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DRAFT MODEL LAW FOR AFRICAN UNION STATES ON ACCESS TO INFORMATION

COMMENTS and RECOMMENDATIONS[1]

I. Introduction

The Center for Studies on Freedom of Expression and Access to Information (CELE) is honored to respond to the call for comments on the Draft Model Law for African Union States on Access to Information (Draft Model Law). The Draft Model Law already embodies an unprecedented achievement in the fight for freedom of information in Africa, and we hope the lessons learned within the Americas may provide the drafters with additional insights as they work to perfect this crucial document. Our expertise at CELE is derived from our extensive experience examining legislation, jurisprudence, and public policies relating to freedom of expression and access to information throughout the Americas. As such, it is through the lens of the Organization of American States' own model freedom of information law that we elaborate our comments below.

We have focused our analysis mainly on the issues related to the definition and scope of information, as well as the exemptions, which, based in our experience, are most sensitive in drafting freedom of information laws. We also consider this rather generalist focus most adequate in order to best translate our experience in the Americas into useful input for the Draft Model Law, while still recognizing the difference in context between the two continents that is likely to be more important in relation to the more specific provision of the law. Below, we recommend: a more limited application of the Draft Model Law *vis-à-vis* private entities; greater recognition of the right to anonymous requests; decreased levels of discretion in request denials; and clearer language in regards to exemptions.

II. Private Bodies

Perhaps the most important difference between the Draft Model Law and the Model Inter-American Law on Access to Information (Americas Model Law) is the former's inclusion of private as well as public entities.

> The Americas Model Law only brings under its scope "public authorities" and, *private organizations which operate with substantial public funds or benefits (directly or indirectly) or which perform public functions and services insofar as it applies to those funds or to the public services or functions they undertake.*[2]

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Furthermore, the drafters explicitly warn that this language should not be construed so broadly as to apply to any institution receiving public funds.[3] Thus, the Americas Model Law's application is limited to those entities included in the Draft Model Law's public body and relevant private body categories. However, Art. 2(b) of the Draft Model Law also sets forth that,

> *every person has the right to access information of private bodies that may assist in the exercise or protection of any right expeditiously and inexpensively*[.][4]

While we recognize that this approach conforms to the Declaration of Principles on Freedom of Expression in Africa,[5] it is important to consider that such a provision could be highly problematic as applied.[6]

First, not establishing limits on the law's application to private bodies will likely harm private entities. Art. 1(1) of the Draft Model Law defines a private body as,

> *(a) a natural person who carries on or has carried on any trade, business or profession, but only in such capacity;*
> *(b) a partnership which carries on or has carried on any trade, business or profession; or*
> *(c) any former or existing juristic person or any successor in title[.]*[7]

Such a broad definition leaves practically any person in their professional capacity subjected to all of the law's exigencies. In practice, this would mean that even the smallest entreprises will be required to designate an information oficer,[8] establish optimal record-keeping system,[9] submit reports to the oversight mechanism,[10] enact all recommendations by the oversight mechanism,[11] and potentially submit to audits by said mechanism.[12]

In fact, private professional entities that consist of very few people – perhaps even a single person – would need to expend a considerable amount of their resources, especially their time, in order to be in compliance with the Draft Model Law. Thus, while it would be ideal to have such free access to information from absolutely all private bodies, its high burden it entails regardless of the entity's characteristics may be impractical as applied.

Second, the current language relating to private bodies means that this law would also apply to privately-owned media outlets. This, in turn, could lead to an interpretation that would require them to reveal confidential sources, and otherwise endanger the processes of investigative journalism. Such a law would be a threat to principled protection of sources, which is inextricably linked to freedom of expression and the press. For all the reasons outlined above, we recommend considering the

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[3] *Ibid*.

[4] Special Rapporteur on Freedom of Expression and Access to Information in Africa; The Centre for Human Rights. *Draft Model Law for African Union States on Access to Information*, Para. 2(b).

[5] African Commission on Human and Peoples' Rights. *Declaration of Principles on Freedom of Expression in Africa*, Para. IV(2).

[6] While some countries, such as South Africa, have opted for this broader approach, many others have not deemed it necessary in order to give full effect to the freedom of information paradigm. Recently, for instance, Nigeria enacted its freedom of information legislation, bringing only publicly funded or public-function private entities under its jurisdiction. *See*: *Freedom of Information Act 2011*, http://www.r2knigeria.org/index.php?option=com_docman&Itemid=87.

[7] SRFEAIA; CHR. *Draft Model Law for African Union States on Access to Information*, Para. 1(1).

[8] *Ibid*., Para. 22.

[9] *Ibid*., Para. 3(2)-(3).

[10] *Ibid*., Para. 70.

[11] *Ibid*., Para. 71(5).

Americas Model Law approach to private entities. Alternatively, it would be prudent to at least specify how journalists would be protected under the law.

III. Requester Anonymity

It is essential that any freedom of information legislation respect the right of a person to anonymously request information. Accordingly, we advise that the drafters of the Draft Model Law remove the provisions in Art. 52 sections (2) and (9), which require that notices to third parties include the name of the requester.[13] Furthermore, we recommend that the Draft Model Law explicitly recognize the requester's right to anonymity, as the Americas Model Law does:

> *Any person making a request for information to any public authority covered by this Law shall be entitled, subject only to the provisions of Part IV of this Law:*
> *(...)*
> *d. to make an anonymous request for information.*[14]

IV. Frivolous or Vexatious Requests

Para. 50 of the Draft Model Law presently provides that, "[a]n information officer may refuse a request if the request is manifestly frivolous or vexatious,"[15] whereas the Americas Model Law includes no such provision. We would advise removing Para. 50 from the final draft of the law, since it engenders dangerously broad levels of discretion by information officers – enough to greatly undermine the law's very mission of instituting a robust freedom of access to information system.

V. Exemptions

Para. 39 of the Draft Model Law states that an information officer may refuse a request for information that includes:

> (*a) trade secrets of the information holder or a third party; or*
> *(b) information about the information holder or a third party that would substantially prejudice a legitimate commercial or financial interest of the information holder or third party.*[16]

In contrast, the Americas Model Law applies a similar exemption, stating that access to information may be denied when:

> *a) Allowing access would harm the following private interests: (...)*
>
> *2. legitimate commercial and economic interests; or,*
> *3. patents, copyrights and trade secrets.*[17]

Upon this comparative analysis, the lack of explicit references to patents and copyrights in the Draft Model Law leads to an ambivalent interpretation of Para. 39 – as either including patents and copyrights under "legitimate commercial or financial interest," or alternatively not providing an exemption for them at all.

Similarly, the Americas Model Law specifically provides an exemption when:

> *a) Allowing access would harm the following private interests:*
> *1. right to privacy, including life, health, or safety[.]*[18]

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[13] SRFEAIA; CHR. *Draft Model Law for African Union States on Access to Information*, Para. 52 (2)(b), (9)(b).
[14] OAS. *Model Inter-American Law on Access of Information*, Para. 5(d).
[15] SRFEAIA; CHR. *Draft Model Law for African Union States on Access to Information*, Para. 50.
[16] SRFEAIA; CHR. *Draft Model Law for African Union States on Access to Information*, Para. 39(1).

Meanwhile, the Draft Model Law states that information requests may be refused where "the release of the information would be likely to endanger the life, health or safety of an individual."[19] Thus, the Draft Model Law thus does not include an explicit mention a privacy interest as the Americas version does. Because exemptions are an indisputably critical part of any freedom of information law, we recommend addressing these ambiguities in hopes of avoiding confusion upon interpretation and judicial application.

Finally, it is worth noting that the Draft Model Law deftly defines exemption categories in a more detailed manner, while the Americas Model Law keeps its exemption categories brief, opting instead for the approach where additional laws provide added detail.[20] Both approaches are undoubtedly legitimate. However, it is important to remember that because very detailed definitions – like the Draft Model Law's – tend to be interpreted as dispositive, and because it is impossible for any law to foresee *ex ante* all circumstances in which its application will be appropriate, further clarification might be necessary. We recommend adding a provision stating that these exemption definitions are guidelines, and that – in order to provide some flexibility in a secure manner – any expansion of the exemption categories should be done explicitly and exclusively through further compatible legislation. This would both keep some measure of flexibility and, above all, prevent potential manipulation of its text by other actors.

[18] *Ibid.*, Para. 41(a)1.
[19] SRFEAIA; CHR. *Draft Model Law for African Union States on Access to Information*, Para. 40.
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