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COMMENTS ON THE SENEGALESE DRAFT LAW ON ACCESS TO INFORMATION

This legal analysis of the draft law on access to information was prepared by ARTICLE 19 Senegal and West Africa and the Rule of Law Lab at New York University School of Law.

UNOFFICIAL TRANSLATION

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I. INTRODUCTION

This legal analysis of the draft law on access to information was prepared by Article 19 Senegal and West Africa and the Rule of Law Lab at New York University School of Law.

Article 19 is a non-governmental organization that works to promote and defend freedom of expression and access to information. It has a global structure composed of regional and national offices, all pursuing the same mission. The branch of Article 9 covering the West Africa region was established in 2010 in Senegal. Its priority programs focus on improving legal and institutional frameworks relating to civic space, particularly in terms of freedom of expression and access to information. It promotes transparency, public accountability, inclusion and diversity, media independence, and the protection of journalists, activists, and human rights defenders. It works in particular through advocacy, access to information and research, and support for CSO engagement in the co-creation of Open Government Partnership commitments in Senegal. For more information: https://article19ao.org/histoire/

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This brief is part of a project to analyze the draft law on access to information, both in substance and form, including the explanatory memorandum and the articles, in light of applicable national and international standards and, above all, African standards such as the African Union Model Law and the Declaration of Principles on Freedom of Expression and Access to Information.

To this end, the explanatory memorandum and a selection of articles from the draft law will be examined in turn and discussed in detail, focusing on the strengths of the text, any legal shortcomings or inconsistencies, and possible areas for improvement. The aim is to support members of the National Assembly, based on existing standards, in adopting a law that complies with the principles of law, is effectively enforceable, and contributes to transparency in the conduct of public affairs in Senegal.

II. COMMENTARY ON THE DRAFT LAW ON ACCESS TO INFORMATION

The analysis of the bill will begin with a presentation of the reasons for the bill, followed by a study of certain articles in ascending order.

II.1. Explanatory memorandum

The explanatory memorandum reflects, from the very first paragraph, the clear desire of the Senegalese authorities to ensure that their legislative arsenal complies with the obligations

arising from international and regional human rights instruments on respect for and effective realization of the right to information contained in administrative documentation and relating to the management of public affairs (hereinafter "the right of access to information"). The explanatory memorandum also cites[1] some of the instruments referred to in the preamble to the African Model Law on Access to Information, prepared by the African Commission on Human and Peoples' Rights[2] . However, a more specific reference to the provisions of these instruments relating more specifically to the right of access to information would be welcome[3].

Furthermore, it is particularly constructive to note that the authorities explicitly acknowledge the limitations of Senegal's current legal arsenal, indicating that various national laws[4] take this right into account without, however, providing for the conditions under which it may be exercised. By proposing the adoption of a law dedicated to the right of access to information contained in administrative documents and relating to the management of public affairs, the authorities are sending a strong signal of their willingness to enable the full realization of, and full access to, this right. The objectives of the law set out in the text also suggest that the scope of the right of access to information is sufficiently broad, which is in line with the African Union Principles on Freedom of Expression and Access to Information[5] and the recommendations of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. The latter calls on States to adopt a national regulatory framework that objectively establishes the right to the widest possible access to information held by public bodies[6].

⇒ Areas for improvement

Enactment of the principle of maximum disclosure

[1] The instruments cited are the Universal Declaration of Human Rights, the African Charter on Human and Peoples' Rights, the African Union Convention on Preventing and Combating Corruption, the African Charter on Democracy, Elections and Governance, the African Charter on the Values and Principles of Public Service and Administration, and the ECOWAS Protocol on the Fight against Corruption

[2] African Commission on Human and Peoples' Rights, Model Law on Access to Information for Africa.

[3] I.e. Article 19 of the Universal Declaration of Human Rights; Article 19 of the International Covenant on Civil and Political Rights; Article 9 (para. 1) of the African Charter on Human and Peoples' Rights; Article 9 of the African Union Convention on Preventing and Combating Corruption; Article 2, 10) and Article 19, 2) of the African Charter on Democracy, Elections and Governance; Article 6 of the African Charter on the Values and Principles of Public Service and Administration; Article 5, i) of the ECOWAS Protocol on the Fight against Corruption.

[4] I.e., Articles 23 to 25 of Law No. 2006-19 of June 30, 2006, on archives and administrative documents; Articles 62 to 67 of Law No. 2008-12 of January 25, 2008, on the protection of personal data; Article 6 of Law No. 2012-22 of December 27, 2012 on the Code of Transparency in Public Financial Management; Law No. 2013-10 of December 28, 2013 on the General Code of Local Authorities (amended); Law No. 2017-27 of July 13, 2017 on the Press Code; Law No. 2021-21 of March 2, 2021 establishing the rules for the applicability of laws, administrative acts of a regulatory nature, and administrative acts of an individual nature; Decree No. 2021-445 of September 5, 2021, establishing and organizing the National Committee for Transparency in the Extractive Industries.

[5] Declaration of Principles on Freedom of Expression and Access to Information in Africa adopted by the African Commission on Human and Peoples' Rights at its 65th Ordinary Session held from October 21 to November 10, 2019, in Banjul, Part III, Principles 26 to 36.

[6] United Nations High Commissioner for Human Rights, "Report on Freedom of Opinion and Expression," A/HRC/49/38, January 10, 2022, para. 16.

It would have been appropriate to mention in the explanatory memorandum that the right of access to information is based on the principle of maximum disclosure, as provided for in international human rights law[7]. Principle 28 of the AU Declaration states: "In all circumstances, the right of access to information shall be governed by the principle of maximum disclosure. Access to information may only be restricted on the basis of strictly defined exemptions, which are provided for by law and strictly in accordance with international human rights standards and law." This principle, presented by the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression in his September 2013 report as the guiding principle for all legislation relating to freedom of information[8], provides for a presumption that all information held by public bodies is deemed to be disclosable, except in a limited number of exceptions[9]. It is therefore suggested that a statement such as this be added: "*this law and any other law, policy or practice creating a right of access to information shall be interpreted and applied on the basis of the principle of maximum disclosure, establishing a presumption of disclosure. Non-disclosure is only permitted in exceptionally justifiable circumstances, as defined in this law."* Any interpretation of the law should therefore be made in favor of a presumption of right of access to information rather than an unfavorable or restrictive interpretation.

In order to ensure the uniform application of this presumption to all disclosures of information held by entities subject to the law, it would be appropriate to add a reference to the primacy of this bill over any other legislation or regulation prohibiting or limiting such disclosure. This is specified in Principle 27 of the AU Declaration, which states: "Laws on access to information shall prevail over the provisions of any other law prohibiting or restricting the disclosure of information."

Inclusion of the objectives pursued by the bill.

As the draft law does not contain any articles on the objectives pursued, it is proposed that these be added to the explanatory memorandum.

Based on Article 3 of the African Commission on Human and Peoples' Rights Model Law, these objectives could include:

- Establishment of mechanisms and procedures, whether voluntary or mandatory, to give effect to the right of access to information in a manner that allows access to information held by information holders as quickly, inexpensively, and with as little effort as reasonably possible;

[7] United Nations High Commissioner for Human Rights, "Report on Freedom of Opinion and Expression," A/HRC/49/38, January 10, 2022, para. 15.
[8] Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, "Report on the promotion and protection of the right to freedom of opinion and expression," 1/68/362, September 4, 2013, para. 76.
[9] United Nations High Commissioner for Human Rights, "Report on Freedom of Opinion and Expression," A/HRC/49/38, January 10, 2022, para. 20; Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, "Report on the promotion and protection of the right to freedom of opinion and expression," 1/68/362, September 4, 2013, para. 76.

- In connection with the principle of maximum disclosure[10], ensure that, in accordance with their obligation to promote access to information, information holders create, preserve, organize, and maintain information in a form and manner that facilitates the right of access to information; and
- The promotion of transparency, accountability, good governance, development, and democratic and public participation.

Additional references to international instruments

It is recommended that the following instruments, which also recognize the right to receive and disseminate information or contain provisions on access to information, be added to the list of international instruments cited in the explanatory memorandum: the International Covenant on Civil and Political Rights, the African Youth Charter, the African Charter on Statistics, and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women.

II.2. Article 1 on the scope of application and certain key concepts

Article 1 of the draft law mentions several essential concepts, such as information, data subject, and personal data, without defining them or defining them in various articles of the draft law. This dispersion may undermine the clarity of the law and therefore compromise its understanding by individuals. Grouping the definitions together in an introductory article would enable individuals to better understand the content of the draft law. Furthermore, adding additional definitions of concepts addressed in the articles of the draft law, in particular those of personal data, administrative document and information, emergency situation, force majeure and appeal, would enhance the overall consistency of the text. It would also be important to add data to access to information in accordance with ACHPR Resolution Res.620 (LXXXI)[11] of November 2024, known as the resolution on the promotion and use of access to data as a tool for the promotion of human rights and sustainable development in the digital age.

⇒ Areas for improvement

It is recommended that a new article defining key concepts related to the right to access information be inserted under Article 1. These definitions should comply with national, regional, and international human rights norms and standards.

[10] United Nations High Commissioner for Human Rights, "Report on Freedom of Opinion and Expression," A/HRC/49/38, January 10, 2022, para. 20; Principle 28 of the AU Declaration on Freedom of Expression and Access to Information.

[11] ACHPR/Res.620, Resolution on the promotion and exploitation of access to data as a tool for the promotion of human rights and sustainable development in the digital age, November 2024.

Alternatively, a section dealing solely with definitions could be added to Chapter I of the draft law, as is the case, for example, in Law No. 2008-12 of January 25, 2008, on the protection of personal data.

With regard to key concepts, certain definitions are already provided in national legislation on the right of access to information. For example, the definition of "administrative documents" provided in Article 21 of Law No. 2006-19 of June 30, 2006, on archives and administrative documents, could be reproduced. It defines administrative documents as "*all documents produced or received in the course of their activities by administrative authorities, namely the State, local authorities, public institutions, national companies, publicly owned companies, and private bodies responsible for managing a public service or entrusted with a public service mission. Administrative documents are either nominative or non-nominative*."

Similarly, with regard to the concept of "personal data," we can reproduce Article 4, 6) of Law No. 2008-12 of January 25, 2008 on the protection of personal data, which provides that "*any information relating to an identified or identifiable natural person, directly or indirectly, by reference to an identification number or to one or more factors specific to his physical, physiological, genetic, mental, cultural, or economic identity"* is personal data.

For the term *"information*," we recommend rephrasing it as "any type of information held by the information holder."

II.3. Article 2 on exclusion from the scope of application

Article 2 lists the categories of information that fall outside the scope of the draft law, relating to various secrets protected by law (such as medical confidentiality, investigative secrecy, or national defense) or that could harm certain public interests (such as foreign policy, currency, public safety, or the safety of individuals).

The wording of this article leaves uncertainty as to whether the bill complies with the broad interpretation of the concept of information adopted by international instruments. Indeed, as mentioned above, the United Nations High Commissioner for Human Rights recommends that the widest possible interpretation of the right of access to information held by public bodies be adopted in national legislation[12]. The positioning of Article 2 at the beginning of the draft law, combined with its vague wording, which creates doubt as to the exhaustiveness of the exceptions provided for, seems to reflect a desire to restrict access to information. This impression is reinforced by the absence of an explicit affirmation of the principle of maximum disclosure in the draft law.

[12] United Nations High Commissioner for Human Rights, "Report on freedom of opinion and expression," A/HRC/49/38, January 10, 2022, para. 16.

⇒ Areas for improvement

Revise Article 2 to ensure that the draft law is compatible with the principle of maximum disclosure

In order to ensure that the current wording of Article 2 does not unduly restrict access to information, and that the exceptions provided for comply with international norms and standards, it should be clarified that these exceptions must be proportionate to the legitimate interest to be protected and constitute the least intrusive means of achieving that objective.

It should be added that exceptions must be explicit in accordance with Principle 33 of the AU Declaration of Principles on Freedom of Expression and Access to Information.

To this end, in addition to the exceptions listed in Article 2, it would be appropriate to include a test to determine whether the exclusion provided for in that Article applies.

Such a test could be organized in three (3) consecutive steps:

1) Verify that the information relates to one of the legitimate objectives set out in the Article;
2) Establish that disclosure of the information would pose a real risk[13] of causing substantial harm to the legitimate objective pursued; and
3) Ensure that the restriction of the right of access to information is proportionate to the protection of the legitimate objective and is the least disruptive means of achieving the desired result. The public interest in having access to the information must therefore be weighed against the achievement of the objective pursued.

The public interest may, for example, consist of a significant contribution to an ongoing public debate, the promotion of public participation in political debate, the improvement of accountability in the conduct of public affairs in general and the use of public funds in particular, the highlighting of serious wrongdoing, including human rights violations, and the abuse of public functions.

In order to carry out this test, it would be up to the entity refusing to disclose the information to prove that:

a) The information falls within one of the exceptions provided for in Article 2; and
b) The harm that disclosure would cause to the protected objective would outweigh the public interest in the information.

This test of public interest is provided for in Article 25 of the African Model Law on Access to Information.

[13] That is, a risk that is neither abstract nor hypothetical.

Furthermore, provision could be made for the partial disclosure of a document where part of that document contains information covered by one of the exceptions provided for in Article 2. In such cases, provision should be made for a procedure for the partial redaction of the document containing the information sought, accompanied by an obligation on the body subject to the request to inform the applicant of the reasons for the redaction.

II.4. Article 1 and Section IV on the concept of the obligated party

In the draft law, the concept of "data subject" is defined in two places, in Article 1 and in the articles of Section IV. While it is crucial that this concept be defined in the context of this draft law, there are inconsistencies between the two definitions proposed, which should therefore be clarified.

Article 1 provides that a data subject is a person "*who generates or holds information to which access is regulated in accordance with public health provisions and the legislation in force on the protection of personal data*." This definition appears to limit the status of data subjects to persons who generate or hold information related to the fields of public health and the protection of personal data. Conversely, Section IV proposes a broader definition, which includes under the concept of data controller all "*persons, bodies, entities, structures that generate or determine the information*," and lists various data controllers in the following articles.

Article 10 specifically includes private sector companies and organizations that receive financial support from public entities or are entrusted with a public service mission. This inclusion in the list of data controllers is rightly appropriate.

⇒ Areas for improvement

Harmonize the definitions of the term "subject" in the draft law

As discussed above, international and regional human rights instruments have all enshrined a broad scope of application for the right of access to information, including a broad conception of those responsible for providing such access. In its 2022 report, the UN High Commissioner for Human Rights recalled that the obligation to provide access to information applies to the executive, legislative and judicial branches of government and extends to all organs of the State, including public- entities and all de facto and private entities exercising public authority.[14] The African Commission on Human and Peoples' Rights Model Law broadens the scope of those subject to the law to include private entities that promote the exercise or protection of a right[15]. In order to ensure that the draft law is in line with international standards,

[14] United Nations High Commissioner for Human Rights, "Report on freedom of opinion and expression," A/HRC/49/38, January 10, 2022, para. 23, referring to Human Rights Committee, "General Comment No. 34: Article 19 Freedom of opinion and freedom of expression," CCPR/C/GC/34, September 12, 2011, para. 18.
[15] African Commission on Human and Peoples' Rights, Model Law on Access to Information for Africa, Article 3(a)(ii).

it would be desirable to amend the definition of "persons subject to the law" in Article 1 by referring to the definition given in Section IV.

Include private entities where the request is aimed at the exercise or protection of a right.

It would be desirable to amend Article 10 concerning private companies to include, in addition to those already provided for, any other private company where the request for access concerns information that could facilitate the exercise or protection of a right of the applicant.

II.5. Article 11 on the preliminary requirements for access to the right to information

Article 11(a) provides for the establishment of a committee responsible for monitoring and evaluating access to information. The wording of this paragraph does not make it clear what the purpose of this committee is. It is therefore not possible at this stage to know whether it would be a committee responsible for procedures allowing access to such information and data. The establishment of such procedures is a corollary of the principle of maximum disclosure, which includes practices aimed at ensuring the recording, storage, and public access to information[16]. The wording would be more precise if it referred to a committee whose task would be, on the one hand, to assess the accessibility of information for citizens and, on the other hand, to monitor access to information.

⇒ Areas for improvement

Clarify the role of the committee to be established by each entity subject to the law

As it stands, Article 11(a) would benefit from being amended so that the role of the committee responsible for monitoring and evaluating access to information is clearly identifiable by the public.

Provide for the appointment of a person responsible for the right of access to information

If it turns out that this committee is not responsible for handling requests for access to information, it would be important to add a provision to this article requiring each subject-entity to appoint an official responsible for handling such requests. Ideally, this person should not be the head of the entity subject to the law, because if an internal appeal procedure is set up in the event of a refusal to grant access to information, such an internal appeal would probably involve the head of the entity subject to the law. This internal appeal procedure could, for example, be incorporated into the functions of the committee responsible for monitoring and evaluation.

Provide for an internal hierarchical appeal

[16] United Nations High Commissioner for Human Rights, "Report on freedom of opinion and expression," A/HRC/49/38, January 10, 2022, para. 22.

In the event that the person responsible for handling requests refuses a request for access to information, it would be desirable for all entities subject to the law to provide for the possibility of an internal hierarchical appeal, either to the committee provided for in Article 11(a) or to the head of the entity subject to the law. This hierarchical appeal should be optional (not required prior to referral to CONAI) and provide for a short time limit within which the appeal must be answered.

II.6. Article 12 on proactive disclosure of information

The inclusion of Article 12 on proactive disclosure of information by data controllers is noteworthy, as it ensures that information and data of public interest will be accessible to the public, even in the absence of a specific request. This Article enables the Senegalese State to comply with its positive human rights obligation to make certain information available in the public domain[17]. As this obligation of proactive disclosure does not cover all information and data that must be accessible, the production of a non-exhaustive list of the information referred to in Article 12 is welcome. In particular, it will enable the public to better distinguish between information that is freely accessible and information that requires specific steps to be taken, which will help to limit the processing of unnecessary requests by the entities subject to the law. This non-exhaustive list, therefore, fulfills a good governance objective.

Nevertheless, although it is non-exhaustive, this list would benefit from being expanded, as it does not mention a set of important public information that everyone should be able to access freely online.

In addition, practical information on the publication and availability of freely accessible information could supplement Article 12.

⇒ Areas for improvement

Complete the non-exhaustive list of information covered by the proactive disclosure obligation.

It is suggested that the list in the second paragraph of Article 12 be supplemented to include the following categories of information covered by the proactive disclosure obligation:

- Operational information on the functioning of the body subject to disclosure, including objectives, organizational structures, standards, achievements, manuals, policies, procedures, rules, and key personnel;

[17] E.g. Human Rights Committee, "General Comment No. 34: Article 19 Freedom of opinion and freedom of expression", CCPR/C/GC/34, 12 September 2011, para. 19; United Nations High Commissioner for Human Rights, "Report on the draft guidelines for States on the effective implementation of the right to participate in public affairs," A/HRC/39/28, July 20, 2018, para. 22; African Commission on Human and Peoples' Rights, "Declaration of Principles on Freedom of Expression and Access to Information in Africa," 2019, Principle 29.

- Information on the entity's audited accounts, licenses, budgets, revenues, expenditures, current and newly incurred debts, grant programs, public procurement, and contracts;
- Information on requests, complaints, or other direct actions that the public may take with respect to the subject of the report;
- Guidance on the processes through which the public can contribute to major policy or legislative proposals;
- Information held by the subject and the form in which that information is held, including document registers and databases; and
- The content of any decision or policy affecting the public, as well as the reasons for the decision and the documents relevant to the preparation of the decision, including any environmental, social or human rights impact assessments.

The African Model Law on Access to Information, in Article 7, provides for the proactive publication of the following information:

a) Within 30 days of their creation or receipt:

- manuals, guidelines, procedures, regulations, and other instruments developed for use by its staff or used by them in the performance of the entity's functions, the exercise of their powers, the handling of complaints, the making of decisions, the formulation of recommendations or the provision of advice to persons outside the entity on rights, privileges or benefits to which they are entitled, or on the obligations, penalties or other sanctions to which they are subject;
- the names, titles, and contact details of the persons responsible for information and their deputies, including the postal and electronic addresses to which requests for access to information may be sent;
- the forms, procedures, processes, and rules applicable to communication between members of the public and the entities concerned;
- the specific statutory or non-statutory arrangements for public consultation and representation in the formulation or implementation of the entity's policies or any similar document;
- whether meetings held within the entities, in particular those of the board of directors and other commissions, committees or bodies, are open to the public, indicating, where applicable, the procedure to be followed to attend them, either in person or by representation; where meetings are not open to the public, the entity shall proactively disclose the content of the comments received and the decisions taken, as well as the process leading to them;
- detailed information on the preparation and implementation of any program subsidized by public funds, including the amounts allocated and spent, the criteria for awarding subsidies, and the beneficiaries;
- all contracts, concessions, permits, authorizations, and public-private partnerships granted by the entity concerned;
- investigation reports, studies or tests, including scientific and technical reports and environmental impact assessments, prepared by the entity concerned;
- any other information determined by CONAI.

b) Annually:

- information on its structure, functions, and missions;
- information on the laws and policies relevant to the entity concerned, as well as their interpretation;
- details of the internal procedures it has established for creating, maintaining, organizing, and preserving information;
- a list of the categories of information it holds or controls;
- a directory of its employees specifying their powers, responsibilities and titles, distinguishing between permanent and temporary or external staff and indicating recruitment procedures and vacant positions;
- the annual salary scale applicable to each public official or civil servant, including benefits, as well as the decision-making processes relating to them, in particular with regard to supervision and accountability;
- a detailed account of travel and representation expenses incurred by each official and civil servant, as well as benefits received in the form of gifts, hospitality, sponsorship or other benefits;
- a description of the composition, functions, and appointment procedures of any board, committee, or other body of at least two persons that is an integral part of the entity or established to advise or administer it;
- the detailed annual budget, income, expenditure, indebtedness and any estimates, plans, projections or reports, including audit reports, for the current fiscal year and for the fiscal year preceding the entry into force of this law;
- the annual report to be submitted to CONAI; and
- any other information required by CONAI.

Specify the procedures governing the publication and availability of information subject to the proactive disclosure obligation.

In order to ensure compliance by those subject to the obligation with their positive obligation, it is advisable to include a paragraph in Article 12 establishing the terms and conditions for proactive disclosure. In line with the continuity of the Model Law proposed by the African Commission on Human and Peoples' Rights, the deadline for making the information referred to in Article 12 freely available could be thirty (30) days after its creation or receipt.[18] This information should be shared in an "open data format" that is suitable for reuse and republication of such information. Following the model of the Model Law, an obligation for annual disclosure of information by the entities subject to the law may be considered.

Provide for the liability of the reporting entity or the person responsible for the information in the event of failure to proactively disclose information

[18] United Nations High Commissioner for Human Rights, "Report on freedom of opinion and expression," A/HRC/49/38, January 10, 2022, para. 27.

In order to ensure the effectiveness of the proactive disclosure obligation, it would be advisable to make those subject to such an obligation accountable by introducing administrative penalties for the obligated party and/or criminal penalties (such as those defined in Article 30 of the draft law on obstruction of access to information) for the person responsible for the information in the event of non-compliance with this obligation.

II.7. Article 13 on beneficiaries of the right of access to information

Article 13 provides that natural and legal persons have the right of access to information. This Article also specifies that the nationality of the person shall not affect the enjoyment of this right or the admissibility of a request for access to information. This clarification regarding the nationality of beneficiaries of the right represents a significant step forward, as it serves as a reminder that the right of access to information is a fundamental right that cannot be applied without respect for other human rights, in particular the rights to equality, life, and non-discrimination.

However, the wording of Article 13 lacks clarity, which could create difficulties in its implementation and undermine respect for the principle of non-discrimination.

Ambiguity arises from the fact that the first paragraph and subparagraph (a) refer to a "right of access to information," while subparagraph (b) refers to "the right to submit a request or application for access to information." It is therefore unclear whether these two rights are the same or different.

This may have consequences since the first paragraph recognizes the right of access to information for any natural or legal person without distinction as to administrative status, while paragraphs (a) and (b) restrict the right to natural persons legally resident in Senegal and paragraph (b) to legal persons legally established in Senegal.

⇒ Areas for improvement

Amend Article 13 to ensure compliance with the principle of non-discrimination

In order to ensure compliance with the principle of non-discrimination, it would be desirable to amend Article 13 to guarantee the full realization of the right of access to information for any natural or legal person, regardless of nationality, place of residence or administrative status. This would also harmonize the wording of the first paragraph and paragraphs (a) and (b) of the Article to ensure non-discriminatory access to information and the possibility of filing a request to that effect.

II.8. Article 14 on the procedure for filing a request for access to information

Article 14 sets out the formalities to be observed when a natural or legal person exercises their right of access to information. As currently drafted, this Article provides for only one scenario: the submission of a request by a person acting on their own behalf. To ensure that this provision is comprehensive, some of its elements should be clarified.

This article does not provide for the possibility of using digital processes to make an online request, whereas with the internet and geographical distance, it should be possible for a citizen to contact an administration online. The latter should treat the request in the same way as a physical request with the information requested. This would not reduce the possibility for citizens to rely solely on physical processes to request information. To this end, an electronic contact point and an online register of requests should be set up to ensure greater transparency with regard to online requests.

Technology, and the internet in particular, should be a means of obtaining information in a reliable, fast, and paperless manner.

⇒ Areas for improvement

Complete the procedure provided for in Article 14 to ensure its exhaustiveness.

Firstly, it would be appropriate to clarify the definition of "quality" of the person, which is listed as an element to be provided in a request for access to information. The introduction of this concept of "status" is likely to create ambiguity as to the universality of the right of access to information, in apparent contradiction with Article 13, which does not provide for any restrictions based on the status of the applicant. Furthermore, this requirement to specify the status of the applicant could be inconsistent with Principle 31 of the Declaration of Principles on Freedom of Expression and Access to Information in Africa, which provides that they are not required to demonstrate a legal or personal interest in filing a request[19].

Secondly, it would be desirable for Article 14, paragraph 2, to provide for more specific cases, in particular to clarify the procedure applicable when a natural person acts through a representative (e.g., the need to include a power of attorney in the request) or a representative, and to specify the status of the person competent to file a request on behalf of a legal person.

Thirdly, in order to facilitate follow-up, it is suggested that the procedure be supplemented by requiring the data subjects to assign a unique reference number to each request.

[19] African Commission on Human and Peoples' Rights, "Declaration of Principles on Freedom of Expression and Access to Information in Africa," 2019, Principle 31.

It would be desirable to provide for an online application process to deal with requests, as this would allow for online contact, online responses, and an online register of requests and their processing.

II.9. Article 15 on requests submitted to data controllers who do not hold the information sought

Article 15 of the draft law provides that a data controller receiving a request for information that it does not hold must direct the applicant to the data controller likely to hold it. By comparison, Article 17 of the African Commission on Human and Peoples' Rights Model Law provides, in such cases, for the transfer of the request - in whole or in part - by the subject to the other subject concerned. This article of the Model Law ensures that the procedure for requesting information is simple and that requests are processed fairly and quickly[20]. Conversely, as currently drafted, Article 15 appears to complicate the procedure for the public by requiring them to start the process from scratch if they have mistakenly approached an entity that is not competent.

⇒ Areas for improvement

Amend Article 15 to allow the transfer of a request by the data controller to the competent data controller.

It would be desirable to amend this provision along the lines of Article 17 of the African Commission's Model Law. It would then be necessary to specify the modalities of this transfer, in particular the time limit (transfer to be made as soon as possible and no later than five days after the request is filed), the obligation of the obligated party transferring the request to inform the complainant in writing and without und al delay, and the obligation of the obligated party concerned to inform the complainant in writing and without delay upon receipt of the request.

II.10. Article 16 on the procedure for assistance in accessing information

Article 16 establishes a specific procedure to assist illiterate persons in accessing information. This addition is particularly significant in that it helps to ensure respect for the principle of equality and non-discrimination in access to information. Under this article, everyone, regardless of their ability to read or write, will be able to fully enjoy the right of access to information. As mentioned above, respect for these principles in relation to the right of access to information is justified by the fact that this right cannot be fully exercised independently of other human rights. Nevertheless, Article 16 should not be limited to illiteracy, but should also provide for procedures to assist access to information for any other marginalized or discriminated group.

[20] United Nations High Commissioner for Human Rights, "Report on the draft guidelines for States on the effective implementation of the right to participate in public affairs," A/HRC/39/28, July 20, 2018, para. 22.

⇒ Areas for improvement

Include in Article 16 any other marginalized group or victim of discrimination

In order to enable the full and effective realization of the right of access to information for everyone, without distinction that may constitute discrimination, it is recommended that the scope of the assistance procedure provided for in Article 16 of the draft law be broadened so that it is accessible to all marginalized persons or victims of discrimination. This could include, among others, persons with disabilities and applicants who do not speak French. This would also require an alternative to the open register provided for in Article 16, which, for example, would not allow blind persons to file a request. An alternative could be to allow applicants to make their requests orally to the obligated entity, which would then transcribe the request in writing and send an acknowledgment of receipt.

More broadly, as provided for in Article 14 of the African Commission on Human and Peoples' Rights Model Law, the draft law could include an obligation for data controllers to assist applicants in ensuring that their requests meet the conditions set out in the draft law.

II.11. Articles 18 and 19 on the additional time limit for processing the request

Article 18 provides that if the information cannot be provided immediately, it shall be provided within eight days, "unless there are duly justified grounds." However, the law does not specify what grounds could justify an additional time limit, which could lead a subject to unduly delay the processing of a request.

It is good that the article specifies that the request must receive an immediate response. If the information is not held by the body, the deadline is five days. If the request is particularly complex, the maximum deadline is eight days. In very exceptional circumstances requiring specific justification, the time limit may be extended to 15 days. Although this provision is commendable, it does not seem very realistic in practice. International standards require bodies to respond to requests for access to information within 30 days. The AU model law provides for a time limit of 21 days.

⇒ Areas for improvement

Require the subject to provide reasons for any delay

If it is impossible to process the request within eight days, it is recommended that the body at least explain the reasons for this and inform the applicant of the new processing deadline. It would also be desirable for the law to provide for limited and reasonable cases justifying an additional period for processing a request. For example, where the request for access concerns a large amount of information or requires extensive research and compliance with the usual

time limit would unreasonably impede the work of the information officer, or where the request for access requires consultations that cannot reasonably be carried out within the eight-day time limit.

II.12. Article 20 on implicit rejection of a request

Article 20 provides that after the expiry of a specific time limit, failure to respond to a request for access to information shall be deemed to constitute an implicit refusal. It is interesting to read this Article in the light of Article 26, which provides that any decision to refuse or reject a request must be justified, failing which criminal penalties may be imposed. The wording of Article 20, therefore, creates an ambiguity that should be addressed.

⇒ Areas for improvement

Clarify the wording of Article 20 to enable the applicant to obtain the reasons for the refusal of their request.

In order to ensure consistency between Articles 20 and 26, it would be desirable to include in Article 20 provisions enabling the applicant to obtain the reasons for the refusal of his request. This would be particularly relevant in cases where the information requested does not exist or cannot be located. In such specific cases, it would be desirable for the data controller to inform the applicant in writing and also the national commission for access to information, so that it can examine the malfunction and fulfill its advisory and recommendation role.

II.13. Article 21 on urgency

Article 21 provides that in urgent cases, which must be justified by the applicant, the data controller shall provide a response within a time limit "enabling it to fulfill the service or commitment that gave rise to the request." This wording does not make it possible to determine the length of this time limit. Nor does the law provide for specific cases in which urgency would be established.

⇒ Areas for improvement

Include certain situations as having an established urgency

It would be desirable for the law to expressly provide that urgency is established in the case of a request for information that appears reasonably necessary to preserve the life, liberty, or health of a person.

Specify the time limit in cases of urgency

Where urgency is established, the law should provide for a maximum period of 48 hours for the data subject to transmit the requested information.

Allow access to remedies in the event of failure to comply with the time limit in urgent cases

In urgent cases, it would be desirable for the applicant to be able to appeal to CONAI upon expiry of the 48-hour period given to the data controller if no response has been received within that period or if the request has been refused.

II.14. Article 22 on costs for access to information

Article 22 provides for free access to information, apart from the communication costs to be borne by the applicant. It is commendable that this provision sets a reasonable threshold for communication costs, i.e., the actual cost of reproducing and/or transmitting the information requested. This is also in line with the interpretation of international standards by human rights mechanisms, which hold that the cost of access to information should not exceed a reasonable threshold[21]. The United Nations High Commissioner for Human Rights thus recommends that procedures for requesting information should be free of charge or at a reasonable cost[22].

However, despite this effort to ensure that requests are reasonably priced, this could still create a real barrier to access to justice for some people, particularly those who are indigent.

⇒ Avenue for improvement

Clarify the wording of Article 22 to include an exception to the payment of costs for reproducing and/or transmitting information

It is desirable to provide in Article 22 for exceptions to the payment of costs for reproducing or transmitting information, in particular where the information requested concerns the applicant's personal data or where the applicant is indigent.

II.15. Articles 27 and 29 on CONAI's competence to deal with unsuccessful requests for information

The creation of an independent administrative authority responsible for protecting and supervising the right of access to information is a notable innovation that should be welcomed, as it will enable the Senegalese State to comply with two standards set out in human rights

[21] United Nations High Commissioner for Human Rights, "Report on freedom of opinion and expression," A/HRC/49/38, January 10, 2022, para. 28.
[22] United Nations High Commissioner for Human Rights, "Report on the draft guidelines for States on the effective implementation of the right to participate in public affairs," A/HRC/39/28, July 20, 2018, para. 22.

instruments; the obligation to ensure that a refusal of a request for access to information can be reviewed by an impartial body[23]; and the obligation to establish independent and impartial oversight mechanisms with a mandate to monitor the exercise of the right of access to information and to report on it.

As it stands, the wording of paragraph (b) of Article 27 on the task of receiving appeals against unsuccessful requests for access to information would benefit from clarification. Article 29 of the draft law appears to provide further details on this procedure, but this provision no longer refers to an "appeal" but to a referral "for opinion." The way in which the two articles are drafted could be confusing, suggesting the existence of two separate mechanisms: one involving an appeal leading to a decision by CONAI, the other a simple consultation for an opinion, with no binding force.

⇒ Areas for improvement

Amend the wording of Articles 27 and 29 to clarify whether these provisions create two separate procedures or refer to a single procedure.

It is advisable to rework the wording of Articles 27 and 29 to avoid any doubt about the procedures they provide for: a procedure for appealing against requests that have been rejected or refused by the person subject to the decision, or two procedures, one for appeal and one for consultation.

Complete the powers of the CONAI provided for in Article 27

In order to facilitate CONAI's primary mission, which is to promote and ensure the protection of the right of access to information, it is suggested that a power be added to paragraph b) of Article 29: the receipt of regular reports (preferably annual) from the entities subject to the law on how they have implemented the bill.

Clarify the procedure provided for in Article 29

Although Article 29 provides that the procedure for referring matters to CONAI for an opinion shall be laid down by decree, it may be appropriate to set out the main elements of this procedure in the draft law, in particular its relationship with the appeal provided for before CONAI in Article 27(b) and the contentious appeal (Article 29(2)).

Other elements that should be included in this bill are:

- An optional preliminary appeal to the CONAI directly from the person subject to the obligation who has refused to disclose the information. This appeal should be optional and not mandatory.

[23] United Nations High Commissioner for Human Rights, "Report on freedom of opinion and expression," A/HRC/49/38, January 10, 2022, para. 33; African Commission on Human and Peoples' Rights, Model Law on Access to Information for Africa, Article 45.

- Notification of the outcome of the procedure to the person who lodged the appeal:
  - In the event of a favorable opinion, CONAI should forward the reasoned opinion, which should be binding on the administration.
  - In the event of an unfavorable opinion, CONAI should forward the reasoned opinion to the applicant and indicate the procedures for lodging an appeal.

II.16. Article 28 on the composition and functioning of CONAI

Article 28 determines, among other things, the composition of the 12 members of CONAI and how they are appointed, including one by the President, one by the Prime Minister, and several by various ministries. The article also refers to a decree establishing the rules for the organization and functioning of CONAI.

⇒ Areas for improvement

Ensuring the political independence of CONAI

Half or more of CONAI members are directly or indirectly appointed by the President and the government, which could undermine its independence. It would therefore be desirable for more CONAI members to come from civil society and include, for example, representatives of the media, women's groups, and youth. It would also be appropriate to provide that CONAI be accountable to Parliament for the execution of its mandate in order to maintain political independence and be able to appoint the staff necessary to carry out its functions.

Ensuring the financial independence of CONAI

It is desirable to ensure CONAI's financial independence in order to guarantee its autonomy and independence of operation. To this end, Parliament should vote and allocate an adequate budget.

Regulate the organization and functioning of CONAI by law

The organization and functioning of CONAI should be established by law for the purposes of legal certainty, in particular with regard to the form of referral, the procedure for processing requests, and the time limit for responding.

Grant broad investigative powers to CONAI

In order to enable CONAI to effectively fulfill its mandate, it would be desirable to be given full powers to investigate any appeal falling within its jurisdiction, including the ability to compel witnesses to appear before it and to require those subject to its jurisdiction to provide it with any information or documents for examination, in camera if necessary and justified. At the end of the investigation, CONAI should have the power to dismiss the appeal, require the

subject to disclose the disputed information, adjust the fees charged by the subject for processing the request, sanction the subject for obstructive behavior when justified, and require subjects to reimburse costs related to the appeal.

CONAI should also be allowed to refer cases to the courts where there is evidence of criminal obstruction of access to documents or deliberate destruction of such documents.

II.17. Chapter IV on criminal provisions

Chapter IV on criminal provisions provides for a fine for any person who gives access to information that the law does not allow to be disclosed or to which a public body refuses access in accordance with the law.

As the law relates to access to information and not to the protection of privacy, such a provision has no place in this law.

Furthermore, the adjective "*knowingly"* in the phrase "*anyone who knowingly provides access to a piece of information* [...]" creates ambiguity as to whether or not intent is required to characterize this offense. There is doubt as to whether the offense is constituted by the mere fact of voluntarily allowing access to a piece of information, or whether the perpetrator must also be aware that the law does not allow access to it or that a public body has refused access to it.

Finally, the law does not provide for any exceptions, which could be particularly detrimental to whistleblowers.

⇒ Avenues for improvement

Delete the provision or expressly provide for an exception in cases of disclosure in good faith

It would be desirable to delete this provision or to add a case of criminal and civil immunity for any person who, in good faith, has given access to information to which the law did not allow access or to which a public body had refused access. This may apply in particular to whistleblowers, where they can claim the status and protections granted by the legislation in force on whistleblowers. The bill should explicitly refer to this situation so that whistleblowers can unambiguously benefit from this exemption from criminal and civil liability.