ARTICLE 19

Iraq: Draft Right to Information Act 2023

April 2024

Legal analysis

Executive summary

In the analysis, ARTICLE 19 reviews the draft Right to Information Act (draft RTI Act), prepared by the Government of Iraq, for its compliance with international freedom of information standards.

While ARTICLE 19 appreciates the efforts of the Iraqi Government to adopt dedicated legislation on the right to information, we are deeply concerned about the current proposal. The draft RTI Act includes very problematic provisions and definitions that pose unnecessary and disproportionate restrictions on the ability of individuals to exercise their right to information. Namely:

- The RTI Act fails to contain key principles that form an essential part of any comprehensive RTI framework, such as the principle of maximum disclosure and a right to appeal against refusals.

- The regime of exceptions from the obligation to provide information falls short of international standards: exceptions are vaguely and broadly formulated and the harm test and public interest override to assess refusals to disclose information are not included at all.

- The structure of the oversight body (Information Department) is very problematic. We are concerned that it will in fact prevent effective implementation of the RTI Act.

- Inclusion of criminal penalties for anyone disseminating information under the exceptions violates the free flow of information and violates the right to freedom of expression.

ARTICLE 19 urges the Government of Iraq to extensively and substantially review the current draft to reflect our recommendations to bring it in line with Iraq's international human rights obligations and to fully enable the right to information.

Summary of recommendations:

- The RTI Act should include a comprehensive section with the objectives of the law – either in the Preamble or the very first provisions of the Act. This section should include that the objective of the legislation is to provide effective mechanisms to realise the international obligations of Iraq and to specify the primacy of the right to information law. The access to information should be guided by the principle of maximum disclosure, while non-disclosure of information should be permitted only in exceptionally justifiable circumstances as set out in the Act and should be subject to appeal.
- The definition of "information" in Article 1 should be expanded. While we recommend using the definition of the Model Law, the definition should encompass any original or

copy of recorded information, irrespective of its physical characteristics or the form of the medium in which it is held, in the possession or under the control of the information holder to whom a request under the RTI Act has been made.

- Article 1 should be amended to include a definition of "public body" which should cover all bodies that are established by or under the Constitution or statute; that form part of any level or branch of government; re owned, controlled or substantially financed by funds provided by government or the state; or carry out a statutory or public function.
- Article 4 should be amended to state that any person and any national or foreign legal entity shall have the right to information under the RTI Act.
- The requirement to use a specific form for right to information requests in Article 6 of the draft RTI Act should be eliminated. Instead, the Act should stipulate that access to information requests can be made in writing or orally. If a request is made orally, responsible body should document the request in writing and provide a copy to the requester.
- Articles 8 and 9 should be revised. The Act should specify that right to information requests must be processed as soon as reasonably possible and no later than within 15 working days of the request. The deadline can be extended by an additional 15 days if the request involves a substantial amount of information or information from multiple bodies. The applicant should be notified of the delay and the reasons for it in writing. Additionally, there should be provisions outlining other requirements for the notice of response, including providing adequate reasons for any refusals and information about the right to appeal.
- Provisions on fees (Articles 10 and 15) should be revised. The Act must specify that no fee should be imposed for making requests and that charges should be limited to reasonable costs related to reproduction and postage (if needed). Fees should be waived for requests pertaining to personal information, requests made in the public interest, and for individuals whose income falls below the national poverty line.
- The RTI Act must explicitly grant the right of appeal against rejection of information requests. The appeal process against rejections should be expanded to provide not only for internal and judicial review but also for appeals to the independent oversight body, with clear deadlines for dealing with appeals.
- The regime of exceptions in Article 11 should be completely redrafted. It should be based on a three-part test. Information should never be withheld unless it affects a legitimate interest protected by law, release of the information would cause actual harm to that interest, and this harm would be greater than the harm caused to the public interest by non-disclosure.
- Article 13, concerning the obligation to proactively disseminate information, should be completely revised.
- Instead of the oversight through a one-person department in the Human Rights Commission, the RTI Act must include comprehensive provisions about independent oversight of the RTI Act. Article 3 should be revised.
- Article 16 should be completely revised. The RTI Act should provide comprehensive protection of whistleblowers. It should also should establish individual liability for wilful destruction and obstruction of access to information, while also providing for sanctions against entities that fail to comply with the RTI Act.

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Introduction

Adoption of a dedicated right to information law in Iraq is long overdue. ARTICLE 19 has been advocating for the adoption of one for several years and we have commented on several draft laws over the years. The current draft RTI Act is the latest of the draft access to information laws developed by the Government of Iraq.

ARTICLE 19 has urged the Government to introduce this law, as the right of access to information is a fundamental human right that is crucial to the functioning of a democracy and key to the protection of other rights. The right is especially important in the context of Iraq – a state struggling to establish the rule of law and democracy in the face of continued and considerable sectarian violence and where human rights conditions remain extremely poor. The consolidation of democracy, rule of law, and human rights in Iraq should be the priority of the Iraqi government and the international community.

We also believe that properly protected right of access to information would help to promote good governance, openness and transparency within Iraq's public administration. It would also increase a sense of trust amongst the people about the governmental and public authorities, whether at the national or local levels.

Importantly, right to information legislation would allow Iraq to join the community of over 140 countries that have already adopted RTI legislation.

While ARTICLE 19 welcomes and supports the initiative to introduce a comprehensive right to information legislation, we are concerned that the current draft Act does not meet international standards on the right to information.[1]

Despite several legislative initiatives in the past, we note there has been some regression in comparison with earlier drafts. The Draft RTI Act does not reflect considerable comparative standards in the area or model laws on access to information developed by human rights regional organisations such as those in the African Union and Latin America.

ARTICLE 19 urges the Iraqi Government and legislators to comprehensively revise the current draft and ensure that the final version meets existing international standards. We stand ready to provide further expertise in this process.

[1] ARTICLE 19's analysis is based on an unofficial translation of the provisions. ARTICLE 19 accepts no responsibility for errors based on faulty or misleading translation.

Key international freedom of information standards

The right of access to information held by public bodies – often referred to as "freedom of information" or the "right to information" (RTI) – is a fundamental human right recognised in international law. Crucial as a right in its own regard, it is also central to the functioning of democracy and an important mechanism for achieving other rights and objectives, including combatting corruption and ensuring social and economic rights.

Article 19 of the International Covenant on Civil and Political Rights (ICCPR), which Iraq ratified on 25 January 1971, guarantees the right to freedom of expression and information. The UN Human Rights Committee in General Comment 34, adopted in 2011, interpreted the scope and limits of the right to information, stating that Article 19 of the ICCPR encompasses the right to access information held by public bodies.[2] It requires that states proactively disseminate information in the public interest and ensure that access is "easy, prompt, effective and practical."[3] The Committee also stated that countries must enact "necessary procedures" such as legislation to give effect to the right to information, which should include timely processes for responding to right to information requests and appeal mechanisms.[4]

One of the key issues in a right to information law is the definition of when a public body can refuse to disclose information. Under international law, restrictions on the right to information must meet the requirements of the so-called three-part test, whereby a public body must disclose any information which it holds and is asked for, unless:

- The information concerns a legitimate protected interest listed in the law;
- Disclosure threatens substantial harm to that interest; and
- The harm to the protected interest is greater than the public interest in having the information.[5]

RTI is also considered key for fighting against corruption by the United Nation Convention against Corruption (UNCAC Convention). The Convention mandates states to "adopt procedures and regulations to obtain, where appropriate, information on the organisation, functioning and decision-making processes of its public administration and, with due regard for the protection of privacy and personal data, on decisions and legal acts that concern members of the public."[6] The UNCAC Convention also requires states to "[ensure] that the public has effective access to information" and to take measures "[r]especting, promoting

[2] UN Human Rights Committee (HR Committee), General Comment No. 34, Article 19: Freedoms of Opinion and Expression, CCPR/C/GC/34, 2011, para 18.
[3] *Ibid.*, para 19.
[4] *Ibid*.
5 See e.g. HR Committee, *Belichkin v. Belarus*, Comm. No. 1022/2001, UN Doc. CCPR/C/85/D/1022/2001 (2005).
[6] United Nations Convention Against Corruption." *Treaty Series*, vol. 2349, Oct. 2003, p. 41, Article 10.

and protecting the freedom to seek, receive, publish and disseminate information concerning corruption;"[7] and to adopt protection of whistleblowers.[8]

The RTI is also specifically protected in the Convention of the Rights of the Child and the Convention on the Rights of Persons with Disabilities.

The RTI has been integrated in the UN Sustainable Development Goals (SDGs),[9] where UN member states agreed to a specific target calling on states to "ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements."[10] The UN has also found the right to information an essential factor in ensuring the right to water,[11] the right to health,[12] and the right to education.[13] The right to information is also found in international treaties and agreements relating to pollution[14] and climate change.[15]

Additionally, 'soft law' standards on RTI – model RTI laws – have been developed by regional organisations, in particular the African Commission on Human and Peoples' Rights,[16] the Organisation of American States,[17] and civil society organisations. ARTICLE 19 has also developed best practices in the field of the right to information in The Public's Right to Know: Principles on Freedom of Information Legislation (ARTICLE 19 Principles) and A Model Freedom of Information Law.[18] Both publications represent broad international consensus on best practices regarding right to information legislation. They therefore provide a useful framework in which to discuss the features of access to information legislation.

[7] *Ibid.*, Article 13.
[8] *Ibid.*, Article 33.
[9] UN (2015). Transforming Our World: The 2030 Agenda for Sustainable Development. Resolution Adopted by the General Assembly on 25 September 2015, 42809 (the 2030 Agenda for Sustainable Development).
[10] *Ibid*., SDG Target 16.10.2.
[11] Committee on Economic, Social and Cultural Rights (ESCR Committee), General Comment No. 15: The Right to Water (2002).
[12] See e.g. ESCR Committee, General Comment No. 14 (2000): The Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights); Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Mission to Japan, A/HRC/23/41/Add.3, 31 July 2013; Committee on the Elimination of Discrimination against Women, General Recommendation No. 24: Article 12 of the Convention (Women and Health) (1999).
[13] ESCR Committee, General Comment No. 13: The Right to Education (Article 13 of the Covenant) 1999.
[14] See e.g. Stockholm Convention on Persistent Organic Pollutants; Minamata Convention on Mercury, 2014.
[15] See e.g. the UN Framework Convention on Climate Change, 1992.
[16] See the Model Law on Access to Information for Africa, 2013.
[17] Model Inter-American Law on Access to Public Information, adopted at the fourth plenary session, held on June 8, 2010.
[18] ARTICLE 19, The Public's Right to Know: Principles on Freedom of Information Legislation, June 1999; and the Model Freedom of Information Law, July 2001.

Analysis of the Draft RTI Act 2023

In this section, ARTICLE 19 sets forth fundamental concerns with the draft RTI Act. Overall, we recommend a major overhaul of the text. Significant changes are needed for the draft to be brought in line with international freedom of information standards.

General principles

At the outset, ARTICLE 19 appreciates that the objectives of the law, *inter alia*, refer to international standards or state that the aim is to enhance transparency and empowering communities (Article 2 of the Draft RTI Act) and promote transparency and integrity, boosting citizens' trust in authorities (section "Reasons"). While these aims are welcome, we believe the provisions should be further expanded, for instance, in the form of a preamble/ section explaining the general principles of the law. In particular:

- The Act should specify that its objectives are to **meet Iraq's obligations under relevant international legal provisions and instruments**, including the ICCPR.

- The Act should specify the **primacy of the right to information**. Such specification is crucial when enacting RTI legislation as it signifies a shift from a culture of secrecy towards one of openness and transparency within public institutions. The principle of primacy ensures that the RTI Act applies to the exclusion of any provision in any other legislation or regulation that prohibits or restricts the disclosure of information of a body holding information under the Act. The legislation therefore must clarify that the Act as a whole must be applied in a way that prefers the right to access information, pre-empting any restrictive interpretations that may arise.

- The **principle of maximum disclosure** should underpin the RTI Act. This principle establishes a presumption that all information held by public bodies should be subject to disclosure and that this presumption may be overcome only in very limited circumstances. This implies that both public authorities and information should be defined broadly.

Recommendations:

- The RTI Act should include a comprehensive section with the objectives of the law – either in the Preamble or in the very first provisions of the Act. These should include that the objective of the legislation is to provide effective mechanisms to realise the international obligations of Iraq and the primacy of the right to information law. Access to information should be guided by the principle of maximum disclosure while non-disclosure of information should be permitted only in exceptionally justifiable circumstances as set out in the Act and should be subject to appeal.

Definitions

ARTICLE 19 notes that definitions of key terms in Article 1 of the draft RTI Act are overly narrow. The principle of maximum disclosure, mentioned above, is not reflected in the entire law. In particular, we make the following observations:

Definition of "information"

Article 1 (I) of the draft RTI Act defines information as "magazines, written or electronically stored documents, drawings, maps, charts, tables, photos, microfilms, sound recordings, video tapes or any data read on special devices in accordance with the provisions of this chapter and under the official's attention or mandate." We find that this definition fails to encompass the wide array of materials held by public bodies, particularly in the digital age.

Instead, we believe that information includes all materials held by a public body or relevant private bodies that carry out state functions. The approach taken in the ARTICLE 19 Model Law, for example, is to define information 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 or not it is classified."[19] The definition of information should explicitly recognise the obligation to disclose records themselves, not just the information they contain.

In summary, the RTI Act should define information in a comprehensive manner and ensure that the right to information covers a wide range of materials held by public bodies, promoting transparency, accountability, and public access to information.

Bodies covered by the obligation to disclose information

Article 1 (II) defines the bodies covered by the RTI Act as "competent authorities" including "state departments, public and mixed space, political parties, non-governmental organisations and other parties that have received funding, State treasury and private companies in charge of managing a public facility."

ARTICLE 19 observes that while this definition encompasses a broad range of bodies, it appears to be limited. We note that under international standards, obligations under right to information laws shall apply to **all** public bodies and to private bodies using public funds. We recommend that the Act explicitly states that

- All branches of government (legislative, executive, and judicial) at both national and local levels are subject to the RTI Act. No public bodies, including defence and security entities, should be exempt from the right to information obligations.[20]

- Private bodies performing public functions, exercising decision-making authority, or utilising public funds also fall within the scope of the RTI Act.

[19] ARTICLE 19 Model Law, *op.cit.*, Article 7(1).
[20] *Ibid*.

Recommendations:

- The definition of "information" in Article 1 should be expanded. While we recommend using the definition in the Model Law, the definition should encompass any original or copy of recorded information, irrespective of its physical characteristics or the form of the medium in which it is held, in the possession or under the control of the information holder to whom a request under the RTI Act has been made.
- Article 1 should be amended to include a definition of "public body" which should cover all bodies that are established by or under the Constitution or statute; that form part of any level or branch of government; re owned, controlled or substantially financed by funds provided by government or the state; or carry out a statutory or public function.

Persons with the right to access information

Article 4 of the draft RTI Act stipulates that only Iraqi citizens may access information from public institutions, while Iraqi residents may obtain information if they have a legitimate interest, subject to reciprocity conditions.

ARTICLE 19 finds that this provision contradicts international freedom of expression standards, which guarantee the right to everyone. Hence, everyone should have the right to request information from public bodies without any exclusion based on citizenship or residency. Additionally, individuals and entities should not be required to demonstrate a specific interest in accessing information or to provide reasons for their request.

Limiting the scope of the RTI Act to citizens will deprive many people the right of access, including, for example, refugees or stateless people. This is particularly relevant in the Iraqi context, where significant numbers of individuals fall within these categories. There are few risks or costs associated with extending the right to everyone, as evidenced by the experience of the many other countries that do not restrict the right to information to citizens. In practice, only a few noncitizens can be expected to make requests for information, so little burden will be imposed on public authorities. Moreover, permitting requests from non-citizens may provide indirect financial benefits, by making the country an easier place for foreigners to do business and hence a more attractive destination for investment.

Recommendations:

- Article 4 should be amended to state that any person and any national or foreign legal entity shall have the right to information under the RTI Act.

Processing the right to information requests

The process for accessing information is set forth in Articles 6, 8-10 and 14-15 of the draft RTI Act. ARTICLE 19 has the following concerns about these provisions.

Overly formalistic requirements for right to information requests

ARTICLE 19 is concerned about overly formalistic requirements for right to information requests. Under Article 6 of the draft RTI Act, requests for information must be submitted to public bodies "in accordance with the form prepared by the Information Department for this purpose." We believe this means that the requesters are subject to unnecessary bureaucracy.

A requirement to submit a written request through specific form makes the procedure difficult to use for those who are unable to write. It can also be an unnecessary formality if the request is a simple one which can be answered straight away. For these reasons, most modern right to information laws either allow requests to be filed orally, or state that if the requester is unable to submit a written request, the official who receives the request will reduce it to writing, providing a copy to the requester. Requests submitted through electronic communication means such as email are normally considered to have been made in writing.

Lack of clarity about deadlines for responding to right to information requests

We find the suggested deadlines for responding to requests for information confusing.

While Article 8 of the draft RTI Act states that the competent authorities must respond to requests within 5 days from the date of the registration of the request, Article 9 allows for various confusing extensions of this deadline. For instance, it mentions extensions "for a period not exceeding seven days, if the request includes a large number of information, or if accessing the information requires contacting other parties" but within "fifteen days of its acceptance." Article 9b) also states that "the information shall be provided immediately and within a maximum of three days" while "the information requested is necessary to protect a person's life or freedom, it may be extended by three days if the request contains a large number of information or the access to the information is related to other parties."

We observe that it is impossible to determine what the actual time limit is in which responsible bodies must respond to requests. We believe that responsible bodies should have a duty to provide access to information as soon as possible. Right to information laws usually set short time periods (in some cases even as short as 8 working days) but no more than 15 days, while these can be extended to one additional period in unusually complicated requests. In such cases, the responsible body is required to notify the requester of the delay in writing, stating the reasons for it. We believe the RTI Act would benefit from the introduction of a similar rule.

We also note that the RTI Act should specify that if a request for information is submitted to a body which does not hold that information, but the information is held elsewhere, there should be an obligation to promptly refer either the request or the applicant to the body which will be able to provide the information in question, notifying the requester. In such

cases, the time limit would begin anew from the moment the request is received by the second public body.

These clarifications are needed to ensure timely responses and to bring more accountability in case the deadlines are not met.

Lack of clarify about fees

Article 10 of the draft RTI Act states that "the expenses of obtaining the information shall be charged to the applicant" while Article 15 states, *inter alia*, that "the fees for a request for access to information, request to object to a decision to reject a request for access to information, or a request by an affected person against a decision to approve the granting of information to the person requesting it, shall be set according to instructions issued by the Chairman of the Board of Commissioners of the High Commission for Human Rights."

According to international standards, there should be no costs associated with making requests for information or appealing against rejections. Imposing fees could deter individuals from accessing information and potentially restrict the right of access by imposing excessive charges. Instead, information should be provided at little to no cost, limited only to covering the actual expenses of reproduction and delivery.

ARTICLE 19 observes that these provisions may lead to limits on the right of access though the imposition of excessive charges for making requests and receiving information. There should be no costs associated with making requests for information or appealing against rejections. Furthermore, the Draft Law does not include any provisions exempting impoverished requesters from paying fees, which in practice limits the right of access to information to those who can pay for it.

A better approach would be to clarify that there is no fee for making applications for information and that information should be provided at little to no cost, limited only to covering the actual expenses of reproduction and delivery. We note that, for instance, the ARTICLE 19 Model Law establishes that payment of a fee shall not be required for requests for personal information and requests in the public interest. From comparative perspective, the European Convention on Access to Official Documents stipulates that "inspection of official documents on the premises of a public authority shall be free of charge… A fee may be charged to the applicant for a copy of the official document, which should be reasonable and not exceed the actual costs of reproduction and delivery of the document. Tariffs of charges shall be published."[21]

Problematic appeal process

Article 14 of the draft RTI Act outlines a review process for appeals against refusals of right to information requests. It requests a creation of "a competent committee" in "each

[21] The Council of Europe, the Europe Convention on Access to Official Documents, adopted in Tromsø on 18 June 2009, Treaty Series - No. 205.

ministry or entity not associated with a ministry" that will consider the appeals "within thirty (30) days from the date of notification of the decision to reject the request." The committee shall then make a decision "within ten (10) days from the date it is submitted, and if it is not decided upon, it shall be considered a rejection of the appeal". The decision of the committee can then be appealed to the Administrative Court of Justice that shall decide it "as a matter of urgency."

ARTICLE 19 finds these provisions extremely problematic and convoluted.

- First, we observe that the draft RTI Act does not explicitly grant **the right to appeal** the refusal of the information requests. The law should clearly outline a system for filing appeals and offer requesters the flexibility to submit appeals in writing, orally, electronically, or through other suitable means. Appeals should be allowed on any grounds related to the non-disclosure of requested information.

- Second, international standards require that appeals against refusal are made before **independent administrative bodies**. We observe that in many countries, appeals against refusals are structured across three levels: internal review within the public body, appeals to an independent administrative body (oversight body), and judicial appeal. We observe that the draft RTI Act only envisions the internal appeal and judicial appeal. We suggest also including the possibility of appealing the refusal of information to an independent administrative body. This may be either the Information Department of the Human Rights Commission (referred in Article 3 of the draft RTI Act), or one specially established for this purpose. In each case, the independence of such body should be guaranteed, both formally and through a process by which the head and/or board is/are appointed. The Act should also set the deadlines in which the oversight body/the Commission must decide about appeals.

- Third, the deadlines in which the appeals must be processed should be provided with full clarity, which is not the case at present. In particular, internal reviews should be conducted promptly and efficiently, with a stipulated timeframe of 15 days from the receipt of the internal review request by the designated information officer. During this internal review process, the information officer should be empowered to make a fresh decision on behalf of the body and promptly communicate this decision to the requester in writing. Additionally, while we appreciate the possibility of judicial review of rejections of right to information requests, this section would benefit from clarity about deadlines in which judicial review must be initiated. It is crucial that all procedures for processing appeals are designed to operate rapidly and cost-effectively. Excessive delays must be avoided to prevent undermining the purpose of requesting information in the first place.

Recommendations:

- The requirement to use a specific form for right to information requests, in Article 6, should be eliminated. Instead, the RTI Act should stipulate that access to information requests can be made in writing or orally. If a request is made orally, the responsible

body should document the request in writing and provide a copy to the requester.
- Articles 8 and 9 should be revised. The Act should specify that right to information requests must be processed as soon as reasonably possible and no later than within 15 working days of the request. The deadline can be extended by an additional 15 days if the request involves a substantial amount of information or information from multiple bodies. The applicant should be notified of the delay and the reasons for it in writing. Additionally, there should be provisions outlining other requirements for the notice of response, including providing adequate reasons for any refusals and information about the right to appeal.
- Provisions on fees (Articles 10 and 15) should be revised. The Act must specify that no fee should be imposed for making requests and that charges should be limited to reasonable costs related to reproduction and postage (if needed). Fees should be waived for requests pertaining to personal information, requests made in the public interest, and for individuals whose income falls below the national poverty line.
- The RTI Act must explicitly grant the right of appeal against rejection of requests.
- The appeal process against rejections should be expanded to provide not only for internal and judicial review but also appeals to the independent oversight body, with clear deadlines for dealing with appeals.

Exceptions

Article 11 of the RTI Act provides a long list of the circumstances under which public authorities can deny access to information. This list includes concerns like national security, international relations, commercial interests and privacy.

ARTICLE 19 finds that the exceptions regime in the draft RTI Act is one of its weakest points and it fails to strike a careful balance between the right of the public to know and the need to protect other important individual and social interests.

According to international standards, exceptions to access to information are allowed but should be limited. Refusals to disclose information represent an interference with the right to information and should only be justified if they meet a strict three-part test under Article 19 ICCPR:
- The information must relate to a legitimate aim as provided for in international law;
- The disclosure must threaten to cause a substantial harm to that aim;
- The harm to the aim must be greater than the public interest in having the information.

Moreover, non-disclosure of information must be justified on a case-by-case basis.

The Draft RTI Act falls short with respect to all three parts of the test.

- First, the grounds for rejecting information requests go beyond the **legitimate aims** provided in international law. For instance, “bids and auctions contracts,” internal communications and correspondence, “deliberations of the Council of Ministers and

ministerial councils and deliberations related to the work of ministries and entities not associated with a ministry" and many others are not linked to a specific legitimate aim. International standards require that exceptions are based only on the content that can harm a legitimate interest, rather than on the type of the document.

- Second, Article 11 fails to state that refusals must meet **a substantial harm test**. We note that it is not sufficient that the information simply falls within the scope of a legitimate aim. The public body must also show that the disclosure of information would cause substantial harm to the legitimate aim. For instance, in national security and defence matters, the exposure of corruption in the military may appear to weaken national defence but actually would help to disclose wrongful behaviour and unveil and eliminate corruption. In such case, the disclosure of information would strengthen the armed forces over time. This explains why is so crucial that the effect of disclosure must be a "substantial harm" to the aim.

- Third, the **public interest override** aspect of the test is completely missing. Even if it can be shown that the disclosure of information would cause substantial harm to a legitimate aim, the information should still be disclosed if the benefits of disclosure outweigh the harm. The harm to a legitimate aim must be weighed against the public interest in having the information made public. When the latter is greater, the RTI Act should provide for disclosure of the requested information. In some cases, the information requested can be private in nature but can at the same time expose high-level corruption within the government.

The regime of exceptions in Article 11 should be completely revised. ARTICLE 19 urges the drafters to consider in particular the Model Law on Access to Information, developed by the African Commission on Human and Peoples' Rights, and ARTICLE 19's Model Law, both of which provide guidance on drafting these provisions in alignment with international standards on the right to information.

Recommendations:

- The regime of exceptions in Article 11 should be completely redrafted.
- The Act's regime of exceptions should be based on a three-part test. Information should never be withheld, unless it affects a legitimate interest protected by law; release of the information would cause actual harm to that interest; and this harm would be greater than the harm caused to the public interest by non-disclosure.

Measures to promote openness

Article 13 of the draft RTI Act lists information that authorities should proactively disseminate. The obligation to publish certain key categories of information, even in the absence of a request for information, is an important aspect of the right to information.

However, ARTICLE 19 finds that the list in Article 13 does not seem to reflect key sorts of information that public bodies are required to disclose routinely under other right to information laws. For instance, the article seems to put emphasis on issues such as "job descriptions," "recruitment procedures," "organisational structure and internal systems", "annual reports on accomplishments," or "completed projects and projects in the process of completion."

The ARTICLE 19 Model Law instead provides for active publication of the following categories of information:

a. a description of a body's structure, functions, duties and finances;
b. relevant details concerning any services it provides directly to members of the public;
c. any direct request or complaints mechanisms available to members of the public regarding acts or a failure to act by that body, along with a summary of any requests, complaints or other direct actions by members of the public and that body's response;
d. a simple guide containing adequate information about its record-keeping systems, the types and forms of information it holds, the categories of information it publishes and the procedure to be followed in making a request for information;
e. a description of the powers and duties of its senior officers, and the procedure it follows in making decisions;
f. any regulations, policies, rules, guides or manuals regarding the discharge by that body of its functions;
g. the content of all decisions and/or policies it has adopted which affect the public, along with the reasons for them, any authoritative interpretations of them, and any important background material; and
h. any mechanisms or procedures by which members of the public may make representations or otherwise influence the formulation of policy or the exercise of powers by that body.[22]

Consideration should be given to ensuring that the obligation as set out in Article 11 of the draft RTI Act covers all of the categories set out above. It should state that

- Public bodies are obligated to "proactively and routinely publish information" of significant public interest, subject only to reasonable limits based on resources and capacity.

- No public bodies should be exempted from proactively publishing information, including armed forces and security agencies.

- Public bodies should be required to publish information as soon as reasonably possible, but no later than 30 days after the information is generated or received. Information should never be published later than one year since its generation.

- Information should be published in a clear, accessible manner and in one or more languages, including local and indigenous languages, to facilitate comprehension by all members of the public.

[22] Model Law, Article 17.

- The RTI Act should specify various means through which information should be disseminated, including electronic means and traditional media such as newspapers, radio, and broadcasting. Public bodies should also be required to inform the public about their rights under the law through these mean

Recommendations:
- Article 13 should be completely revised, as outlined above.

Insufficient oversight body

Article 3 of the draft RTI Act envisions creating the Information Department within the High Commission for Human Rights (the Commission) that will be tasked with a number of responsibilities related to access to information under the Act.

While ARTICLE 19 appreciates the decision to create an information department within an existing human rights body, we find the proposed structure and resources wholly inadequate. The independence of oversight bodies is a key requirement for the successful implementation of access to information legislation. The Draft RTI Act fails to ensure that independent bodies oversee the implementation of the law.

First, the Information Department is to be composed of only one employee within the Commission. This will not be sufficient to carry out all the tasks required for successful implementation of the Act (which include training public officials on the RTI law, drafting annual reports on its implementation, disseminating information through the media, issuing guidance to public bodies, and educating citizens about the law) and for embedding a culture of openness in Iraq.

Appointing a single individual cannot suffice as a proper “oversight body” given the pivotal role such a body plays in promoting, monitoring, and protecting the right to information as guaranteed by the draft Act.

Moreover, some tasks that the Information Department is supposed to carry out, such as “receiving and verifying complaints over failure to apply provisions in the Act and following up on their treatment”, lack clarity. If this refers to receiving individual appeals, the powers to decision on appeals against rejections of right to information requests should be clarified and elaborated upon.

ARTICLE 19 notes that comparative standards, including the Model Law, further elaborate on the type, structure, establishment and processes of independent oversight bodies. We urge the legislators to be guided by these standards, as they reflect international standards and best practices in this area. In any case, it is imperative that the oversight body is endowed with the necessary powers and resources to ensure the effective implementation of the law.

Recommendations:

- The RTI Act must include comprehensive provisions about independent oversight of the RTI Act. Article 3 should be completely redrafted.
- Even if the Human Rights Commission is designated as the oversight body over the implementation of the RTI Act, the Act must ensure that it is given necessary powers and resources to effectively oversee the implementation of the Act.

Unlawful dissemination of public information

Article 16 of the draft RTI Act introduces criminal penalties (one-year imprisonment and/or a fine) for anyone who disseminates information that falls under one of the exceptions, withholds information that should be disclosed, provides incorrect information, destroys or misses the statutory deadlines for replying to requests, or in case of any disclosure regarding national or economic security.

ARTICLE 19 finds that these provisions fail to distinguish between protected disclosures made in good faith and deliberate acts to deny access to information, make obstruction or destroy information.

- First, the RTI Act should **protect whistleblowers** – individuals who release otherwise confidential information to expose wrongdoing or which exposes a serious threat to health, safety or the environment. These individuals should be protected against sanctions if the information was substantially true, in the public interest and disclosed evidence of wrongdoing.

- Second, public officials should be **shielded from sanctions if they disclose information in good faith**, even if it later turns out that the information is not subject to disclosure. If officials can be penalised for making even reasonable mistakes, they will necessarily err on the side of caution and be reluctant to disclose information even if it should be disclosed. Given the culture of secrecy that normally prevails within government, such reluctance to disclose may already be a longstanding practice. For this reason, protection for reasonable, even if mistaken, disclosures under the law is important.

As for criminal responsibility, Article 16 should include sanctions for individuals who intentionally obstruct access to information or wilfully destroy information. Such provisions are crucial for upholding the integrity and availability of information. However, the system of sanctions should be narrowly tailored to serve the objectives of the law and should encompass a range of administrative, civil, and criminal sanctions that are necessary and proportionate.

Recommendations:

- Article 16 should be completely revised.
- The RTI Act should provide comprehensive protection of whistleblowers.
- The RTI Act should establish individual liability for wilful destruction of information and

obstruction of access to information, while also providing for sanctions against entities that fail to comply with the RTI Act. Administrative and civil sanctions, including fines, should be outlined in the draft law for deliberate violations of the RTI Act. Criminal penalties should be established for wilful acts such as obstructing access to information, hindering a public body's duties under the Act, interfering with the oversight body's work, or unlawfully destroying records.

Omissions

ARTICLE 19 also observes that the draft RTI Law fails to include a number of provisions which are either essential or of great value to the effective operation of a system of access to information. These include in particular:

- **Record maintenance**: An access to information law can be seriously undermined if public authorities keep such poor records that they cannot locate the information sought. To help avoid this problem, many such laws place an obligation on public authorities to maintain their records in good condition. Some countries require that the ministry of justice adopt a code of practice concerning the keeping, management and destruction of records by public authorities, with a view to ensuring best practice in this regard across the civil service. Good record keeping is important not only for access to information, but also for effective governance, so the benefits of such a system will extend far beyond the scope of the draft RTI Act.

- **Annual reports:** It is important that public authorities keep records of their various information disclosure activities and that they be required to report annually on these activities. Such reports are an important means of monitoring the performance of public bodies in the information field and most access to information laws provide for their creation and maintenance. For example, the ARTICLE 19 Model Law provides that annual reports by public authorities must contain information on issues such as the number of requests for information received, granted in full or in part, and refused; how often and which sections of the Act were relied upon to refuse, in part or in full, requests for information; appeals from refusals to communicate information; fees charged for requests for information; and others. Ideally, this annual report should be published and formally submitted to the independent administrative body responsible for oversight of the law, and that body should in turn be required to report annually to the legislature on overall progress in implementing the law.

ARTICLE 19 recommends the incorporation of these obligations into the RTI Act.

About ARTICLE 19

ARTICLE 19 advocates for the development of progressive standards on freedom of expression and freedom of information at the international and regional levels, and their implementation in domestic legal systems. We have produced a number of standard-setting publications which outline international and comparative law and best practice in areas such as defamation law, access to information and broadcast regulation.

On the basis of these publications and ARTICLE 19's overall legal expertise, the organisation publishes a number of legal analyses each year, comments on legislative proposals as well as existing laws that affect the right to freedom of expression. This analytical work, carried out since 1998 as a means of supporting positive law reform efforts worldwide, frequently leads to substantial improvements in proposed or existing domestic legislation. All of our analyses are available at http://www.article19.org/resources.php/legal.

If you would like to discuss this analysis further, or if you have a matter you would like to bring to the attention of the ARTICLE 19, you can contact us by e-mail at legal@article19.org. For more information about ARTICLE 19's work in Iraq, please contact Karim Belhaj Aissa at karimbha@article19.org.