Access Info Europe

Legal Analysis

CAMBODIA:

Draft Law on Access to Information Law

Access Info Europe

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Legal Analysis of Cambodia's draft Law on Access to Information

1. Introduction & Overview

The evaluation of Cambodia's access to information law is being done against a series of well-established international standards.

These include, in particular, General Comment No. 34 of the UN Human Rights Committee as well as declarations by the United Nations Special Rapporteur on Freedom of Opinion and Expression. General Comment No. 34 is an authoritative interpretation of Article 19 of the International Covenant on Civil and Political Rights.

These standards have in turn been referred to explicitly by international human rights courts, with the European Court of Human Rights having drawn on them specifically in developing its emerging jurisprudence on the right of access to information.

The importance of the right of access to information is also included in the Sustainable Development Goals, with UNESCO tasked with evaluating the quality of access to information laws, and of respect for the right in law and practice, under Goal 16.10.2.

Furthermore, there are now 124 countries worldwide that have access to information laws and it has become a *sine qua non* of a democratic society. The comparative law, all of which is captured in the RTI Rating (www.rti-rating.org) along with the extensive experience of the implementation of these laws, provides a rich source for analysis of the quality of any new access to information law as well as the likelihood that it will function well in practice or hit obstacles due to the wording and interaction between various provisions.

The initial analysis of the Cambodian Law on Access to Information indicates that, in spite of the extensive process that has been followed, there are some causes for concern.

This analysis has two primary objectives. The first is to highlight the ways in which the draft law is currently below or out of line with international standards, along with recommendations for reform.

The second objective is to point to where provisions may give rise to some challenges in practice and to suggest ways that these challenges can be avoided or mitigated, through measures that range from amending the law to training of public officials.

2. Cambodia's Law on Access to Information: RTI Rating

In preparing for this more detailed analysis, as part of the evaluation work, we have conducted a rating of the draft law on Access to Information against the RTI Rating. This rating is a tool developed by experts based on analysis of comparative law on the right of access to information from around the world.

The rating is based on a series of indicators in 7 different categories, for which a total of 150 points may be scored. Cambodia's draft Law currently scores just 69 points out of 150 points. This would put in in towards the bottom of the global ranking of the world's current 124 access to information laws.

The more detailed breakdown is as follows:

Section	Max Points	Score
1. Right of Access	6	1
2. Scope	30	23
3. Requesting Procedures	30	20
4. Exceptions and Refusals	30	12
5. Appeals	30	6
6. Sanctions and Protections	8	3
7. Promotional Measures	16	4
Total score	150	69

It will be seen from this chart that there are various aspects of the law where it needs to be improved to be in line with international standards. These are in particular the scope of the law, the exceptions, and the appeals mechanisms.

Furthermore, to ensure a good implementation of the future Law on Access to Information, it is essential to increase the emphasis on both promotional measures and sanctions.

» *It is highly that there be a high level political commitment to ensuring that the future Law on Access to Information of Cambodia meets international standards. This should not however stop the preparation for the entry into force of this law. Hence is it recommended that, whatever the quality of the version adopted, the Information Commissioner be mandated to review the international standards and the implementation of the law on a regular basis (at least every two years) and to make recommendations for strengthening the law. The Law itself shall provide the steps for acting on the Information Commissioner recommendations (for example, that they shall be debated in parliament).*

3. Proactive Publication measures

It is very positive that the draft Law contains provisions on proactive publication.

We note that this is not something we are currently evaluating as part of the RTI Rating, so we have not scored on this.

A positive feature of the proactive publication section of the law (Article 6) is that it also establishes the "principle of maximum disclosure" – a principle that could usefully be stated in general in the law, not only for the proactive publication provisions.

It is also positive that public bodies are required to update and broadly disseminate information about action plans, budgeting, fulfilment of tasks, responsibilities, and other decisions in connection with national and public interests, including their organisation and functioning, development plans, and information on services and fees. There also has to be transparency of financial plans and budgets.

A particularly important requirement is that there be publication of: "Laws, regulations, policies, decisions, and duties of public institutions relating to rights, freedoms, obligations, and public interests" – in a rule of law state it is essential that the public know the law and these provisions contribute towards that.

Similarly, the Law will help ensure greater transparency of the judicial system, by requiring that, with limited exceptions, "all aspects of functioning and procedures at courts, including administrative

affairs, which are of the interest of and have direct connection with the public" should be public.

Last but not least, there shall be publicity of complaints mechanisms and of actual complaints and follow-up actions. Here we note that it will be important to ensure protection of the privacy and personal data of those who make complaints, so that the new levels of transparency do not act as a disincentive.

What could useful be added is a provision that states that when a particular piece of information or a document or type of document is regularly requested, then it should be published proactively on an institutions website. Some access to information laws require that this be done for every request, others require that it be done for information and for classes or types of information that are requested more than three times. At the outset of the implementation of the Law on Access to Information in Cambodia, the criterion of information requested three times would be a good starting point.

Oversight of the proactive publication provisions is also important to provide for. Below we propose the creation of an Information Commissioner, and we suggest

- *Add language ensuring that when information containing personal data (such as the complaints submission), then the information shall be published but with care taken to protect personal data of private individuals. We note that this should not apply to the names of public officials, which should be known to the public.*
- *Mandate the Information Commissioner to review the compliance with the proactive publication requirements, and to ensure that public bodies are updating information regularly.*
- *Add an obligation to publish information that is requested more than three times, making it available on the public body's website and in hard copy automatically to anyone who asks for it, without the need for a request.*

4. Requesters & Requesting Procedures

In the preparation of this law, it is clear that attention has been given to the procedural aspects of the law during the drafting process. This is very important and positive: having clear, detailed and precise procedures for requesting can help significantly with implementation and can ensure that citizens are able to exercise their right of access to information.

Positive provisions include that anyone may request information (Article 10), and that requesters are not required to provide a reason or motivation for their requests (Article 11) and that information officials are required to provide assistance to requesters (Article 9.1). There is also a specific provision (Article 11.2) for providing assistance to those who are unable to fill out the application form by him/herself due to illiteracy or disability and who are, instead, permitted to make a request for information orally.

It is also positive that receipts must be issued (Article 12.4) and that requests must be transferred to other institutions as relevant (Article 11.7).

It is also positive that the law makes clear that there may be no discrimination on any grounds (in articles 7 and 10), which we understand also to mean no discrimination on grounds or ethnicity, gender, or social or economic status.

It is baffling therefore, that Article 11.1, in the formalities for the request procedure, sets out a series

of conditions that must be fulfilled to make a request, including name, sex, age, nationality, occupation, as well as both current address and electronic address (if any).

It is difficult to understand how requesters are best protected against discrimination on grounds of gender if one of the very first bits of information that they have to provide is their gender.

The same goes for age, nationality and occupation, none of which are necessary to process a request.

If there is a desire to obtain information about the profile of requesters for statistical purposes, there are various other ways in which this can be achieved. These include through voluntary declaration of information in a format that ensures that those processing the requests will not know any more detail about the requester than (possibly) a name. Another method is surveys of requesters to find out their experiences (opinion surveys, focus groups, etc.). Given that the highest international standards mandate permitting anonymous requests, demanding anything more than a name is a violation of international standards.

It is positive that requesters can specify the format in which they would like the information. To this end, no more than an email address is needed for information to be received electronically. Hence, when it comes to the address of the requester, it is recommended that the requesters be required to provide no more than ***either*** a postal ***or*** an electronic address.

Another feature of the draft Law is what seems to be a conflict between articles 11 and 15 in terms of whether or not requesters are required to fill in a form. There should be no requirement to complete a form, as a simple email or letter should suffice. If public authorities which to aid requesters with a form, it should be simple, and should not require anything but minimal details from the requester.

When it comes to the description of the information being requested, it should be noted that as well as describing which information is sought, it is advisable to permit requesters to pose questions (such as "How much was spent on water sanitation in this district last fiscal year?" or "What is the total number of children between ages 5-10 in school?" and then the public officials have to find documents that answer the questions (to the extent that they exist).

- *Remove requirement that requesters identify themselves beyond a name. In no circumstances require requesters to state their gender, age, nationality, or occupation.*
- *Ensure that requesters are given option of providing either a postal or an email address, but that both are not necessary.*
- *Clarify that it is not obligatory to complete a form, and that requests may also be submitted by email or letter.*
- *Ensure that the Information Commissioner (see below) and the Courts can hear appeals for complaints about discrimination in the treatment of requests, including discrimination in terms of gender, age, nationality, occupation and other factors.*
- *Ensure that information officers are trained to help convert "questions" from requesters into requests for particular information or documents, so that those who are less familiar with the functioning of the administration are still able to exercise their right of access to information.*

5. Time Frame for Answers

Article 14 provides for a 15-day time frame for answering request, and this may be extended to a total

of 40 days, meaning an extension of 25 days.

Article 13 provides that officers in charge of information shall "promptly examine a requests for information," which is positive, encouraging short time frames. They shall then "give a written response to its requester by notifying if there is or no such requested information or if it's the confidential information, which is prohibited by law from revealing publicly. The response shall be given no later than 5 (five) working days, commencing from the date of receiving the request."

It is true that some of the world's most advanced openness regimes are able to respond to requests in a time frame of just a couple of days (Sweden and Finland for example, and on occasions the European Union and some European countries), but this is in contexts where there is extremely good records management. Our experience of other countries, particularly those which are new to implementing access to information regimes, is that the processing of requests, identifying information, consulting with the relevant departments holding it, reviewing information to assess possible exceptions, all takes time.

It seems that this provision is based on a misunderstanding of how easy it will be to identify documents that fall within the scope of the request. Our assessment, based on considerable comparative experience, is that this will be more of a challenge than it seems. It is therefore unlikely that in the first years of the implementation of the Law on Access to Information in Cambodia, it will be possible for public officials to provide clarity on whether or not a request can be answered in just 5 days. Indeed, if that were possible then there would be no necessity for the 15-day time frame nor for extensions.

We therefore strongly recommend that the provisions relating to the timeframes be revised in the following way:

- *Request shall be registered immediately*
- *Requests shall be answered promptly, and as soon as possible*
- *Requests shall, at a maximum, be answered within 15 days*
- *In exceptional circumstances, the time frame may be extended by up to 25 days (a total of 40 days), provided that the requester is notified of this extension within 15 days and that the extension is full justified. The requester should have a right to appeal to the Information Commissioner and/or courts to challenge the application of extensions.*
- *If an extension is not invoked, then at any point after 15 days from submission of the request, the requester may appeal to the Information Commissioner and/or courts to challenge the administrative silence.*

6. Fees

Article 7 provides that public institutions shall facilitate access with "reasonable fees" and Article 13 replies that the initial positive response (without the information), shall indicate "the public service fees applicable for receiving the information".

Article 19 further clarifies there shall be no charges for providing information about how to apply nor for assistance in preparing an application for information, and then states that the "service fees charged for providing a copy of document in writing, sound, picture, or other forms shall be fixed by joint-Prakas between the Ministry of Economy and Finance and relevant ministries/institutions."

This sounds reasonably acceptable. International standards make clear that there shall be no fee for applications and fees may only be charged for copies and postage. Hence, information delivered electronically should be free of charge.

Furthermore, the first few copies of information (a standard is 20 pages) shall be free of charge, and there should be fee waivers for impecunious requesters. Some regimes also waive information charges for journalists and others acting in the public interest (CSOs, etc).

We strongly recommend that the language on fees be further clarified to ensure no abuse of the future Law with fees blocking access to information. Specifically:

- *State clearly that no fees will be charged for information provided digitally*
- *Introduce a provision saying first 20 pages of copies per request are free of charge*
- *If information is requested in digital format but not available in that format it should either be scanned at no cost or copies should be provided free of charge*
- *Introduce a fee waiver for impecunious requesters and those who can demonstrate that the information is needed for exercise of the right to freedom of expression and other public interest goals (journalists, CSOs, bloggers, grass roots organisations, etc.)*
- *Add language stating that the fees set may only be for copies and that the cost of the copies may be no more than the cost of photocopying in commercial outlets (photocopy shops).*

7. Scope: Information

Article 4 defines the scope of the law in terms of the information to which it applies.

There is a good definition of information: "Information: refers to all pieces of official documents under the possession of public institutions." This definition is in line with international standards although it could be strengthened by the inclusion of references to the format of the information, specifically by saying "in whatever format the information is stored," so as to ensure that not only finalised printed documents, but digital copies of documents, spreadsheets, databases, emails, and so forth. That said, Article 12.2 notes that "documented information can be in writing, audio, picture, video, disk, or other forms" which completes this.

The challenge here (not untypical in this draft) is that one has to read multiple provisions together to ensure clarity. This is of course a facet of many laws, but it does underscore the need for very thorough training of public officials to ensure proper implementation of the law.

The definition is then undermined by an additional definition of "Confidential Information" which the Law states "refers to the information that public institutions cannot disclose to the public." This is not helpful as all information in theory can be given to the public, even if at a particular moment in time, it might be denied because of the application of an exception. We recommend that this term be removed.

Next there is a complication caused by the definition of "Public Information" as that which "refers to the information that public institutions must widely disseminate to the public." We understand that this refers to the information subject to proactive publication, but it is noted that once some information is released to a requester it also becomes "public" in the sense that anyone else may access it and also that the person who received the information may disseminate it, so the information is truly in the public sphere.

- *Consider achieving greater harmony in the definitions of information and greater clarity in the terminology so that there is not an artificial division made between "public" and "confidential" information, but rather clarity that the right of access to information applies, in principle, to all information, which may only be excluded if it can be demonstrated that an exception applies.*

- *Ensure that public officials are well trained on the definitions of information included in the law. This could also be a task for the Information Commissioner that we strongly recommend be established.*

8. Scope: Public Bodies

The law applies to the national and subnational administration of the Kingdom of Cambodia (Article 3).

Based on our evaluation the interpretation provided by the stakeholders interviewed, we understand that the law as drafted at this point and, the law clearly applies to administrative bodies and the legislature.

The judicial branch, state owned companies, private bodies that perform public functions and constitutional bodies would need to accept the law also applies application to them.

The international standards are clear that the right of access to information is a right that must apply to all public bodies. For countries which have needed to ensure that the law applies to constitutional bodies, this has been achieved through constitutional amendments. This was done in Mexico for example.

Other countries, which recognised that for some bodies it may take time to prepare for application of the law, there has been a progressive implementation, starting with the main administrative bodies (central and then local, as was done in Peru and Spain for example) and then progressively expanding to apply to all other bodies.

A further solution, is to start by obliging a wider range of bodies (including private bodies performing public functions) to undertake proactive publication of information and then later bringing them under the scope of the access to information law.

What is important is to ensure that within a period of, maximum, a few years, the entire executive, legislative, judicial, and administrative apparatus is under the scope of the right of access to information. This is because the right is now established as a fundamental right that must apply to all public bodies (UN Human Rights Committee).

As thins currently stand, the draft Law on Access to Information is losing significant points on the RTI Rating because of the narrowness of the scope. We therefore recommend the following:

- *That there be a review of the current provisions of the law to ensure that the definition of the scope applies to all bodies exercising public power and/or operating with public funds.*

- *That the law should come into effect immediately for all administrative bodies, and then there should be a progressive roll out of the law, in order to give other bodies time to prepare for its implementation. No more than 3 years should be given for preparation for the entry into force of the law. For bodies to which requests will not be filed initially, there should nevertheless be proactive publication obligations.*

» *The Information Commissioner should be given powers to review whether a body should fall under the scope of the law due to the public interest in the information that it holds. The Information Commissioner should be empowered to order responses to both one off requests (based on public interest) and to require that a body commence answering requests generally. The Information Commissioner should also be empowered to assess the readiness of bodies to respond to requests, and to engage with that body to ensure that it undertake necessary measures (such as records management or training of public officials) in order to be ready to receive requests.*

9. Exceptions Regime

The exceptions to any access to information law are particularly important as they determine how much information may really be accessed in practice, and therefore how useful the law will be to democratic reform, to ensuring participation in decision making and to permitting members of the public to hold public authorities to account.

There are three main principles determined by international standards that must apply to an exceptions regime:

- ✓ That the list of exceptions must be limited to those established by international comparative standards, and the interpretation of the right of access to information by relevant human rights bodies, as well as by conventions (Council of Europe) and model laws (Africa, Americas);
- ✓ That all exceptions must be subject to a harm and public interest test. In other words: there can be no "blanket" or "class" exceptions.
- ✓ That all exceptions are temporal, and that the refusal to release information at one point in time must be reviewed if a request is received at another point in time, to assess whether the exception still applies.

The draft Law on Access to Information falls short of the international standards on all these three counts.

Indeed, one of the main conceptual problems with the draft Law is that it continues to refer to the concept of a "confidential document", as something rather absolute. The section on exceptions is entitled ""Confidential Information", which is a different concept from "exceptions" or "limitations" and we recommend revising this language throughout the law.

This would also remove the burden of keeping a list of confidential information. That doesn't mean of course, that some sensitive information should not be protected, but then a proper classification regime is needed. To the extent that this law substitutes for that, it is a reasonable start, but we are concerned not to confuse protecting a narrow set of secrets with the day-to-day exceptions to be applied under an access to information law.

The exceptions in Article 20 are extensive. We understand that the lists of information to be excluded from access has been carefully considered and in general looks reasonable. Clearly disclosing, for example, the "Medical history and psycho-physical therapy of a private person" would violate that persons' privacy.

Nonetheless, strictly speaking, there is a mixture here of a harm test and blanket exceptions. So for example, under "Information harmful to the national security and defense matters" the list of materials

excluded include “Images data and maps relating to military base and/or military installation situation and condition, weapons production or storage locations, and military science research buildings” irrespective of whether this information would cause actual harm to national security. We note that in many countries, the locations of military bases are known and are shown on maps, and that this is not a problem.

What Article 20 should do is make clear that these are illustrative examples and that nevertheless the harm test should be applied when considering refusing access to any particular piece of information.

Next is the public interest test. We note that the reference to the public interest test comes earlier, in Article 7, which provides that: “In the case of public interest greater than the preservation of confidential information as stipulated in the prohibition provisions, the confidential information must be provided to the public on request.” We recommend that the public interest test also be explicitly referred to in Chapter 4.

We have a particular concern about the protection of decision making in Article 20.6 and the idea that information shall be classified as confidential if it relates to “internal meetings of public institutions, process of appointments and examinations which organized by the public institution.”

In a democratic society, some information about appointments and examinations may become available, at the very least immediately after the process is concluded. As to “internal meetings” this is especially problematic as there is no definition of what is an internal meeting. The cultural shift towards transparency is also a shift away from the concept of “internal meetings” towards the idea that everything that a public authority does is part of its public activity. Hence, while it is legitimate to have the space to thing, information on meetings must be available. Not to have this is to undermine the possibility of participation in decision making.

The timeframes are also problematic. The 90-day timeframe for information related to internal meetings is likely to exclude the pubic from being able to follow and/or participate in decision-making processes. Rather, at any point in an ongoing process, there should be the evaluation of harm and public interest tests.

Similarly, 30 years for information related to national security, defence, foreign or international relations, national economy and finance, is far too long. There is much information that could be released sooner. Again, there should be the evaluation of harm and public interest tests.

Even more problematic is the 60 years from the date of creation or of issuance of the record of information related to the functioning of the criminal justice system or information constituting a violation of privacy of an individual. Whilst we have some sympathy to the protection of individual privacy, a better test would be if that person is still alive as 60 years may be too short. Again: is there a harm at this current moment?

As to the criminal justice system, it is positive that information relating to genocide, crimes against humanity, war crimes, or serious violations of human rights shall be disclosed as soon as available, as it is a clear that the public interest prevails here. As for other instances of criminal justice, there should be overall transparency of the criminal justice system, and for any specific request, the harm and public interest tests should be applied.

- *Revise language on exceptions removing references to the concept of “confidential information”*
- *Clarify that all information under Article 20 may be requested and that it will only be rejected*

following application of the harm and public interest tests, even if Article 20 provides very strong guidance on classes of information that are unlikely to be disclosed unless there is a compelling public interest.

- *Add language about the public interest test in Chapter 4. Good practice would be to give examples of conditions in which the public interest test might weigh particularly strongly, such as:*
  - *corruption, non-compliance with regulations, unlawful use of public funds or abuse of authority in the exercise of public office;*
  - *suspicion that a criminal offense has been committed or there is a reason for revoking the court decision;*
  - *unlawfully obtaining or spending funds from public revenues;*
  - *threat to public security;*
  - *threat to life;*
  - *threat to public health;*
  - *threat to the environment.*

- *Amend Article 20.6 to include a clear harm test for decision-making processes, appointments processes and examinations.*

- *Reframe Article 21 so that rather than fixed time limits, there is a clear application of the harm and public interest tests.*

10. Oversight and Appeals

Whilst it is positive that the law anticipates that requesters can appeal to the courts, in reality the option of taking court cases is something open to very view people, given that it is something that requires contracting a lawyer, and even then requires a certain level of comfort with legal procedures, and can be time consuming.

The law does provide for appeals against local bodies to the local Ombudsmen, but we understand that they do not have strong powers. Furthermore, having multiple entities charged with oversight of the law fails to achieve the important function that and information commissioner can play, which is that of an institution which accumulates knowledge, expertise, and develops standards, guidance, and a body of decisions that help define and advance the right.

For this reason, in order to ensure protection for the fundamental right of access to information, in many countries an information commissioner has been established. There are different models for such a body – information commissioner or commission, sometimes combined with the body responsible for data protection – but they all share some essential features, which include:

- The information commissioner or other independent oversight body is appointed by parliament
- There are prohibitions on individuals with strong political connections from being appointed to the information commissioner and there are requirements of professional expertise.
- The budget for the information commissioner's office is set by parliament and/or there are other effective mechanisms are in place to protect its financial independence.
- The information commissioner has the necessary mandate and power to perform its functions, including to review classified documents and inspect the premises of public bodies.
- The decisions of the information commissioner are binding on public authorities, which may appeal to the courts to challenge them but if they do not, must be enforced.

- In deciding an appeal, the information commissioner has the power to order appropriate remedies for the requester, including the declassification of information.
- The information commissioner has the power to impose appropriate structural measures on the public authority (e.g. to conduct more training or to engage in better record management).
- The information commissioner is mandated to mediate with public bodies to find solutions to information requests that are also satisfactory for the requester, so that not all is resolved through decisions but also through a process of dialogue. This is particular useful for issues that are more procedural than disputes about whether or not a particular document be released.
- The public may take complaints about lack of proactive publication as well as treatment of requests.
- The information commissioner is charged with promoting the right, which includes awareness raising and education of the public.
- The information commissioner is mandated to participate in training of public officials and has the necessary budget to do so. Ideally it would also coordinate between public officials.
- The information commissioner gathers data on the implementation of the law and reports annually to parliament in a report that shall be made public.

We strongly recommend that, given some of the other structural weaknesses in the law, the office of an information commissioner be established. It will make a huge difference to the implementation of the law in Cambodia. We are aware that such independent bodies are not yet common in Cambodia. Nevertheless, establishing an information commissioner's office would be a very positive signal of commitment to a fundamental right that is a crucial element of a democratic system. Such a body will contribute to the cultural change towards transparency and open government that Cambodia aspires to achieve.

» *Establish the office of in independent Information Commissioner fully mandated to promote and oversee implementation of the Law on Access to Information.*

11. Implementation & Promotion

The draft Law contains very little on promotion of the right of access to information, in particular not promotion towards the general public.

It is positive that there is a requirement to appoint and train information officers (Article 8). This is an essential component of a functioning access to information regime. It is also positive that these information offices are protected from sanctions for revealing information in good faith (Article 25).

It is not, however, recommended that these also be spokespersons for the institutions. A spokesperson is often required by his or her superiors to put a political spin on information provided to the public, whereas the task of an access to information officer is to process requests and release documents accordingly.

It is also positive that the information offices that are to be set up under the Law will have a senior person heading them (the vice president of the institution). This should help guarantee that these offices have the power and authority within the institution to carry out their function.

It would be positive if the information officers were tasked with other roles, such as training other public officials and ensuring good information management.

» *It is highly recommended that the functions of information officer and spokesperson be*

separated

- *Mandate information offices to train other officials*
- *Require information officers to implement records creation and management procedures.*

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