

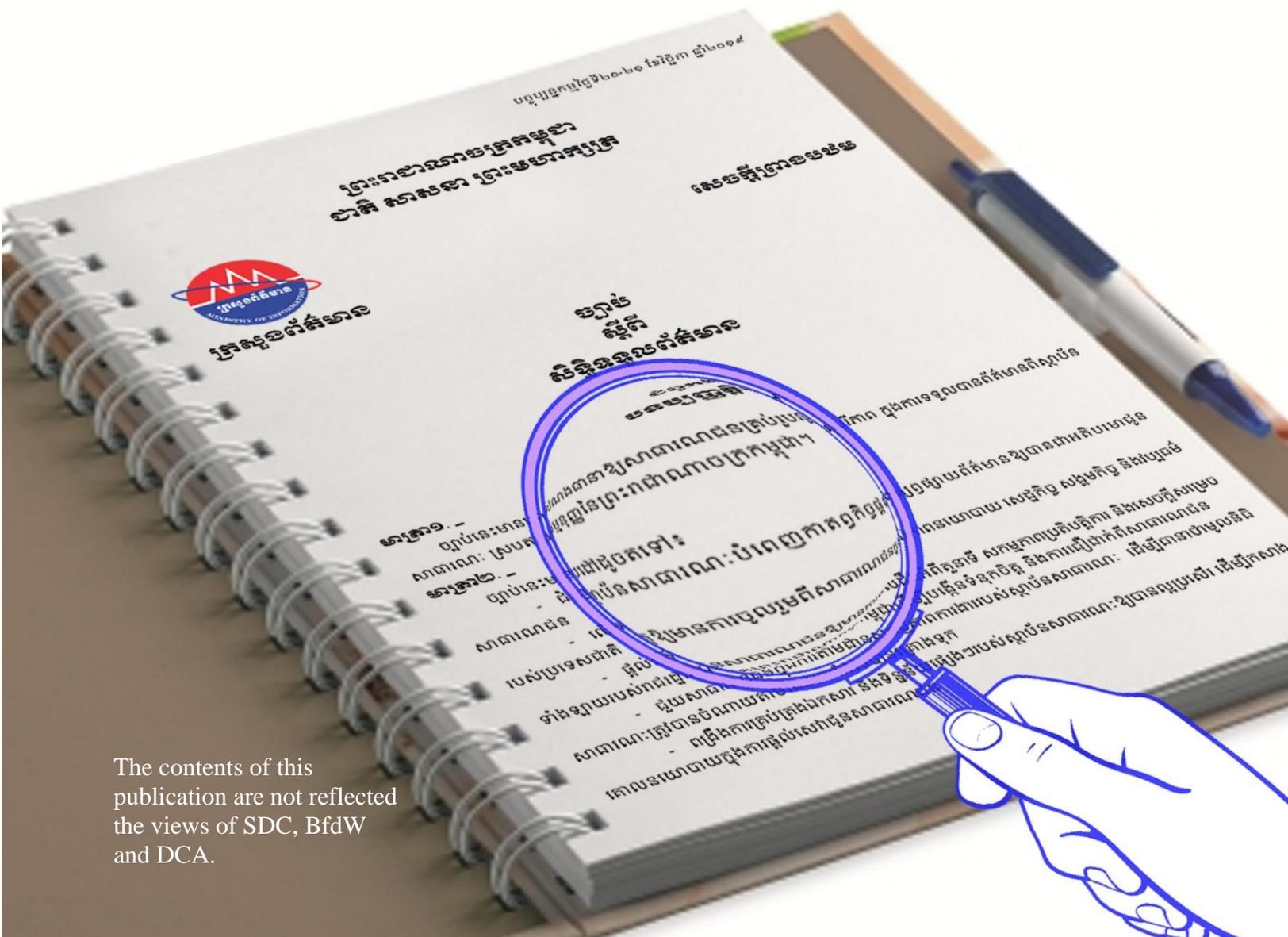
Cambodia Draft Law on Access to Information

Legal Analysis

Draft 20-21 November 2019

Advocacy and Policy Institute

28 December 2019



The contents of this publication are not reflected the views of SDC, BfdW and DCA.

Executive Summary

The right to access information held by public bodies (also referred to as ‘freedom of information’ or ‘right to information’) has been recognized in international law as a fundamental human right. Although there is no ‘right to information’ specifically listed in the earliest human rights instruments, this right is now generally recognized as part of the fundamental right of freedom of expression, which includes the right to seek, receive, and disseminate information. Access to Information (also known as A2I) has now been adopted into law or policy in over 120 countries around the world.

In Cambodia, over a decade of A2I public workshops, consultative meetings and conferences involving government officials, members of civil society, and legal experts took place. A draft policy paper on Access to Information was also completed in 2007. By 2015, a technical working group consisting of Ministry of Information officials, UNESCO officials, civil society representatives, and legal experts was formed to create the first draft of the Law on Access to Information. Public consultations with civil society groups and legal experts continued on a regular basis for nearly three years, which resulted in the completion and submission of the first draft in February 2018. It has since been submitted to the Council of Ministers for further review. This analysis of the law will focus on the latest draft released by the Council of Ministers, dated 20-21 November 2019. The draft law has already been evaluated by several international experts, including the international human rights NGO Article 19.

This legal analysis is entirely the author’s own, although there is much agreement between the author and the other international legal experts who have already evaluated the law. However, the author, who has lived in Cambodia and has worked on these issues for nearly 20 years, is also fully aware of the Cambodian context in terms of current resources and legal development. Although the author agrees with the recommendations made by the international experts, some of their recommendations, in light of the current Cambodian situation, are not feasible or realistic at this time.

For example, one important accepted international standard regarding A2I laws relates to the issue of appeals. Chapter 6, Articles 26 and 27 describe a system of appeals for requests for information. However, there is no provision for the creation of an independent Information Commissioner or Information Commissions, which would consider appeals and help to ensure effective implementation of the law, and which is accepted practice in over 80 countries that have A2I laws. Because of budgetary limitations, the creation of a new institution may not be possible at the present time in Cambodia. However, use of an existing ombudsman system, which is being developed in Cambodia, could be applied to appeals, at least until the creation of an Information Commissioner institution in the future.

Therefore, in this analysis the author has decided to focus on those key sections of the latest draft which are the most important, and are the highest priority areas of concern, with recommendations for improvement.

Recommendations:

Chapter 1, Article 1

1. Add references to human rights instruments relevant to A2I, including Article 19 of the Universal Declaration of Human Rights (UDHR), and Article 19 of the International Covenant for Civil and Political Rights (ICCPR), as well as reference to the International Covenant for Economic, Social, and Cultural Rights.
2. Include the presumption or priority of full disclosure with regards to implementation of the Law.

Chapter 1, Articles 3 and 4:

1. Revise Articles 3 and 4 to make it clear they apply to *all* public bodies, including bodies exercising public functions, such as courts, legislative bodies, and special Constitutional bodies, as well as private bodies using public funds.

Chapter 1, Article 4:

1. Revise to include *all* documents under the possession of public bodies, and not only “official” documents.

Chapter 3 Article 11:

1. Revise Article 11 by deleting the requirement that the requester provide his /her gender (sex), age, nationality and occupation.

Chapter 3 Article 13:

1. Revise Article 13 by reducing the response time to a request for information from 15 days to 5 days. In the previous draft of the law, the response time was noted as 5 days.

Chapter 3 Article 15:

1. Delete Article 15.4 regarding a 40-day limit before a repeat request can be made. This is unnecessary. Requester should be free to make repeat requests without a time limit.

Chapter 4 Article 20:

1. Include the three-part test as a general principle of Article 20. A possible section could be as follows:

Public institutions can only deny the release of information to the requester when *all* three of the following conditions are met:

- The information falls under one or more of the listed exemptions in this article;
 - There is a real and identifiable risk of harm to a legitimate protected interest if the information is released;
 - The harm to a legitimate protected interest is greater than the public interest in disclosure.
2. Delete Article 20.7: “Other confidential information as stipulated in the prohibition provisions.” Overly broad and lacks specificity.

Chapter 5, Article 24

1. Revise Article 24 to protect whistleblowers who release or reveal information on wrongdoing, including crimes, failure to comply with a legal duty, corruption or dishonesty, bad management or lack of good governance regarding a public body, and threats to public health and environment.

Chapter 7, Articles 29 and 30:

1. Delete Articles 29 and 30. They do not belong in the law. There are already provisions in the Criminal Code that can be implemented in such cases.

Chapter 9

1. Restore Article 37 from the previous draft:
“This law shall prevail in case provisions of other laws contradict any provision of this law.”

This Article clearly establishes the priority of the law as part of the existing legal framework and legal institutions in Cambodia.

Table of Contents

	Page
Executive Summary	1
Access to Information: International Legal Standards	5
Global and Regional Recognition of Access to Information	6
Access to Information in Cambodia	7
Analysis of the Draft Law (Latest Version, November 2019)	8

Access to Information: International Legal Standards

The right to access information held by public bodies is also referred to as ‘freedom of information’ or ‘right to information’, and has been recognized in international law as a fundamental human right. Although there is no ‘right to information’ specifically listed in the earliest human rights instruments, this right is now generally recognized as constituting part of the fundamental right of freedom of expression, which includes the right to seek, receive, and disseminate information. Article 19 of the Universal Declaration of Human Rights (UDHR) states:

Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference, and to *seek, receive and impart information and ideas* through any media and regardless of frontiers. (Emphasis in italics added)

Although the UDHR is not directly binding on States, portions of it, including Article 19, are now generally regarded as part of customary international law. Article 19 of the International Covenant on Civil and Political Rights (ICCPR), which unlike the UDHR is a formally binding legal treaty endorsed by over 170 countries, including Cambodia, guarantees the freedom of expression and information, using language similar to the UDHR.¹

In 2011 the UN Human Rights Committee interpreted the scope and limits of the right to information, stating that Article 19 of the ICCPR guarantees the right to access information held by public bodies. The Committee also required that states proactively disseminate information in the public interest and ensure that access is “easy, prompt, effective and practical.” Also, countries must enact “necessary procedures” such as relevant legislation to give effect to the right to information. Fees for information access must be limited, responses to requests must be timely, authorities must provide clear explanations for not releasing information, and states need to establish clear appeals mechanisms.²

The right to access information has also been recognized as part of the international legal framework related to social and economic rights, as set forth by the International Covenant on Economic, Social and Cultural Rights (ICESCR). Access to Information (A2I) is considered under

¹ UN General Assembly Resolution 2200 (XXI), December 15, 1966, entered into force, March 23, 1976.

² UN Human Rights Committee, General Comment No. 34 Article 19: Freedoms of opinion and expression, (2011) <http://www.refworld.org/pdfid/4ed34b562.pdf>.

international law to be an “enabling right”, a right that supports or helps people to better achieve other human rights, and to help encourage public discourse and participation on policy and governmental issues. As part of the United Nations Sustainable Development Goals (SDGs) UN member states agreed to establish specific targets in which states “ensure public access to information”. The UN has also stated that the right to access information is necessary to ensure the right to water, the right to health, and the right to education. The right to information is also specifically mentioned in the Convention of the Rights of the Child and the Convention on the Rights of Persons with Disabilities. The right to information has been also recognized as a key resource in environmental protection. The right is also found in international treaties and agreements relating to pollution and climate change, and in the UN Convention against Corruption (UNCAC).

Global and Regional Recognition of Access to Information

A2I has now been adopted into law or policy in over 120 countries around the world (61 percent of UN Member States), including the United States, the United Kingdom, Germany, Japan, China, Russia, South Korea, and India. In ASEAN, Indonesia, Thailand, and Vietnam have enacted A2I national policies and laws. In addition, 90 countries (including the Republic of the Philippines in ASEAN) have adopted explicit constitutional guarantees.

Sweden’s Freedom of the Press Act, which was passed in 1766, is generally thought to be the oldest Freedom of Information Law in existence.³ Following State examples, a growing number of inter-governmental and international institutions, such as the European Union, the United Nations Development Program (UNDP), the World Bank, and the Asian Development Bank (ADB), have also adopted freedom of information policies. A2I has also been repeatedly recognized in declarations of the UN General Assembly and Human Rights Council, and in General Comments and cases before the UN Human Rights Committee and the UN Committee on Social, Economic and Cultural Rights.

³ “The Principle of Public Access”, <http://www.sweden.gov.se/5b/d/2184/a/15521>

Access to Information in Cambodia

Although there is currently no specific A2I law in Cambodia, in 2004 the Royal Government of Cambodia (RGC) formally acknowledged the need for an A2I law, “in order to create transparent government, reduce corruption, and promote confidence in the government by the citizens of Cambodia.”⁴ A target was set (with donor approval) to develop a clear policy framework on access to information, which would lead to an eventual drafting and adoption of an applicable law.

After three years of public workshops and conferences involving government officials, members of civil society, legal experts, and members of the general public, the Council of Ministers assigned the Ministry of National Assembly Senate Relations and Inspections (MoNASRI) to formulate a government Draft Policy Paper on Access to Information, which would precede the drafting of a national A2I law. The Draft Policy Paper on Freedom of Information was completed in late August 2007.

Then in May 2013, the Embassy of Sweden, in conjunction with UNESCO, sponsored a “National Conference on Access to Information” which included the participation of civil society groups, government officials, local authorities, and legal experts. Then on May 30, 2014, UNESCO signed an agreement with the Ministry of Information and the Swedish International Development Agency (SIDA) to cooperate on a project which would lead to the drafting of a national Access to Information Law. By 2015, a technical working group consisting of Ministry of Information officials, UNESCO officials, civil society representatives, and legal experts was formed to create the first draft. Public consultations with civil society groups and legal experts continued on a regular basis for nearly three years, which resulted in the completion and submission of the first draft of the law in February 2018. It has since been submitted to the Council of Ministers for further review. The latest draft of the law with several revisions from the first draft was completed by the Council of Ministers in November 2019.

⁴ Access to Information: A Clear Policy Framework for Cambodia”, July 22, 2007, Draft Policy submitted to Ministry of National Assembly and Senate Relations (MoNASRI), Royal Government of Cambodia; p. 7.

Analysis of the Draft Law (Latest Version, November 2019)

This analysis of the law will focus on the latest draft released by the Council of Ministers, dated 20-21 November 2019. The draft law has already been evaluated by several international experts, including the international human rights NGO Article 19.

This legal analysis is entirely the author's own, although there is much agreement between the author and the other international legal experts on a number of issues. However, the author, who has lived in Cambodia and has worked on these issues for nearly 20 years, is also fully aware of the Cambodian context in terms of the current state of resources and legal development. Although the author agrees with the recommendations made by the international experts, some of their recommendations, in light of the current Cambodian situation, are not feasible or realistic at this time.

Therefore, the author has decided to focus on the following sections, which are the most important and the highest priority areas of concern, with recommendations for improvement:

Chapter 1. Article 1

The latest version of Article 1 omits any reference to Article 19 of the Universal Declaration of Human Rights.

November 2019 draft:

Article 1 –

The purpose of this law is to ensure the public's right to freedom of access to information from public institutions and to require the public institutions to be fully obligated to provide and disseminate maximum information to the public.

Previous draft:

Article 1 – The purpose of this law is to ensure the public's right to and freedom of access to information. This law provides for duties of public institutions to provide and disseminate information publicly, **in conformity with the Constitution of the Kingdom of Cambodia and article 19 of the Universal Declaration of Human Rights.**

Comment:

It is important at the very beginning of the law to refer to Article 19 of the UDHR and to Article 19 of the International Covenant on Civil and Political Rights (ICCPR) which are fundamental parts of the international human rights legal framework, and which Cambodia has previously

committed to follow. Including this in the law would also demonstrate that Cambodia recognizes Access to Information as a human right.

In addition, Article 1 should include the presumption of full disclosure. This means that full disclosure should be the first priority and duty of the government, unless there are special exceptions or situations. The presumption of full disclosure is a key principle of international human rights standards regarding transparency and freedom to express and access information.

Recommendations for Article 1:

1. Add references to human rights instruments relevant to A2I, including Article 19 of the Universal Declaration of Human Rights (UDHR), and Article 19 of the International Covenant for Civil and Political Rights (ICCPR), as well as reference to the International Covenant for Economic, Social, and Cultural Rights.
2. Include the presumption or priority of full disclosure with regards to implementation of the Law.

Chapter 1, Articles 3 and 4

November 2019 draft:

Article 3 –

This law is applicable to all pieces of information, which shall be provided by public institutions both at national administration and subnational administration across the Kingdom of Cambodia, with the exception of a certain number of confidential information laid down by this law.

Article 4—

Public Institutions: refer to ministries/institutions, or other entities performing public functions including national and subnational administration, created by law or/and other regulations;

Comment:

Article 3 states that the Draft Law applies to national and subnational administration bodies of the Kingdom of Cambodia. Article 4 defines public institutions as “ministries/institutions, or other entities performing public functions including national and subnational administrative, created by law or/and other regulations”.

Based on the specific language of Articles 3 and 4, the law only applies to administrative bodies and others created by law or regulations. It does not appear to include the judicial (courts) and legislative branches (National Assembly or Senate) or private bodies that perform public functions. Constitutional bodies, (such as the Constitutional Council, for example) are also not specifically included in the scope of application of the law. According to currently accepted international legal

standards, the right to access information shall apply to all public bodies and to private bodies using public funding. This provision provides too narrow a definition.

Recommendation for Articles 3 and 4:

1. Revise Articles 3 and 4 to make it clear they apply to *all* public bodies, including bodies exercising public functions, such as courts, legislative bodies, and special Constitutional bodies, as well as private bodies using public funds.

Chapter 1. Article 4

November 2019 draft:

Article 4—

Technical terms used in this law include the following:

- Information: refers to all pieces and all formats of official documents under the possession of public institutions;
- Public Information: refers to the information that public institutions must widely disseminate to the public;

Comment:

These definitions could be made more clear by referring to *all* information held by public bodies, and not just official documents. This could prevent a public official from classifying a document as “unofficial” in order to limit or deny public access.

Recommendation for Article 4:

1. Revise to include “all” documents under the possession of public bodies, and not only “official” documents.

Chapter 2, Article 5

Chapter 3, Articles 10, 11, and 15

November 2019 draft:

Article 5 –

All persons have the right to and freedom of access to information held by public institutions under the provisions of this law.

Article 10 –

All persons whether natural persons or legal persons shall be entitled to request all kinds of information from public institutions without any discrimination.

Article 11 –

A request for information shall be made in writing with its detailed descriptions about the requested information and its format to be submitted to public institutions. Procedures and formalities for requesting information shall be determined as follows:

1. Formalities for requesting for information:

- Name, sex, age, nationality, occupation;
- Current address and/or electronic address (if any);
- List of detailed information to be requested.

Article 13-

Officers in charge of information shall promptly examine a request for information and give a written response to its requester by notifying if there is or no such requested information or if it is the confidential information, which is prohibited by law from revealing publicly. The response shall be given no later than 15 (fifteen) working days, commencing from the date of receiving the request.

Article 15-

Public institutions may deny providing information to requester based on the following conditions:

1. Requested information is prohibited as specified in Article 20 of the law;
2. Requester failing to fully fill in the application forms as stated in article 11 of this law
3. Requester obstructs the operation of the public institutions and/or officer of public institutions or officer in charge of information;
4. Requested information has recently been provided by the same public institution to requester within a period of 40 (forty) days.

Comment:

Articles 5 and 10 state that the right to access information applies to natural and legal persons without any discrimination. This means that public institutions shall assist a requester's access to information without regard to the ethnicity, gender, or social or economic status of the requester.

However, Article 11 lists a series of conditions that must be fulfilled to make a request. These requirements regarding gender (sex), nationality, age, and occupation are unnecessary. They are inconsistent with international law standards with regards to non-discrimination.

In Article 13, the previous draft listed a period of 5 (five) working days. There is no clear reason or specific rationale given for increasing the time to 15 (fifteen) working days in the latest draft.

In Article 15, a 40-day limit is required before a repeat request can be made. This is unnecessary. Requester should be free to make repeat requests without a time limit.

Recommendation for Article 11:

1. Revise Article 11 by deleting the requirement that the requester provide his /her gender (sex), age, nationality, and occupation.

Recommendation for Article 13:

1. The time period should be restored to the original 5 (five) working days in the previous draft.

Recommendation for Article 15:

1. Delete 15.4 which includes the 40-day limit before a repeat request can be made.

Chapter 4, Article 20

November 2019 draft:

The latest version of Article 20 remains unchanged from previous versions and lists information that in special cases, can be withheld from the public (also known as “exemptions). These information exemptions include national defense and security matters, relations with other countries, national economy and finance, criminal and judicial processes, personal privacy, and internal confidential information.

Article 20.7 of the latest draft also includes an additional exemption:

“Other confidential information as stipulated in the prohibition provisions”

Comment:

Article 20.7 is overly broad and lacks specificity. This is a “blanket provision” which is unnecessary and should be deleted.

In addition, the latest version of Article 20 contains no “three-part test” to determine whether exempted information can be withheld from the public. International standards of access to information require application of the three part test regarding release of confidential information.

The May 2011 report of the UN Special Rapporteur on Freedom of Expression to the UN Human Rights Council outlines a three-part test, which must be applied when imposing restrictions on the right to the freedom of expression as provided by Article 19 (3) of the ICCPR. Access to information is now considered part of the Article 19 right of freedom of expression.⁵

This three-part test consists of the following:

Step 1: Are the exemptions related to a legitimate purpose or aim? And if yes, does the information fall under one of the exemptions?

Step 2: Is there a legitimate and identifiable risk of harm to legitimate protected interest if the information is released? (causing substantial harm)

Step 3. Is the substantial harm greater than the public interest in releasing the information? If the public interest is greater, then the information must be released to the public.

Recommendation for Article 20:

1. Include the three-part test as a general principle of Article 20. A possible section could be as follows:

Public institutions can only deny the release of information to the requester when all three of the following conditions are met:

- The information falls under one or more of the listed exemptions in this article.;
- There is a real and identifiable risk of harm to a legitimate protected interest if the information is released;
- The harm to a legitimate protected interest is greater than the public interest in disclosure.

2. Delete Article 20.7 as overly broad and unnecessary.

Chapter 5, Article 24

November 2019 draft:

Article 24 –

No person who provides information shall be criminally, civilly and disciplinarily responsible for the denunciation of a felony or a misdemeanor they had known and/or during the performance of their function or duty made before the judicial authority or other competent authorities, as well as receiving protection from any threat and retaliation if done in good faith.

⁵ A/HRC/17/27, paragraph. 69. <https://www.right-docs.org/doc/a-hrc-17-27/>.

Defamation should not be exaggerated by facts that affect the honor of an individual and / or public institution.

Comment:

Article 24, which provides protection for whistleblowers is too restrictive. The latest draft only gives protection to those who expose “a felony or a misdemeanor”. Article 24 should also give protection to those exposing *all* forms of wrongdoing, including dishonest behavior, or even mismanagement or lack of good governance regarding a public body.

Recommendation for Article 24

1. Revise Article 24 to protect whistleblowers who release or reveal information on wrongdoing, including crimes, failure to comply with a legal duty, corruption or dishonesty, bad management or lack good governance regarding a public body, and threats to public health and environment.

Chapter 7, Articles 29 and 30

November 2019 draft:

Article 29 –

In case there is an act of violence committed against officers of public institution or officers in charge of information performing their duties as stipulated in the article 15 of this law shall be punishable by the provision of article 506 (Obstruction against the implementation of public works) of the Criminal Code.

Article 30 –

Whoever makes a lying denunciation to any public institutions or judicial authorities about an offense, causing the investigation to become useless, shall be liable to an imprisonment from 1 (one) month to 6 (six) months and/or to a fine from 100,000 (one hundred thousand) Riels to 1,000,000 (one million) Riels.

Comment:

The penalties chapter of the law (Chapter 7), contains Articles 29 and 30 which are not related to issues of government transparency and the core spirit and purpose of an access to information law. According to the international human rights and freedom of expression organization Article 19: “Access to information laws should promote open access to information held by public authorities.

Such laws play a crucial role in promoting accurate reporting and in limiting publication of potentially defamatory statements in democratic societies.”

The main priority and spirit of the Law of Access to Information should be positive; it should encourage citizens to access information and not punish them. These articles could discourage and create fear in people, and prevent them from making information requests to public institutions and bodies.

Recommendation for Articles 29 and 30:

1. Delete Articles 29 and 30. They do not belong in the law. There are already provisions in the Criminal Code that can be implemented in such cases.

Chapter 9, Article 37

Comment:

Article 37 in the original draft clearly establishes the priority of the law as part of the existing legal frameworks and legal institutions.

Recommendation for Article 37:

1. Restore Article 37 from the previous draft:
“This law shall prevail in case provisions of other laws contradict any provision of this law.”

Appeals and International Standards

One important accepted international standard regarding A2I laws relates to appeals. Chapter 6, Articles 26 and 27 describe a general system of appeals for requests for information.

However, there is no provision for an administrative appeal system, or the creation of an independent Information Commissioner or Information Commission, which would consider appeals and help to ensure effective implementation of the law. This is accepted practice in over 80 countries that have A2I laws. Because of budgetary limitations, the creation of a new institution may not be possible at the present time in Cambodia. However, use of an existing ombudsman system, which is being developed in Cambodia, could be applied to appeals, at least until the creation of an Information Commissioner institution in the future.

