an especially elaborate preamble, we do suggest that that the draft law would be strengthened by

[15] *Társaság a Szabadságjogokért v. Hungary*, Application no. 37374/05 14 April 2009.
[16] As of 9 May 2011, the Convention on Access to Official Documents has been ratified by 3 states (Norway, Sweden and Hungary). It requires 10 ratifications to come into legal effect.
[17] See Privacy International, *National Freedom of Information Laws, Regulations and Bills 2010* http://www.privacyinternational.org/foi/foi-laws.jpg
[18] Law No 20.285 on Access to Information published in Official Gazette on 20 August 2008.
[19] The principle of public access to information has been established in Sweden since the 1766 Freedom of Press Act.
[20] See Law 47 of 2007 on Access to Information.
[21] See the Openness of Public Information Act of 3 April 2008.
[22] Constitution of South Africa 1996, Article 32; Promotion of Access to Information Act 2000.
[23] Law on Access to Administrative Documents, No. 11/02, 2002.
[24] Constitution of Uganda 1995, Article 41; Access to Information Act 2005.
[25] Freedom of Information Act 2010.
[26] Access to Information and Protection of Privacy Act 2002.
[27] Charte d'accès à l'information publique et aux documents administratifs, Ordonnance N. 2011-22, 23 Fevrier 2011.
[28] See ARTICLE 19, "Nigeria: Senate Must Strengthen And Adopt Right to Information Bill", 28 February 2011 http://www.article19.org/pdfs/press/nigeria-senate-must-strengthen-and-adopt-right-to-information-bill.pdf
[29] See ARTICLE 19, *Note on Draft Rwandan Law on Access to Information* 24 February 2011 http://www.article19.org/pdfs/analysis/rwanda-note-on-draft-law-on-access-to-information.pdf

including a preamble identifying its central goal. In our view, the preamble should define the legislation as "an Act to promote transparency and maximum disclosure of information in the public interest, to guarantee the right of everyone to information and to provide for effective mechanisms to secure that right". The preamble should also refer to relevant international, regional and national legal sources, such as the UDHR, the ICCPR and the ACHPR and related Principles, as well as Article 12 of the Botswanan Constitution.

c. Goals

The object of the draft law is indicated in section 3 of the Memorandum which states that it is to "extend the right of members of the public to access information in the possession of public authorities by, *inter alia* – (a) making available to the public, information about the operations of public authorities and, in particular, ensuring that the rules and practices affecting members of the public in their dealings with public authorities are readily available to persons affected by those rules and practices; (b) creating a general right of access to information in documentary form in the possession of public authorities, limited only by the exceptions and exemptions necessary for the protection of essential public interests and private and business affairs of persons in respect of whom information is collected and held by public authorities; and (c) creating a right to bring about the amendment of records containing personal information that is incomplete, incorrect or not relevant to the purpose for which the document is held."

In ARTICLE 19's view, the goals of the draft law should not be so limited and be more straightforwardly and succinctly stated. The draft law should state that its goals are to promote the right of information subject to specific and limited exceptions, and to provide an independent institutional framework for the implementation of this right.[30]

Within its first few provisions, the draft law should include *a presumption* that all information held by public bodies is subject to disclosure and that this presumption may be overcome only in very limited circumstances according to the provisions of the legislation. The importance of such a presumption has been emphasised by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression. In 2004, they stated:

> The right to access information held by public authorities is a fundamental human right which should be given effect at the national level through comprehensive legislation (for example Freedom of Information Acts) based on the principle of maximum disclosure, establishing a presumption that all information is accessible subject only to a narrow system of exceptions.[31]

The Ugandan Access to Information Act 2005 concerning the purpose of the legislation indicates such a presumption through such provisions such as Section 2(1) which states that the legislation "applies to all information and records of Government ministries, departments, local governments, statutory corporations and bodies, commissions and other Government organs and agencies, unless specifically exempted by this Act".

The draft law might also a list of principles which apply to the interpretation of the right to information as part of its main body, not only its preamble. In this regard, the recently adopted Liberian Freedom of Information Act of 2010 includes a number of important guiding principles

[30] Para 2 ARTICLE 19 Model FOI Law.
[31] Joint Declaration of International Mechanisms on Freedom of Expression, 2004 http://www.article19.org/pdfs/igo-documents/three-mandates-dec-2004.pdf

including the principle that "public bodies hold information not for themselves but as agents of the public and custodians of the public good" and "everyone has a right of access to information generated, received and or held by public bodies, subject only to such limitations as are narrowly established for reason of an equally or more compelling public interest".[32]

Recommendations:

- All references, including in the title, to the "freedom of information" should be replaced by the "right to information".
- A preamble to the draft law should be included which introduces the draft law as "an Act to promote transparency and maximum disclosure of information in the public interest, to guarantee the right of everyone to information and to provide for effective mechanisms to secure that right".
- The preamble should indicate that the draft law shall be interpreted in accordance with the Constitution, the international legal obligations, including those under the UDHR, the ICCPR and the ACHR.
- A provision should be added to the beginning of the draft law stating that its goals are to (a) to provide a right to information held by public bodies in accordance with the principles that such information should be available to the public, that necessary exceptions to the right of access should be limited and specific, and that decisions on the disclosure of such information should be reviewed independently of government; and (b) to provide a right of access to information held by private bodies where this is necessary for the exercise or protection of any right, subject only to limited and specific exceptions.
- The draft law should state the presumption that all information held by public bodies is subject to disclosure and that this presumption may be overcome only in very limited circumstances according to the provisions of the legislation.

4. Scope

a. Information covered

It is significant that the draft law does not provide a general right to information, but rather "the right to right to obtain access to an official document" (section 5). Under section 2, official document is any document held by a public authority in connection with its functions as such, whether or not it was created by that authority or before the commencement of the legislation. The word "document" is interpreted broadly under section 2 and covers any medium in which information is recorded.

In ARTICLE 19's opinion, the draft law should use the term "information" rather than "official documents". The reference to documents suggests that physical access to original documents is what is necessarily required, when in most cases it is the information contained within such documents which is what is being sought. Furthermore, access to documents is more restrictive than access to information as applicants will not have a specific document in mind when lodging their information requests. Officials may rigidly interpret a right to documents in order to reject, instead of responding in substance to, requests. The term "*official* documents" also places an additional burden on the requestor of information to demonstrate that it is "official".

[32] Section 1.4 of the Freedom of Information Act of Liberia of 2010.

Information should be more broadly defined to cover *any* recorded information, regardless of its form, source, date of creation, *or official status*, whether or not it was created by the body that holds it and whether it not it is classified.[33] The Liberian Freedom of Information 2010 allows the legislation to cover a broad range of types of information. It states that "public record means a record, manual book, regulation, or other documents produced or received by, being used by, possessed by or under the control of a public authority, whether in written form or recorded or stored in electronic form or in any other device".[34]

b. Bodies covered

At first sight, the scope of the draft law is broad. Section 6 states that a "public authority shall give an applicant access to an official document" in certain circumstances. Section 2 defines a number of terms, including "public authority" which is deemed to encompass: the Parliament or a committee of Parliament; the Cabinet; Ministries or Departments or Divisions of Ministries; local authorities; statutory corporations or bodies responsibility for which is assigned to a Minister; Commissions established by law; bodies owned or controlled by the Government and any other body designated as a public authority for the purposes of the law. Section 4 also states that the legislation "binds the State".

Upon closer inspection, the draft law qualifies "public authority" by expressly excluding courts, holders of judicial office or other office "pertaining to a court" (paragraph 2(2)) (even though registries or other offices of court administration and staff of such bodies in their capacity as members of staff in relation to those matters relating to court administration are included as public authorities). The draft law also explicitly indicates that it shall not apply to the President and Commissions of Inquiry established by the President (section 3). There is no reason in principle why all three branches of government including the judiciary and the Executive (including the Presidency) should not be covered by the legislation provided that the regime of exemptions protects legitimate secrecy interests. Furthermore, limiting the scope of the law to certain branches of government runs contrary to the idea of the right to information as a human right and the obligations on *all* public bodies that it imposes as a result. The draft law should therefore apply to the judiciary and those exercising a judicial function, the President and Commissions of Inquiry.

More generally, the draft law should more clearly indicate that it covers all branches and levels of government, including local government, elected bodies, bodies which operate under a statutory mandate, nationalised industries and public corporations, non-departmental bodies or quangos and judicial bodies, as well as private bodies carrying out public functions or receiving public funds. Ideally, the draft law should specify the bodies covered by the draft law. The South Africa RTI law covers all bodies exercising a public power or performing a public function pursuant to any legislation.[35] The South African legislation also imposes obligations on private bodies, defined as commercial entities, to disclose information needed for the exercise or protection of any right.[36]

[33] *Model FOI Law*, Article 7.
[34] Section 1.3.12 of the Liberian Freedom of Information Act 2010.
[35] Section 1, Promotion of Access to Information Act 2000 of South Africa. However, pursuant to section 12, the law does not cover cabinet or its committees, the judicial functions of courts and the judiciary or individual members of parliament.
[36] Ibid.

c. Personal scope

Section 5 establishes the right to obtain access to obtain an official document for everyone. This is positive: as a human right, the RTI should be a right available to all within the jurisdiction of a state.[37] This provision may be improved through reference to the principle of non-discrimination in the application of the RTI.[38]

d. Relationship with other legislation

It is positive that the draft law states that it shall "not prevent a public authority from publishing or giving access to a document, otherwise than as required by this Act, where it has the discretion to do so or is required under any Act to do so" (section 8). In other words, the draft law should provide a minimum level of protection of the right of access to official documents.

Section 5 states that "*[n]otwithstanding any law to the contrary and subject to the provisions of this Act*, every person shall have the right to obtain access to an official document" (emphasis added). This override of other legislation is positive. In addition, a better practice is for RTI legislation to specifically repeal or at least order a review of legislation that conflicts with it, including official secrets legislation, and prevail over legislation which classifies information. This principle should be clearly stated within the draft law. The Liberian Freedom of Information Act of 2010 emphasises the primacy of the legislation over other laws stating "[s]ave for the Constitution, this Act is and shall be the primary law governing the right of access to information ... and ... shall prevail prevail over any and all subsequent inconsistent statutes, except a subsequent statute that specifically amends or repeals it".[39]

Recommendations:

- The draft law should be amended to provide everyone with a right to "information" (rather than the right to obtain access to an official document).
- The draft law should state that information is defined as any recorded information, regardless of its form, source, date of creation, or official status, whether or not it was created by the body that holds it and whether it not it is classified.
- The draft law should indicate that it covers all branches and levels of government, as well as private bodies carrying out public functions or receiving public funds.
- It should indicate that it covers the all branches of government including the executive (including the President), the legislature and the judiciary; Commissions of Inquiry; all administrative bodies; municipal bodies and authorities; autonomous public bodies/quangos; administrative courts; public broadcasters and state owned media; intelligence agencies; the armed forces; the police; public universities and institutions of higher education; state owned corporations; corporations and companies partially owned by the state; political parties; any private organisation that receives public funds; any private organisation that conducts public functions; any private organisation when

[37] It is recalled that the universal nature of the right of information has been underlined by the Columbian Constitutional Court which has stated that "all persons [have] the right to inform and receive information that is true and impartial" and the Constitutional Chamber of the Supreme Court of Costa Rica which has indicated that "the active subject of [this] right ... is any person ..., which reveals that the aim of the constituent assembly was to reduce administrative secrecy to its minimum expression and expand administrative publicity and transparency". Appeals Chamber of the Constitutional Court of Columbia. Judgment T-437/04 File T-832492 6 May 2004; Constitutional Chamber of the Supreme Court of Costa Rica Exp 05-001007-0007-CO, Res 2005-04005 San Jose Costa Rica 15 April 2005.

[38] Principle 3 of the Council of Europe recommendation of 21 February 2002 states that the general principle on access to official documents "should apply to without discrimination on any ground, including national origin".

[39] Section 1.7 of the Freedom of Information Act, 2010 of Liberia.

information is needed to protect another right; monopolies; privatised organisations; regulated public utilities (such as electricity services); health insurance companies; labour unions when they receive public funds.

- The draft law should be amended to state that everyone has the right to information without distinction of any kind such as sex, race, ethnic origin, colour, sexual orientation, language, religion, political or other opinion, national or social origin, property, birth or other status.
- The draft law should be amended to repeal official secrets legislation and other legislation that conflicts with it.

5. Exemptions

Part IV (sections 25-37) of the draft law lists documents which are exempt from the principle of disclosure. This long list of generally exempted documents encompasses the following: cabinet documents; internal working documents and policy documents; national security and defence documents; international relations documents; documents affecting enforcement or administration of the law; documents subject to legal professional privilege; documents affecting personal privacy; documents relating to trade secrets and business affairs; documents containing material obtained in confidence; documents affecting the national economy and documents to which secrecy provisions apply. Rather than this broad list of exempted documents, the draft law should include a "narrow, carefully-tailored" list of types of information which may justify non-disclosure, as indicated by the Joint Declaration of the UN, OAS and OSCE Special Rapporteurs in 2004.[40]

The effect of this long list is somewhat mitigated by the inclusion of sections 37 and 38. Section 37 provides "[n]otwithstanding any law to the contrary, a public authority shall give access to an exempt document where, in the circumstances, the giving of access to the document is justified in the public interest, having regard to any benefit and to any damage that may arise from doing so in manners such as, but not limited to – (a) abuse of authority or neglect in the performance of official duty; (b) injustice to an individual; (c) danger to the health or safety of an individual or of the public; or (d) unauthorised use of public funds. Section 38 states that "[i]n considering whether or not to claim that a document is an exempt document under this Act, a public authority shall act in good faith and in the public interest, and shall endeavour, as much as possible, to afford to members of the public maximum access to official documents".

Section 37 may be appreciated as some kind of public interest test, although it is only triggered *after* a piece of information has already been deemed to be exempt. Under international standards, a piece of information would only be exempt if it was shown that the harm caused to a specific legitimate aim by its release would outweigh the public interest in having the information made public. In other words, all types of information should be subject to the fundamental

[40] International Mechanisms for Promoting Freedom of Expression, Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 6 December 2004 http://www.article19.org/pdfs/igo-documents/three-mandates-dec-2004.pdf The Mexican federal right to information law contains a reasonable set of specific exceptions to the principle of disclosure, namely in cases where disclosure would: compromise national or public security of defence; impair ongoing negotiations or international relations, harm the country's financial or economic stability; pose a risk to the life, security or health of an individual; or severely prejudice law enforcement, including the prevention or prosecution of crime and the administration of justice, amongst other things. The Transparency and Access to Public Government Information Law of June 2002, Article 13.

principle of maximum disclosure unless it can be shown that disclosure of information would: (1) cause substantial harm to a legitimate aim; and (2) that harm outweighs the public interest in having the information made public. We suggest that this approach to the public interest test is adopted.

Cabinet documents and internal working and policy documents, are exempt for a period of ten years (section 25). Cabinet documents should not be subject to a general exemption. With respect to internal working and policy documents however, it is noted that the period of ten years is in line with comparative approaches to classified information. The approach to the maximum period for non-disclosure of the Liberian Freedom of Information Bill is helpful. In Liberia, information or records are exempted from non-disclosure *for as long as the reason for their exemption exists*, but in any event no longer than a continuous period of 15 years.[41] There should also be no general exemption for national security and defence documents. In relation to such exceptions which are covered by section 27, the draft law should draw from the *Johannesburg Principles on National Security, Freedom of Expression and Access to Information*, in particular the general principle that no restriction on the right to information on the ground of national security may be imposed unless the government can demonstrate that the restriction is prescribed by law and is necessary in a democratic society to protect a legitimate security interest.[42]

ARTICLE 19 is particularly concerned about section 35 which states that a document is exempt "if there is in force a written law applying specifically to information of a kind contained in the document and prohibiting persons referred to in the written law from disclosing information of that kind, whether the prohibition is absolute or is subject to exceptions or conditions". This provision is inconsistent with the previously section overriding other legislation and thus preserves pre-existing official secrets legislation and undermines the objectives of the draft law. It also means that the draft law does not provide a comprehensive list of exemptions which may be spread out over other pieces of legislation.

Recommendations:

- Part III of the draft law should be amended to state that all exemptions are provided for in this law itself.
- Provisions on exemptions in the draft law should be amended to contain a harm test limiting disclosure only when its dissemination would substantially harm a

[41] Section 4.9 of the Freedom of Information Act of Liberia, 2010. In the US, the Executive Order on Classification sets a default that information can only be classified for ten years.Executive Order 12958, 25 March 2003. Under Mexican Federal Law of Transparency and Access to Public Government Information, "privileged information" may remain as such for a period of up to twelve years. See s 15 of the Mexican Federal Law of Transparency and Access to Public Information.

[42] In other words, the genuine purpose and demonstrable effect of any restriction must be to protect the state's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat. It is not legitimate if its genuine purpose or demonstrable effect is to protect interests unrelated to national security, including, for example, to protect a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology, or to suppress industrial unrest. See the *Johannesburg Principles on National Security, Freedom of Expression and Access to Information* http://www.article19.org/pdfs/standards/joburgprinciples.pdf The Principles were developed by a working group of experts in 1995 and have been subsequently endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression, the UN Commission on Human Rights and various courts. See for example, Report of the Special Rapporteur, Promotion and protection of the right to freedom of opinion and expression, UN Doc E/CN.4/1996/39, 22 March 1996, para 154; Commission Res 1996/53; *Gamini Athukoral "Sirikotha" and Ors v Attorney-General*, 5 May 1997, SD Nos. 1-15/97 (Supreme Court of Sri Lanka) and *Secretary of State for the Home Department v. Rehman* [2001] UKHL 47 (House of Lords).

specified legitimate interest.

- Provisions exemptions in the draft law should be amended to state that all exemptions are subject to a public interest test where information may not be withheld unless the legitimate interest protected is greater than the public interest in disseminating the information.
- The draft law should be amended so that there is no general exemption for cabinet documents. The draft law should state that information or records may only be classified *for as long as the reason for their exemption exists* and for no longer than 10 years.
- The draft law should be amended to indicate that there is no general exemption for documents relating to national security and defence. The draft law should state that information may be withheld on national security grounds only if the government can demonstrate that the restriction is prescribed by law and is necessary in a democratic society to protect a legitimate security interest.
- Section 35 should be deleted.
- The draft law should state that information relating to human rights violations and crimes against humanity cannot be restricted.

6. Procedures

Part II contains the procedures for accessing documents. Access to an official document may be possible where a request for access is duly made by the applicant, is approved by the public authority and any fee is paid before access is granted (section 6). A requester is required to "identify the document or provide information concerning the document as is reasonably necessary" to enable its identification.

There are a number of positive features about Part II which: allows the transfer of a request to an appropriate public authority where the request has not been directed to the appropriate public authority in the first place (section 10); provides a duty to "take reasonable steps to assist" a person wishing to make a request or exercise any other rights in the legislation (sections 9(2), 11 and 17); provides that fees "shall be commensurate with the cost incurred in making a document" (section 14(4)); provides that access to the document may be requested and given by a range of methods including an opportunity to inspect, a copy of the document, an electronic copy of the document, a recording or a transcript (sections 9(3) and 15); provides that a request for access may be made for all documents that contain information of a specified kind or relate to a particular subject matter (section 9(4); provides that an applicant for information may be granted access to a copy of a redacted version of the document with exempted information deleted (section 13); provides that a public authority may refuse access to a document without having processed the request "if the public authority is satisfied that the work involved in processing the request would substantially and unreasonably interfere" with its normal operations" (section 17) or is a repeated request or one that has been already refused by authority (section 18); provides that reasons should be given for a refusal of a request for information (section 19).

However, the procedures for submitting requests for information require revision in various ways.

First, in relation to making a request, the draft law requires persons wishing to make a request for access to official documents to fill out the form set out in the Schedule of the legislation according to section 9. Individuals should not be bound to fill out a particular form, even if assistance is going to be provided to them to fill it out. Instead, the draft law should provide that

requests may be made in person, submitted in writing, verbally (including by phone) or electronically, by post (or mail) or through a lay or legal representative. The draft law should also ensure that it is not necessary to demonstrate the identity of the requester to submit a request for information and that the requester need not justify the request.

Second, the draft law should provide that reasonable assistance should to be provided to applicants where, for example, they cannot make a written request either because they are illiterate or due to disability. In India, such assistance extends to helping the disabled actually access information which has been disclosed. It should also provide for special access by persons with disabilities, at no extra cost, as the provided for by the Ugandan Access to Information Act.

Third, the draft law should provide for access to information in the language preferred by the applicant if the record exists in that language, as South Africa Promotion of Access to Information Act.

Fourth, the draft law's provision on fees appears incomplete. The draft law should clarify that fees should not be payable when submitting a request for information, but also when filing an appeal against a refusal of a request for information or for the time taken to consider whether to disclose the information. Fees should also not be charged for individuals on a low income and should be set by a central authority.

Fifth, the 30-day time limit for the public authority to determine requests is too long (section 12). Public authorities should respond within 15 days after the request has been made.

Sixth, the provision on the "deferral of access to information" potentially serves as a further barrier to access to information and an excuse not to release information at the time of the request (section 16). Although deferral under the draft law would only be possible "where it is reasonable to do so in the public interest or having regard to normal and proper administrative practices, the possibility of deferral undermines the principle of maximum disclosure. A public interest test should apply anyway in deciding whether to withhold the information and reliance upon "normal administrative practices" to delay the release of information could be used to cover up corrupt or weak established practices and avoid accountability.

Seventh, the draft law omits any provisions on the requirements for filing internal appeals to the public authority, time limits for appeals and legal guarantees for appeal. Section 42 does provide for judicial review of the decision of a public authority under the legislation.

Recommendations:

- The draft law should be amended to provide that requests may be made in person, submitted in writing, verbally or electronically, by post (or mail) or through a lay or legal representative.
- The draft law should clearly state that it is not necessary to demonstrate the identity of the requester to submit a request for information and that the requester need not justify the request.
- The draft law should clearly state that bodies are required to provide applicants with reasonable assistance where they cannot make a written request either because of illiteracy or disability.
- The draft law should provide for access to information in the language preferred by the applicant if the record exists in that language.

- Section 14 should be amended to clearly state that fees should not be payable when filing an appeal against a refusal of a request for information or for the time taken to consider whether to disclose the information.
- Section 14 should be amended to indicate that fees should also not be charged for individuals on a low income and should be set by a central authority.
- Section 7 (on situations where a person's access to an official document shall not be obtained) should be deleted.
- Section 12 should be amended to state public authorities should respond within 15 days after the request has been made.
- Section 16 (on deferral of access) should be deleted.
- The draft law should be amended to include provisions on the requirements for filing appeals. The draft law should state that a refusal of a request for information may be appealed in writing, by electronic means or by other means. It should state that the name and address of the requester of information is not necessary for filing notification.
- In terms of time limits, the draft law should state that an applicant should have at least 40 days to an appeal for review. The public authority must complete a review within 20 working days. The public authority has up to 40 days to provide information that was not made available.
- The draft law should also establish the procedure for the resolution of appeals. It should establish the presumption in appeal in favour of the requester. In other words, the burden of proof shall be on the public authority to show that it acted in accordance with its obligations.

7. Oversight body

The draft law lacks any provisions establishing an independent and autonomous oversight body specialised in transparency and access to information to resolve disputes under the legislation. Such an oversight is essential for a progressive RTI law. We note that one of the most positive features of the Liberian Freedom of Information Act is the creation of an independent Information Commission.[43] We note that over fifty other states – including India, Mexico, Thailand, the UK and the US – provide for an independent, administrative oversight body to review refusals to provide access to information and oversee the implementation of the law. Such oversight bodies are crucial to the effective functioning of right to information systems in countries, particularly when direct appeals to the court process are too time-consuming and expensive for most applicants, as campaigns in the US and South Africa for the establishment of an oversight body have highlighted.[44]

Recommendations:

- The draft law should provide for a body, called the Information Commissioner or Ombudsman, specialized in transparency and access to information to resolve disputes concerning the right to information. The body should be independent and impartial, and have budgetary, operational and decision-making autonomy. Its powers should include: the authority to hear and to determine appeals from persons whose requests for information have been denied; the power to issue binding decisions which are final for

[43] Section 5.1.
[44] T Mendel, *The Right to Information in Latin America: A Comparative Legal Survey* (UNESCO: 2009) at 168.

bodies; the authority to monitor and follow up on compliance with its decisions; the authority to receive and hear the facts on violations of access to information legislation; have the full powers to gather information and demand testimony; the authority to evaluate the actions of the bodies covered by the law; the authority to review and order declassification of information; the authority to provide general guidelines; the authority to verify compliance with rules on transparency.

- In terms of appointment, the draft law should set out that the process of nomination for appointment must be open and transparent, the minimum qualifications for appointment; that the appointment must be approved by the legislature and that the appointment is for a fixed term of five years with the possibility of renewal.
- The draft law should state that the Information Commissioner or Ombudsman should report and be accountable to the legislature, who can remove the post-holder (for criminal violation, serious dereliction of duties, or a clear inability to conduct the job).
- The draft law should clearly state a person who has made a request for information may apply to the Information Commissioner (or Ombudsman) for a decision that a public or private body has not complied with the terms of the law by failing to (1) indicate whether or not it holds a record, or to communicate information; (2) respond to a request for information within the time limits; (3) provide a notice in writing of its response to a request for information; (4) communicate information; (5) charged an excessive fee; or (6) communicate information in the form requested.

8. Proactive transparency

A significant portion of the draft law concerns the "publication of certain documents and information". This follows the approach of many RTI laws which impose a duty on bodies to publish certain key information, even in the absence of a request. The types of information which ought to be released under this part include information concerning the public authority such as the decision-making and other powers and a statement of the categories of documents maintained by the public authority) (section 21). Other types of information (such as manuals setting out guidelines, practices and precedents) should be available for inspection and purchase (section 22). The public authority should publish in the Gazette a statement specifying the documents – such as reports, statements or recommendations produced by the public body, an interdepartmental committee, technical expert or consultant, policy instructions for the drafting of legislation and environmental impact assessments – which it holds in its possession (section 23). In a provision which relates to proactive transparency, the draft law later requires the relevant Minister to prepare an annual report on the operation of the Act during that year and submit it to the National Assembly. Other ministers should provide that Minister with information on the number of requests for information made to, the number of refusals of information made by public authorities, the number of applications for judicial review (Article 43).

Provisions on the way the various types of documents and information which ought to be released appear excessively lengthy yet are is not comprehensive. The draft law could be more effective in setting out the framework for a system of affirmative publication by clearly and succinctly identifying the types of information which ought to be released. This should include key information on the internal structure of a public authority, on decision-making of that authority and financial and budgetary information of the public authority.

Furthermore, the draft law should stipulate that such information should be disseminated through a range of means, including the internet. Informing the public of their rights and promoting a culture of openness within government are essential if the goals of RTI legislation are to be realised.

In addition, the draft law should establish clear rules for the publication of information. Public bodies should: use language which is clear, accessible and which facilitates comprehension by its users; update the information on a regular basis; publish the date of update for each item; indicate the administrative division responsible for generating the information for each item; indicate the official responsible for generating information for each item; provide for information to be made available indigenous or local languages; indicate items which are not applicable to them; indicate a complaints procedure for failure to comply with the principle of transparency; provide for a system for increasing the requirements for proactive dissemination of information. The draft law should also provide that specific types of information should be provided for different vulnerable groups, such as pregnant women, persons with disabilities and minorities, who may benefit from such targeted information.

The draft law should require that adequate state resources are devoted to promoting the goals of the legislation. As a minimum, the draft law should make provision for resources for public education and the dissemination of information regarding the RTI, the scope of information which is available and the manner in which such rights may be exercised. Electronic and broadcast media are a particularly important vehicle for the dissemination and education, particularly but not only in areas where newspaper distribution or literacy levels are low.

Recommendations:

- Part III of the draft law should be amended to indicate that public bodies should release information about the internal structure of their organisation including information relating to the functions of each unit, a directory of individual civil servants, a catalogue of documents kept, all laws and regulations, and concessions, licenses, permits and authorisations granted to the body.
- Part III should be amended to indicate that public bodies should release information regarding their decision-making including information on the body's aims and objectives, its internal regulations, decisions, management indicators, reports generated by it or its agents, services, programmes administered, procedures, mechanisms for civic participation and location.
- Part III should be amended to specify that financial and budgetary information should be released by public bodies. This should include the full detailed budget, the gross and net remuneration, benefits and compensation schemes of all civil servants, the results of audits and other reviews, announcement of procurement of goods and services, all contracts issued and the design, implementation and criteria for access to subsidy programmes.
- The draft law should state that bodies should affirmatively release information on the internet, through the provision of reading material and reading opportunities at their location, among other methods.
- The draft law should state that bodies are required to use language which is clear, accessible and comprehensible for users. Bodies should, among other things, ensure that the information is regularly updated, indicates the date of the update, the administrative body responsible for the update, the official responsible for generating the information for each item, the provision of information in indigenous languages.
- The draft law should also provide a complaints procedure for failure to comply with the

principle of transparency.

- The draft law should also provide for specific types of information for different groups such as pregnant women, persons with disabilities and minorities.
- The draft law should also provide for a system for increasing the requirements for proactive dissemination of information.
- The draft law should state that adequate resources should be set aside for the promotion of the goals of the legislation through public education and the dissemination of information about RTI through, among other things, electronic and broadcast media.

9. Protections

The draft law also offers protection to those who provide access to a document (i.e. representatives of public bodies) in good faith or in accordance with its requirements against actions for defamation, breach of confidence or infringement of copyright law, or criminal sanctions. Yet despite this protection for good faith disclosures under the legislation, the draft law does not address the issue of whistleblowers, persons who release information on wrongdoing. Whistleblower protection laws have gained a strong interest around the world including in Africa in states such as South Africa, Ghana and Uganda.[45] Furthermore, a provision on whistleblower protection is an integral part of the Ugandan RTI law.[46]

In the absence of comprehensive legislative protection for whistleblowers, the draft law should provide for this in accordance with international standards and the best practice of states. Whistleblower protections are an important complement to access to information laws by facilitating the disclosure of information in the public interest. A number of international and regional instruments require the adoption of these protections to fight corruption. The UNCAC recommends that countries adopt "appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention".[47]

Recommendations:

- The draft should provide for protection against any legal, administrative or employment related sanctions for individuals who release information on wrongdoing, or which would disclose a serious threat to health, safety or the environment. This protection should apply where the individual acted in good faith and in the reasonable belief that the information was substantially true and disclosed evidence of wrongdoing or a serious threat to health, safety or the environment. Wrongdoing should be defined to include the commission of a criminal offence, failure to comply with a legal obligation, a miscarriage of justice, corruption or dishonesty or serious maladministration regarding a public body.[48]
- The Government should consider the adoption of a comprehensive whistle-blower

[45] See the South African Protected Disclosures Act 2000.
[46] Section 44 of the Ugandan Access to Information Act 2005. See David Banisar, Whistleblowing: International Standards and Developments (World Bank/UNAM, 2011) http://ssrn.com/abstract=1753180
[47] Article 14, UN Convention on Anti-Corruption s 33
http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf
[48] See *ARTICLE 19, FOI Principles*, Principle 9, and *ARTICLE 19, Model FOI Law*, Part VII.

protection act such as has been adopted in South Africa, Uganda, and Ghana.

10. Sanctions

a. Civil Responsibility and Criminal Sanctions

The draft law provides no civil liability or criminal sanctions for violations. It is important to include sanctions for individuals who wilfully obstruct access to information or wilfully destroy records in order to protect the integrity and availability of records. Nearly every RTI law around the world includes such provisions. For instance, the Liberian Freedom of Information Act provides for the possibility for fines for violations of the legislation. Such fines may be imposed by the relevant authority or entity or the Independent Information Commissioner at the end of an internal review or hearing consistent with due process. The Liberian RTI law also provides for criminal sanctions for the wilful destruction of records.[49]

A system of sanctions should be narrowly focussed to serve the particular objectives of the law and should encompass a range of administrative, civil and criminal sanctions to deter violations of the law.

Recommendations:

- The draft law should provide for administrative and civil sanctions, including fines, for deliberate violations of the law.
- The draft law should provide that it is a criminal offence to wilfully – (a) obstruct access to any information contrary to the provisions of the act; (b) obstruct the performance by a public body of a duty under the act; (c) interfere with the work of the oversight body; or (d) destroy records without lawful authority. It should go on to state that anyone who commits such an offence shall be liable on summary conviction to a fine not exceeding an appropriate amount and/or to imprisonment for a period not exceeding two years.
- The draft law should provide for sanctions against bodies for failure to proactively disseminate public information.
- Legal fees and damages should be available to requestors when the oversight body finds that information is being unlawfully withheld.
- The draft law should provide that sanctions may be directly issued by the oversight body for the law.

[49] Sections 7.1-7.5 of the Freedom of Information Act 2010 of Liberia.