MEMORANDUM

on

the draft Right to Information Bill of the Republic of Ghana

ARTICLE 19
Global Campaign for Free Expression

November 2003

I. Introduction

This Memorandum analyses the draft Right to Information Bill of the Republic of Ghana (draft Law). The draft Law was prepared by the Department of the Attorney General and was subsequently forwarded to the Ministry of Information to circulate for public comment. It is expected to be submitted to Parliament in due course.

ARTICLE 19 welcomes the draft Law and regards it as a positive step to advance freedom of expression and information in Ghana. The draft Law has some of the key elements needed in an effective freedom of information law, including an obligation to publish, procedures for accessing information held by government agencies and also by private bodies, time limits for disclosing information, a right to amend personal records held by government agencies, protection from liability for persons who release information in the event that they believe in good faith that the release is permitted or required by the draft Law, and obligations on government agencies to keep track of and to make available data relating to the information requests they have received from the public.

There are, however, areas in which the draft Law could be considerably improved in order to safeguard the public's right to know. Two areas of particular concern are the

regime of exceptions and the provisions for appeals. The regime of exceptions is too complex and contains a number of exceptions which are vague and/or overbroad. In addition, it is not sufficiently sensitive to the public interest. The appeals system provides for independent review too late in the process and is likely to be prohibitively expensive for many persons seeking to assert their rights under the law. Consequently, the likelihood of successful appeals of improper decisions to withhold requested information is considerably lessened. We detail these and other concerns below.

We analyse the draft Law against international standards. Section II outlines these standards, particularly as developed under the *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights*, and as illustrated and expounded in two key ARTICLE 19 publications, *The Public's Right to Know: Principles on Freedom of Information Legislation* (the ARTICLE 19 Principles)[1] and *A Model Freedom of Information Law* (the ARTICLE 19 Model Law).[2] Section III briefly describes the draft Law's structural features. Section IV contains the principal analysis.

II. International and constitutional obligations

The *Universal Declaration of Human Rights* (UDHR)[3] is generally considered to be the flagship statement of international human rights, binding on all States as a matter of customary international law. Article 19 of the UDHR guarantees not only the right to freedom of expression, but also the right to information, in the following terms:

> Everyone has the right to freedom of expression: this right includes the right to hold opinions without interference and to *seek, receive* and impart information and ideas through any media and regardless of frontiers.…[emphasis added]

The *International Covenant on Civil and Political Rights* (ICCPR),[4] which Ghana ratified in September 2000, guarantees the right to information in similar terms, providing:

> Everyone shall have the right to freedom of expression: this right shall include freedom to *seek, receive* and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print.… [emphasis added]

Article 9 of the *African Charter on Human and People's Rights*[5] provides general protection for freedom of expression. While this Article does not expressly protect the right to receive opinions and ideas, discussions of the African Commission suggest that this right is implicitly be protected. For example, in 2002, the Commission adopted the *Declaration of Principles on Freedom of Expression in Africa*,[6] which states:

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[1] (London: June 1999). The ARTICLE 19 Principles have been endorsed by, among others, the UN Special Rapporteur on Freedom of Opinion and Expression. See Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/2000/63, 18 January 2000, para. 43.

[2] (London: July 2001).

[3] UN General Assembly Resolution 217A(III), 10 December 1948.

[4] Adopted and opened for signature, ratification and accession by UN General Assembly Resolution 2200A (XXI), 16 December 1966, entered into force 3 January 1976.

[5] Adopted at Nairobi, Kenya, 26 June 1981, entered into force 21 October 1986.

[6] Adopted by the African Commission on Human and Peoples' Rights at its 32nd Session, 17-23 October

IV
Freedom of Information

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.

While international law recognises that the right to information is not absolute, it is well established that any restriction on this right must meet a strict three-part test. This test requires that any restriction must be (1) provided by law, (2) for the purpose of safeguarding a clearly defined legitimate interest, and (3) necessary to secure the interest.

Critical to an understanding of this test is the meaning of "necessary". At a minimum, a restriction on access to information is "necessary" for securing a legitimate interest only if (1) disclosure of the information sought would cause substantial harm to the interest (in short, if the disclosures satisfies the harm test), and (2) the harm to the interest caused by disclosure is greater than the public interest in disclosure.[7]

Finally, Article 22(1) of Ghana's Constitution provides that all persons have the right to "freedom of speech and expression", as well as the right to "information, subject to such qualifications and laws as are necessary in a democratic society". This language would suggest that Ghana has accepted as a constitutional matter, the right to information enshrined in the above international texts.

III. General overview of the draft Law

The draft Law contains a general right of access to information in the custody or control of a government agency as well as a right of access to information held by private bodies under certain circumstances; both rights are subject to regimes of exceptions. "Information" is defined to include recorded matter or material, regardless of form or

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2002.
[7] See ARTICLE 19 Principles, Principle 4.

medium, in the control or custody of a government agency or private body, regardless of whether or not it was created by such agency or body. Where information is requested, part of which is exempt, the agency or body must provide access to that part of the information which is not exempt. The government is given the positive obligation to make available information on governance.

The draft Law lays out a basic structure for accessing information from government agencies: upon receipt of an application (usually in writing and with no requirement to provide a reason for the request), an information officer, to be appointed by the agency, must respond within reasonably drawn deadlines – extensions are provided for where "reasonably necessary"; denials of applications must be accompanied with reasons; where requests are granted, the draft Law provides details on how access is to be accomplished; fees, including advance deposits, are provided for and typically required, though waivers are possible; individuals are given the right to demand that personal information about them that they have accessed and which they believe to be incorrect, misleading, incomplete or out of date be corrected; and a system of internal reviews and external appeals is created.

Government agencies are obligated, even in the absence of a request, to publish manuals containing information on their structure and functions, on the classes of information of which they have custody or control and about the contact person (the information officer) to whom requests for information can be made, as well as other details relevant to information requests. In addition, these agencies are required to submit annual reports detailing the number of applications for access received, the number approved and the number rejected (along with reasons for the latter), and information about reviews and appeals sought.

A parallel structure exists for accessing information by private bodies: persons have the right to access information from such bodies if the information is required for the exercise of a fundamental human right or freedom, for the preservation of private safety or the protection of the public interest. Provisions similar to those relating to government agencies govern the submission of requests, fees, deadlines for responding to requests and appeals. A somewhat different system of exceptions is established, more tailored to information requests in this context. Special provisions exist for providing notice to third parties in the event that the private body has received a request for information relating to them, and for permitting such third parties to object to release of such information; information officers may take such objections into account when they are deciding whether to disclose the requested information. Private bodies are obligated to compile and make available to the public manuals with much of the information required in the manuals of government agencies, including what information they hold and how to access that information.

Finally, the draft Law provides for immunity from criminal liability for all persons, and from defamation for government agencies and applicable government employees, who facilitate access to information based on a good faith belief that the draft Law permits or requires that such access be granted.

IV. Detailed analysis of the draft Law

IV.1 Scope of the Draft Law

Section 90 of the draft Law defines a "government agency" to include any "Ministry, government department, District Assembly or any local authority, any statutory or other body corporate or unincorporated, [and] any public office funded in whole or in part from public funds or in which the Government has any interest, fund or otherwise ...."

Analysis

This definition appears to reach all levels of government agency but it also appears to stop short of reaching private bodies which are substantially funded or controlled by public bodies or which carry out public functions. Such bodies may well hold information relating to key public interests, including not only to health and the environment, but also to law enforcement, maintenance of critical infrastructure and so on. A freedom of information law regime should not only include such bodies within its reach but should treat them in the same way that it treats government agencies.

Recommendation:

- The draft Law should impose the same freedom of information obligations as it imposes on government agencies on private bodies which are substantially funded or controlled by public bodies or which carry out public functions.

IV.2 Exceptions

IV.2.a) Exceptions Relating to Government Agencies

Part II of the draft Law contains a complex regime of exceptions applicable to requests to government agencies for information.[8] It contains over a dozen different categories of exempt information, some of which overlap with others while yet others contain as subcategories information from a range of diverse and not obviously related sources. The categories are: information from the President's and Vice President's Offices; information relating to the Cabinet; information relating to law enforcement, public safety and national security; information affecting international relations; information that affects the defence of the country; economic information of third parties; information relating to tax; internal information of agencies; information relating to parliamentary privilege, fair trial and contempt of court; information subject to legal or other privileges recognised by law; information subject to medical professional privilege; and information relating to personal matters.

Section 17 provides that information is not exempt, notwithstanding the particular exception, if disclosure of the information "would reveal evidence of (a) a contravention of or a failure to comply with a law; or (b) an imminent and serious risk to public safety,

[8] The regime of exceptions is supplemented by section 83, which provides that information exempt from release by government agencies ceases to be exempt on "the expiry of 20 years calculated from the end of the calendar year in which the information came into existence". ARTICLE 19 welcomes this reasonable restriction on exempt information.

health or the environment [–] and the benefits of disclosure clearly outweighs [sic] the harm or danger that could occur in the absence of disclosure". We assume that this is a drafting error, and that the intent here is that the benefits of disclosure must clearly outweigh the harm that could occur *in the event of* disclosure.

Analysis

We emphasise at the outset that, as the ARTICLE 19 Principles make clear, it is absolutely crucial that a freedom of information law be *accessible* to the public: the public must be educated about what it says and how to use it. For this reason, the law must be clearly articulated, and its provisions must be simple and intuitive.[9]

Some categories of exceptions (detailed below) are extremely vague and broad, in tension with the principle just mentioned, as well as in violation of the international law requirement that the interests protected in a regime of exceptions must be narrowly and clearly defined. The dangers of both vague and overly broad exceptions are exacerbated both by the absence from the draft Law of a general harm test and by the absence of an appropriately-drafted provision requiring disclosure of information in the event that the harm caused by disclosure is outweighed by the public interest in its disclosure. We treat these difficulties in turn.

Turning to the harm test first, we note that some of the exceptions clearly do not make reference to the possible harm consequent upon disclosure, but are rather simply blanket (or "class") exceptions. To take some examples: information from the President's and Vice President's Office is exempt simply "if it contains matters the disclosure of which would reveal information concerning opinion, advice, deliberation, recommendations, minutes or consultations made or given to the President or Vice President" (section 3);[10] information is exempt merely if its release could reasonably be expected "to reveal a record of information that has been confiscated from any person by a police officer or any person authorised to effect such confiscation ..." (section 5(1)(h)); information is

[9] In this connection, the draft Law could be improved by consolidating certain sections. For example, the separate sections on information on the President and Vice President, on the Cabinet, and on the internal working information of agencies, should be merged into a single section on the deliberations of public bodies. The sections on parliamentary privilege, on legal privilege and on medical privilege should be treated in a single section on legally-sanctioned privileges. Section 10, relating to tax information, could be eliminated in view of the protection of personal matters, including financial matters, in section 15.

Relatedly, somewhat more care should be taken to ensure that subsections within a given section of exceptions are not duplicative. To take just a single example, subsections 5(1)(b) and (d), relating to the investigation of possible contraventions of law and to the disclosure of confidential sources in respect of law enforcement matters, presumably are already covered by subsection 5(1)(a), relating to the "prevention, detection or curtailment of a contravention or possible contravention of a law".

While these are somewhat detailed suggestions, we emphasise the point that a "leaner" and more easily understandable system of exceptions is not only easier for the public to understand but also is easier for information officers to master, without which they cannot be expected to make responsible decisions relating to applications for information.

[10] We note in addition that sections 3 and 4 except information on, inter alia, "any decision" of the President or Vice President, or of the Cabinet. While these sections otherwise appear to be directed to protecting information relating to the *process* of deliberation (information that would be properly exempt under certain circumstances), these provisions could also be understood as applying to information related to the *substance* of decisions taken, which should almost always be subject to disclosure.

exempt that merely "*relates to* the security of the State and has been created by or is in the custody of the Armed Forces or the Security and Intelligence Agencies" (section 5(3) (emphasis supplied); and information relating to tax returns or tax liability is unqualifiedly exempt (section 10).[11]

Other exceptions *might* be read to include a harm test, but they are not unambiguous on this point. For example, section 5(1)(e) exempts information whose release could reasonably be expected to "impede any prosecution of an offence". However, the term "impede" is vague and therefore subject to potentially wide interpretation. It is easy to imagine that an information officer might find that the release of information falling within this category might "impede" a prosecution even though it would not *prejudice* the prosecution in any way. Similarly, section 5(1)(i) exempts information which could reasonably be expected to "interfere with the maintenance or enforcement of any lawful method or procedure for protecting the safety of the public…." The term "interfere" is an extremely broad one, as is the phrase "method or procedure for protecting the safety of the public". The combination of these terms might give rise to denials by information officers of requests for information even where the possibility of harm to the protection of public safety that might result from the information's release would be quite remote. Again, section 8 creates an exception for information whose disclosure "could reasonably be expected to create undue disturbance in the ordinary course of business or trade in the country". In view of the fact that "undue disturbance" is undefined, this provision leaves very wide leeway for interpretation and abuse by public information officers.

Finally, some exceptions are subject to an explicit harm test. These include section 6(1)(a), which excepts information which could reasonably be expected to "damage or prejudice the relation between the Government and the government of any other country", and section 8(b), which excepts information whose disclosure could reasonably be expected "to damage the financial interest of Government or the ability of the Government to manage the national economy".

There is no good reason why some but not all of the exceptions are subject to an explicit harm test. In any case, the draft Law should be brought into line with international best practice by conditioning each exception, in explicit terms, with a harm test, cast in terms of a risk of *serious prejudice* to the protected interest.

Regarding protection of the public interest, as noted, section 17 provides for a limited public interest override applicable to all exceptions. Certain sections of the draft Law go beyond section 17 and limit the regime of exceptions in the event of overriding (but narrowly defined) public interest. For example, section 15(3)(b) permits the disclosure of information relating to personal matters if "the disclosure is required to promote public health or public safety.…" Section 5(2) provides that information in factual reports and

[11] Other sections or subsections that appear to lack any kind of harm requirement include section 5(1)(c), (d) and (h), section 6(1)(b) and (c), section 8(a), (e) and (f), section 12(a) and (c), section 13, section 14, and section 15.

outlines relating to crime prevention are not exempt if their release "would on balance be in the public interest".[12]

That the draft Law evidences some deference to the public interest evident is welcome, but it does not go far enough in this regard. As we have noted, international law, supplemented by practice in a wide range of national contexts, has recognised that regardless of the interest being protected by an exception, information should *always* be disclosed upon request when the public interest in such disclosure outweighs the harm likely to be caused by it. This should apply not only where the public interest relates to public health and safety, the environment or protecting against violations of law, the limited interests listed in section 17. For example, instances of corruption always involve a violation of public trust but they do not necessarily involve a violation of law. Accordingly, section 17 should be redrafted as a general public interest override, not restricted to the interests currently listed therein.

Furthermore, the balancing test in section 17 – which currently requires the interest in disclosure to "clearly outweigh" the protected secrecy interest – should be fundamentally reworked. In our view, the onus should be reversed and, unless the secrecy interest outweighs the public interest in disclosure, the information should be disclosed. In any case, the standard of "clearly outweighs" should be amended in favour of "outweighs".

These problems with section 17 are exacerbated by the clear need for a strong public interest override in relation to some exceptions in the law, for example, due to their particularly wide sweep.

Recommendations:

- Each exception should be explicitly conditioned by a harm test, cast in terms of a risk of *serious prejudice* to the interest that the exception seeks to protect. To illustrate, section 5(1) might lead with: "Information is exempt if it contains matters the disclosure of which would seriously prejudice…."
- The public interest override in section 17 should be generalised to cover all situations in which the public interest in disclosure comes into play.
- The onus of the balancing test envisaged in section 17 should be reversed, so that disclosure should be mandated unless the secrecy interest outweighs the public interest in disclosure.
- The "clearly outweighs" standard of section 17 should be replaced with a simple "outweighs" standard.

IV.1.b) Exceptions Relating to Private Bodies

In contrast to the regime of exceptions relating to government agencies, the regime in the context of access to information held by private bodies is relatively straightforward. Information need not, and in some cases must not, be released if it would involve unreasonable disclosure of "personal information about a third party"; commercial

[12] It bears emphasis that most information relating to law enforcement that is exempted by section 5 is not subject to this particular public interest override.

information relating to a third party; if it would breach a duty of confidentiality owed to a third party; if it would be likely to endanger the life or safety of any individuals; if it is privileged from production in legal proceedings; if it is commercial information of the private body; or if it contains research information of the private body or of third persons (see sections 60-66.)

Section 67, concerning disclosure in the public interest, is substantially identical to section 17, discussed above. It provides for the granting of access to any information requested of a private body if the disclosure would provide evidence of a "substantial contravention of or failure to comply with an enactment"[13] or "imminent and serious public safety or environment risk", and "the public interest in the disclosure of the record clearly outweighs the benefits from non-disclosure".

Analysis

ARTICLE 19 welcomes the extension of the freedom of information regime to private bodies. However, while the particular exceptions are relatively uncontroversial, the regime of exceptions is similar to that for government agencies in that it contains an inconsistent harm test requirement and an insufficiently weak public interest override.

Recommendations:

- Each provision in the regime of exceptions should have an explicit harm requirement, cast in terms of "substantial prejudice".
- Section 67 should be redrafted along the lines suggested for section 17, to apply to all public interest situations and to reverse the onus of the balancing test, or at least to replace the standard of "clearly outweighs" with the simple standard of "outweighs".

IV.3 Internal Review and Appeals

The draft Law provides that where an information officer refuses access to information, this decision may be reviewed by the Minister responsible for the agency (section 39) and that such reviews may then be appealed to the courts (section 41).

Sections 3 and 4 (exempting, respectively, certain information from the President's and Vice President's Offices, and information relating to the Cabinet) need to be noted separately in this regard. Each provides that certificates under the hand of an official (the Secretary to the President or the Secretary to the Vice President in the case of section 3, and the Secretary to the Cabinet or the Head of National Security in the case of section 4) "establish[] that the information is exempt", subject only to appeal to the Supreme Court. Thus, for these categories of exempt materials, there appears to be no appeal or review mechanism either to the government agency itself or to the lower courts.

Analysis

[13] It is somewhat curious that the contravention of law must be "substantial" in section 67 while this adjective is missing from section 17.

The general appeals/review system is problematic. The first "appeal" – called a request for review – goes to the Minister, who is clearly not independent of the body which gave the original decision. In addition, section 39 provides that a fee may be required for such a review, although the draft Law nowhere specifies the amount of such fee. The requirement of such a fee, in an unspecified amount, may be a sharp deterrent for many who would otherwise seek review of denial of their applications to access information.

Independent review may presumably be expected at the next level, in the event that an aggrieved applicant appeals to the courts. At the same time, such review may pose onerous time and financial obstacles to applicants. Such obstacles may be sufficiently onerous that many will simply elect not to appeal negative decisions. The draft Law, it should be noted, does not provide for an expedited procedure for appeals to the courts and it also contains no provisions defraying or waiving court costs for aggrieved applicants. The result of this system is that negative decisions by information officers may well be shielded from independent scrutiny, leaving such officers with too much discretion in making their decisions and opening the door to abuse.

To address problems such as these, freedom of information laws in many jurisdictions create, or provide access to an already-existing, separate and independent administrative appeal. This body should be fully independent of government. Independence should be secured, in part, through the appointments process for members of this body and through ensuring that members can command significant social support and respect. The body should have the power to compel production of any document or record, to order the public authority or private body to disclose the record, to reduce any fees charged and to take appropriate steps to remedy any unjustifiable delays. The right of appeal to the courts provided for under the draft Law should be *from* decisions by this administrative body.

In addition to the appellate responsibilities just outlined, this body should have the responsibility to educate public and relevant private officials regarding the freedom of information legislation, and to educate the public about its rights under the legislation. Such bodies, it should be noted, have often played a role in exposing and embarrassing public authorities which have a poor disclosure record or which actively seek to undermine the objectives of the applicable freedom of information legislation. And they can play a role in monitoring and promoting compliance with any positive obligations on public authorities to publish certain material.[14]

In view of these considerations, the draft Law should adopt the additional fundamental safeguard of an independent administrative body charged with oversight of the draft Law and in particular with an appellate function that is swift and free of charge.

A different set of problems applies to the presumptions of exempt status provided for in sections 3 and 4. First, while there may be some institutional reasons for not providing for an internal review of denials of applications to the offices of the President or Vice

[14] See Part V of the ARTICLE 19 Model Law for an illustration of how to establish such an administrative body in line with international best practice.

President or to the Cabinet, there is strong reason for ensuring the possibility of swift, low-cost appeals of any such denials to an independent body. For this reason, negative decisions by these bodies should be subject to appeal to the independent body discussed above. Second, appeals from this body, or in the absence of such a body, direct appeals to the courts, should be permitted to courts of first instance. The restriction to the Supreme Court ensures that appeals of section 3 or 4 denials will be subject to particularly long delays, with the predictable result that few such appeals will be taken and that even those that are taken may result in the release of information too late to be of any use to the applicant or potentially to the public at large.

Recommendations:

- An independent administrative body, along the lines described in the text, should be tasked with both dealing with appeals from refusals to disclose information and providing an education function.
- Negative decisions by the offices of the President or Vice President or of the Cabinet should be able to be appealed to the independent administrative body. Appeals of the decisions of this body, or in the absence of such body, appeals to the courts, should be permitted to courts of first instance.

IV.4 Fees

The draft Law makes mention of various other fees, in addition to the fees that denied applicants may face in appealing to Ministers and the fees that they will have to face in appealing negative ministerial decisions to the courts. Section 26 refers to an "application fee", as well as to an "advance deposit" and "any further advance deposit". This section also specifies that the sum of these amounts may not exceed "the amount which in the opinion of the agency is necessary to cover the costs of dealing with the application". Section 76 provides that a "fee or charge" is mandatory and is to be set by the Attorney General. This latter fee is to include amounts payable for any hour in excess of two hours spent in manually searching for requested documents, computer access charges incurred in locating and accessing requested information, "the cost of preparing the information for disclosure" and postage. Section 77 accords discretion to the information officer to waive fees where, in the officer's opinion, the applicant "will suffer financial hardship if required to pay the fee or charge". Finally, section 28 permits government agencies to refuse to process applications that are not accompanied by the applicable fees.[15]

Analysis

It is essential for the success of freedom of information regimes that costs are not so high as to inhibit access in practice. While access regimes do cost public authorities (and, in the case of this draft Law, certain private bodies) money, they also provide intangible benefits in efficiency, professionalism, accountability and rooting out corruption and other forms of wrongdoing. Costs to these bodies must be viewed in the context of the draft Law's role in advancing democracy and public participation. Examination of the functioning of a range of long-standing freedom of information regimes demonstrates a

[15] Section 52, relating to requests to private agencies, also provides for an advance fee, which may not exceed "the commercial cost of producing the documents containing the requested information including the cost of man-hours and materials spent in obtaining the documents".

number of key points. First, as public authorities become more efficient at record-keeping and dealing with access, the cost of access requests decreases. Second, even high application fees recover only a tiny proportion of the overall costs to public authorities and yet such fees can exercise a significant deterrent effect. Third, the actual number of access requests made is often significantly lower than initially expected, thereby keeping costs down.[16] Finally, the vast majority of access requests relate to personal information which is relatively easy to identify.

Turning to the provisions of the draft Law, there is some tension between section 26, which provides for the setting of fees based on the individual agency's opinions about how much the production of information will cost, and section 76, which appears to provide for a central binding fee schedule set by the Attorney General. It is highly preferable that a binding and central fee schedule be set in place to reduce the potential for abuse by individual agencies that may "estimate" fees so high as to discourage applicants from proceeding with their information requests and to avoid a patchwork of different fee structures across the civil service.

Second, fees should not be required to be paid in advance. In many cases, such advance fees, presumably based on an average, or perhaps a "worst case", cost of retrieval, will discourage applicants, particularly poor ones, from proceeding with their applications. Moreover, the draft Law provides little guidance as to when a waiver might be given and at what stage of the process. For example, pursuant to section 76, it is possible that an advance fee might be required of every applicant and that some such fees may be refunded at a later stage if the information officer determines that the fees impose a financial hardship on the applicant. This would clearly defeat the purpose of the hardship waiver.

A far better system would impose no "entry costs" whatsoever on the public when they make their requests for access to information. Costs to be charged, if any, should be imposed at the point of delivery of the information and should in no case exceed the amount needed to cover copying, and perhaps retrieval, costs. In addition, the draft Law should contemplate a generous, and clearly and centrally defined, fee waiver regime.

Fees relating to review of refusals to disclose information by Ministers should be eliminated and consideration should be given to the idea of providing financial assistance for those who wish to appeal to the courts and who are in financial need.

Recommendations:

- The draft Law should provide for the creation of a central binding fee schedule, based solely on the costs of copying, and perhaps retrieval, costs.
- There should be no requirement for advance payment of fees.
- A generous and clearly-defined fee waiver regime should replace the current

[16] In Australia, for example, it was estimated that the Department of Employment would receive between 100,000 and 200,000 applications in the first year of operation of the Australian freedom of information law. In fact, the Department received 166 applications. See *Anticipated and actual levels of requests under the Australian FOI Act 1982*, February 1987, Campaign for Freedom of Information, London.

provision in section 77, which accords largely unfettered discretion to information officers in the matter of granting waivers.

- There should be no fees for Ministerial review of negative decisions by government agency information officers.
- Consideration should be given to providing financial assistance, where appropriate, to those appealing negative decisions to the courts.

IV.5 Refusal of Access by Government Agencies

Section 29(1)(c) provides that applications for access to information may be denied by a government agency when the information requested is contained in a document available for inspection at the agency or at some other agency "whether or not inspection of the document is subject to a fee or charge" and also when "the information is usually available for purchase" (section 29(1)(e)).[17]

Analysis

Both of these provisions are subject to abuse and both should be removed from the draft Law. Section 29(1)(c) raises the possibility that government agencies may seek to restrict access to information by indirectly imposing a different, higher, fee structure than that allowed for requests, by making documents "available to the public" but subject to prohibitive fees. While this may be a relatively unlikely eventuality, we emphasise it here in order to highlight again the need to keep access costs to an absolute minimum, in the interest of maximising the effectiveness of the freedom of information regime. As noted above, costs for accessing information should include only the actual cost of copying requested materials (subject to waivers for financial hardships and also in favour of certain groups, including NGOs working on issues in the public interest and journalists). Any provision for extra costs raises the probability that significant sectors of the population will simply not avail themselves of their fundamental right to access information.

Section 29(1)(e) is flawed inasmuch as it does not apply only to information that is available for purchase but also to information that, while not actually available, is usually available.

Recommendation:

- Sections 29(1)(c) and 29(1)(e) should be removed from the draft Law.

IV.6 Public Education

As has already been mentioned in the context of the appeals system created by the draft Law, the experience of a number of countries shows that freedom of information laws are most effective when they provide for, and their operation is accompanied by, pro-active campaigns for public education. While section 79(2) *permits* the Attorney General to

[17] Section 29(1)(b) also provides that a government agency may refuse access to information, inter alia, when the work involved in processing the application would "unreasonably divert the agency's resources away from their use by the agency in the exercise" of its functions. This duplicates section 16(b) and should be deleted from this section.

conduct public information programmes, to conduct research into matters affecting the purposes of the draft Law and to receive representations from the public regarding the law's operation, the Attorney General is not obligated to do any of these things.

Recommendation:

- The draft Law should require the independent administrative body responsible for implementation of the law, noted above, to conduct public information programmes regarding the existence and operation of the Law, and to receive and deal with input from the public regarding the Law.

IV.7 Whistleblower Protection

We have already noted that the draft Law contains protection for all persons from criminal liability (as well as immunity from defamation actions for government officials and agencies) for release of information pursuant to the law where the person responsible for the release believes in good faith that the law permits or requires such release. ARTICLE 19 welcomes these positive provisions of the draft Law. At the same time, protection should be extended to so-called whistleblowers. Specifically, the draft should Law extend protection against legal or employment-related sanctions to persons who release information on wrongdoing, or information that could disclose a serious threat to health, safety or the environment, provided that the person acts in good faith and in the reasonable belief that the information is in fact true.[18]

In the context of the need for whistleblower protection, we note section 86 of the draft Law, which provides: "A person who wilfully discloses exempt information, the disclosure of which is prohibited under this Act commits an offence and is liable on summary conviction to imprisonment for a term of not less than 12 months". ARTICLE 19 seriously questions whether this provision is necessary at all and we suggest that consideration be given to eliminating it altogether. At a minimum, however, in the event that the section is retained, two changes should be introduced. First, its operation should be restricted to information officers and any other persons acting pursuant to obligations and duties they have under the draft Law. A freedom of information law should never introduce general penalties, extending to journalists and other private citizens, for the release of secret information. Second, it should be quite clear that the whistleblower protection noted above should override this provision whenever both apply.

Recommendations:

- The draft Law should contain protection for whistleblowers as described above, along the lines of section 47 of the ARTICLE 19 Model Law.
- Consideration should be given to eliminating section 86 from the draft Law.
- In the event that section 86 is retained, its operation should be restricted to those persons performing duties accorded them under the draft Law and it should be overridden by whistleblower protection whenever that applies.

[18] See section 47 of the ARTICLE 19 Model Law for such a provision. Such provisions exist in the freedom of information laws of a number of jurisdictions.

IV.8 Relationship to Other Laws

We note that the draft Law contains no reference to other laws that, for example, may provide that certain information "relating to" State security or other matters constitute State secrets. The freedom of information law should contain a complete list of exceptions relating to legitimately secret information, and other laws should not be permitted to extend it. It may be noted that a key function of the freedom of information law is precisely to change previous practices of undue secrecy in government. As a result, it is important that it be clear that, in case of conflict, the draft Law will supersede or override secrecy laws.

Recommendation:

- The draft Law should explicitly override any secrecy or other laws that could be construed as providing for the withholding of information properly disclosed pursuant to the provisions of the draft Law.

IV.9 Requirement of Written Submission

Section 20 requires that applications for access to information to agencies be in writing, except where illiteracy or disability make this impossible, and section 51 requires substantially the same of applications to private bodies.

Analysis

These requirements may be too formalistic and inefficient in practice. Provision should be made for the possibility, in appropriate circumstances, for the making and servicing of oral requests. This can ensure a quick, informal system for release of information where there is no question of the information falling within the scope of the regime of exceptions.

Recommendation:

- The draft Law should provide for the making and servicing of oral requests, where appropriate.

IV.10 Maintaining Records

We note that the draft Law contains no provision imposing on government agencies (and perhaps even private bodies) the obligation to appropriately maintain their records. Such an obligation, along with the provision for the creation of a Code of Practice relating to the keeping, management and disposal of records, is an important part of a freedom of information regime.[19]

[19] See section 20 of the ARTICLE 19 Model Law for an example of a provision relating to the maintenance of records.

Recommendation:

- The draft Law should include a provision obligating government agencies and private bodies to maintain their records in good condition so as to facilitate the right to information. It should also provide for the creation of a central Code of Practice detailing the relevant procedures in this regard.