

Freedom of Information Legislation: Best Practices for Egypt

by

THE EGYPTIAN AMERICAN RULE OF LAW ASSOCIATION¹

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¹ The Egyptian American Rule of Law Association (EARLA) is a non-profit organization consisting of over forty lawyers of Egyptian ancestry committed to supporting rule of law in Egypt. More information about EARLA can be found at www.earla.org. EARLA thanks WilmerHale and its excellent attorneys for their research assistance.

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EXECUTIVE SUMMARY

One year after its historic January 25th revolution, Egyptians continue to demand greater citizen inclusion in the affairs of the government and an end to corruption that pervaded every aspect of the Mubarak regime. At the same time, the newly elected Egyptian government finds itself with the reasonability of not only governing but also restoring trust in the state. Integral to accomplishing such worthy goals are freedom of information laws (FOIL). Such laws provide citizens an opportunity to engage in oversight over their government officials to ensure the public treasury is spent towards the country rather than embezzled into officials' private accounts. Similarly, businesses use FOIL to assure they have a fair opportunity to bid and receive government contracts based on quality and competency as opposed to nepotism and cronyism. Equally important, FOIL protect Egyptians' human rights by providing lawyers and families of those detained to assure detainees do not disappear into government dungeons or experience torture at the hands of security personnel.

Accordingly, this report is the first of a series by the Egyptian American Rule of Law Association that focus on freedom of information laws from a uniquely Egyptian perspective. This report focuses on international best practices in an attempt to provide a resource to those working on rule of law reform and specifically freedom of information laws in Egypt. These best practices can be summarized as follows:

- Scope of FOIL
 - FOIL should apply to all public bodies and non-public bodies engaging in public functions.
 - Never exempt entire bodies in an effort to exempt sensitive information.
- Affirmative Disclosures
 - Require the government to affirmatively disclose a broad class of information.
 - Require such information to be published through methods most accessible by the public, including the Internet.
- Review Process
 - Adopt a three-tiered review process and set reasonable time limits on the appeals process.
- Exemptions
 - Exemptions should be narrowly defined and should exclude only information the government claims will *harm* the following interests.
 - Exemptions must pass the “substantial harm-public interest” test.
 - All exemptions to disclosure must be contained within the FOI law itself.
- Adoption of Complimentary Laws
 - Adopt laws that protect employees from prosecution for disclosing information in good faith and establish good records management practices.

I. INTRODUCTION

On May 26, 2011, less than six months after the fall of the Ben Ali regime, the Tunisian Interim Government enacted the “Decree on Access to Public Administrative Documents,” which gave citizens the right to access information in the government’s possession.³ After the fall of communism in Eastern Europe and the Soviet Union, twenty-five former communist countries adopted laws that gave citizens the right to access government information.⁴ In response to the United States’ most infamous corruption scandal, Watergate, the U.S. Congress adopted measures in 1974 to ensure citizens meaningful access to government records.⁵ Despite the significant political, religious, and economic differences between Tunisia, former communist countries, and the United States, all turned to Freedom of Information Legislation (FOIL) to reform former corrupt regimes and restore trust in government.

The newly elected Egyptian parliament finds itself with the noble task of restoring the people’s trust in the government and building a better Egypt. To that end parliament is considering adopting FOIL. While Egypt has its unique circumstances and no one model applies to all countries, best practices and the experiences of other countries can provide important lessons. This report briefly explains how FOIL works, identifies the most important FOIL provisions, and draws on the experiences of other countries to identify successes and failures.

A. What is Freedom of Information Legislation (FOIL)

FOIL, also known as access to information or right to information laws, are laws that give citizens the right to access information in the government’s possession, absent a compelling reason to prevent disclosure. FOIL has become a widely recognized standard for good governance and a basic human right. Over thirty years ago, the International Covenant on Civil and Political Rights (ICCPR), to which Egypt is a party, established that access to information is a fundamental human right.⁶ At least 90 countries have adopted FOIL—over half of these countries adopted FOIL in the

³ Human Rights House London. "Tunisia: New Decree on Access to Administrative Documents adopted." 17 July 2011. 25 November 2011 <<http://humanrightshouse.org/Articles/16715.html>>.

⁴ Right2Info. Access to Information Laws: Overview and Statutory Goals. 2012. 28 March 2012. <<http://right2info.org/access-to-information-laws>>.

⁵ Lopez, Dan. The National Security Archive Briefing Book No. 142. 23 November 2004. <<http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB142/index.htm>>.

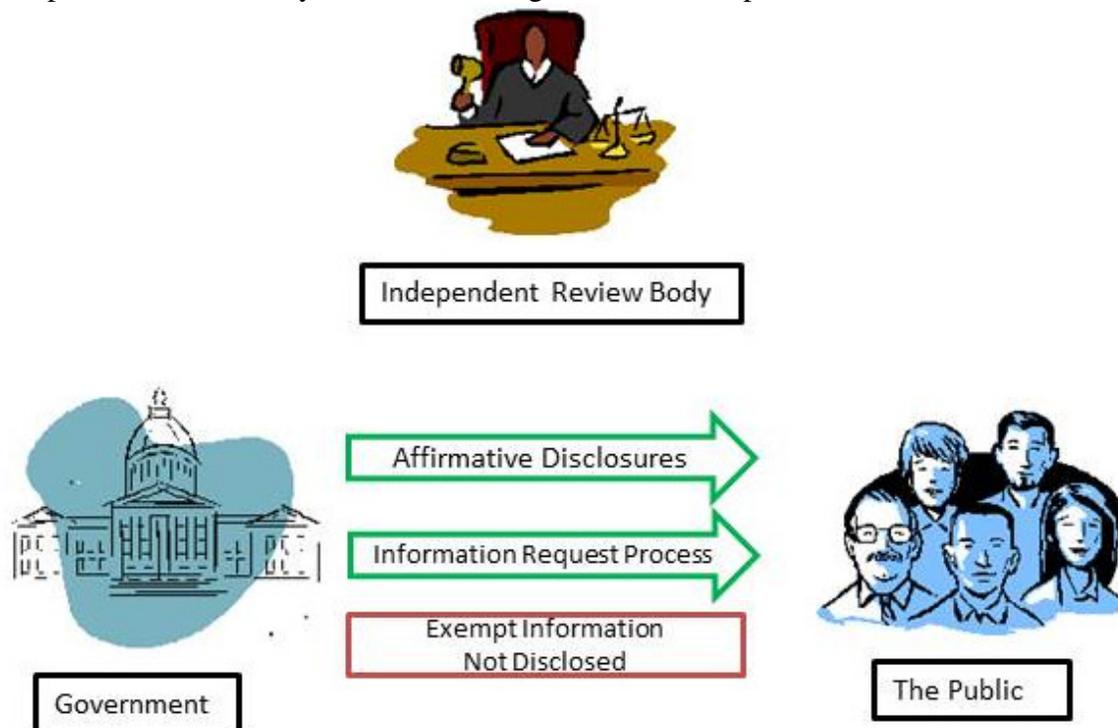
⁶ Article 19 of the ICCPR states: Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

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last fifteen years.⁷ These countries are not just western democracies. To the contrary, they include China, India, Mexico, Jordan, South Africa, Morocco, and Tunisia.⁸

B. How does FOIL work?

Like all laws, the text of any FOIL will depend on the legal, political, economic, and social landscape particular to each country. Notwithstanding these differences, all effective FOIL functions in essentially the same way. As the picture below demonstrates, there are three players in FOIL, the government, the public and an independent review body. Under FOIL the government discloses information to the public through affirmative disclosures and the information request process. The government does not disclose information that is exempt under the law. An independent review body ensures that the government complies with the law.



⁷ Right2Info. Access to Information Laws: Overview and Statutory Goals. 2011. 28 March 2012. <<http://right2info.org/access-to-information-laws>>.

⁸ *Id.*

1. Affirmative Disclosures and The Information Request Process

The public receives information from the government through two mechanisms illustrated in the green arrows above—affirmative disclosures and an information request process. Affirmative disclosures can be thought of as a “push” mechanism. It requires the government to automatically publish or “push” certain classes of information into the public domain without a request from the public. The second mechanism by which information is disclosed under FOIL is the information request process, or “pull” mechanism. The information request process enables a person to request information that is in the government’s possession but not automatically published through the affirmative disclosure mechanism. The public can “pull” or demand this information even if the information does not fall under the classes of information that are automatically published.

2. Exemptions

Although FOIL creates a presumption that all information in the government’s possession is public, this presumption is not absolute. Where the disclosure of certain types of information would cause significant harm to legitimate interests, the government is excused from disclosing this exempt information. The red box in the above image illustrates that exempt information is not disclosed.

3. Independent Oversight

In order to ensure compliance with the law, an independent review body, frequently an independent agency, the judiciary or both, must oversee this process. These bodies have the authority to review all aspects of enforcement including whether the government has correctly classified requested information under an exemption, whether it has disclosed information in a timely manner, and whether the citizen’s request for information conformed to the requirements of the law.

C. The Benefits of FOIL

It is said that Sunlight is the best of disinfectants. Indeed, countries seeking to emerge from inefficient or corrupt regimes adopt FOIL to detect and prevent corruption and improve government decision-making processes.

A 2010 survey conducted by the Egyptian Information and Decision Support Center reveals that more than 94% of Egyptians believe corruption constitutes a serious problem in their country, and 70% believed corruption increased from the previous year.⁹ Recent media coverage of government involvement in corrupt lands sales, licensing, and other crimes reinforced this perception.¹⁰

⁹ Saleh, Amira. "IDSC: Vast Majority of Egyptians attest to widespread corruption." 21 December 2010. [AlMasry AlYoum](http://www.almasryalyoum.com/en/node/277007). <http://www.almasryalyoum.com/en/node/277007>.

¹⁰ AlJazeera. "Egypt jails ex-housing minister over graft." 26 May 2011.

<<http://www.aljazeera.com/News/middleeast/2011/05/2011526154231111980.html>>.

As stated in the introduction, governments often turn to FOIL to restore the public's trust in government. Indeed, in many countries that have enacted FOIL, the law was used successfully to detect and end corrupt practices.

Thailand: Ending Corruption in Education

Advocates in Thailand used FOIL to decrease bribery and nepotism in education. In 1998, the daughter of Sumalee Limpa-Owart was denied admission to one of Thailand's best government schools despite scoring well on the entrance exam. Believing that the school denied her daughter enrollment in order to admit the children of wealthy and politically influential families, Sumalee used FOIL to ask the government for the test scores of all the students who were admitted to the school. The scores released by the government revealed that 33% of the students in the school failed the entrance exam. As suspected, these students came from wealthy and politically influential families. Consequently, the government of Thailand passed new rules that required publishing scores from all schools. Families in other districts also began using FOIL to request information from their schools. Because of FOIL, bribery and nepotism have decreased substantially, guaranteeing all Thai children a chance at a quality education regardless of socio-economic background.

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India: Ending Corruption in Food Programs

Advocates in India used FOIL to end corruption in important anti-poverty programs. In 2003, the government of India sought to alleviate poverty by providing food at subsidized rates. The program, however, was widely believed to be corrupt. One news source claimed that corrupt local officials sold over half the wheat intended for India's poor on the black market. After learning about India's Right to Information Act, poor families requested information from the government about why they never received the food. FOIL allowed the families to alert the government about the missing food shipments, forcing government officials to investigate and end the corruption. Now families in the area have improved access to this much needed food supply.

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In addition to detecting and rooting out corruption, governments credit FOIL with improving the quality of government decisions and record keeping. The Australian Law

¹¹ Commonwealth Human Rights Initiative. "Our Rights Our Information: Empowering people to demand rights through knowledge." 2007. http://www.humanrightsinitiative.org/publications/rti/our_rights_our_information.pdf.

¹² *Id.*

Reform Commission and Administrative Review Council found that:

the [FOI] Act has had a marked impact on the way agencies make decisions and the way they record information...[it] has focused decision-makers' minds on the need to base decisions on relevant factors and to record the decision making process. The knowledge that decisions and processes are open to scrutiny, including under the FOI Act, imposes a constant discipline on the public sector.¹³

D. The cost of FOIL

While FOIL offers significant benefits, there are costs associated with administering a FOIL regime; institutions must be established, and staff must be hired and trained to receive and respond to FOIL requests. Moreover, resources must be dedicated to litigate appeals of FOIL decisions. The fact that countries have so widely adopted FOIL, however, some adopting it over fifty years ago, demonstrates that the costs of administering FOIL are greatly outweighed by the benefits.

II. BEST PRACTICES

This section identifies several important FOIL provisions and draws on other countries experiences to highlight best practices.

A. Scope of FOIL: Which entities are covered by FOIA?

Model legislation provides that FOIL should apply to (1) public bodies, (2) non-public bodies engaged in public functions, and (3) some private bodies. FOIL laws usually do not apply to natural persons.

It is critical that the law apply to all public bodies. Some countries exclude entire public bodies from the scope of FOIL in an attempt to exempt certain classes of information from disclosure. Excluding entire public entities has the unintended consequence of excluding important information from disclosure. An example from India highlights this problem.

¹³ Australian Law Reform Commission, *Open Government: A Review of the Federal Freedom of Information Act 1982* 132 (1996), <http://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC77.pdf>.

India's Under-Inclusive Scope

Section 24 of India's FOIL excludes nineteen different intelligence and security organizations from the scope of the law. Presumably, India designed the provision to protect the disclosure of sensitive information relating to national security. Advocates in India tried to use FOIL to request information relating to suspected corruption in the Central Bureau of Investigation (CBI). Because the Bureau fell under Section 24's exclusions, however, the government denied the advocate's request for information, even information unrelated to national security. Instead of exempting these organizations, India should have exempted information relating to national security and other sensitive matters.

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In addition to covering all public bodies, it is a best practice to require non-public bodies engaging in public functions to comply with the law. The inclusion of such non-public bodies is a recent trend. Commentators attribute this trend to rapid privatization in the developing world.¹⁵ Because private entities are assuming roles traditionally played by governments, requiring them to comply with FOIL is significant to achieving transparency. In contrast, other commentators speculate that requiring FOIL compliance by private bodies may produce adverse consequences, such as discouraging private investment due to the costs of compliance.¹⁶

Although including "private entities engaged in trade" within FOIL's scope is referenced as a best practice, very few countries have actually done this. Moreover, including private entities in FOIL's scope may create adverse effects for private organizations.

South Africa is the only country to expressly apply FOIL to purely private bodies. Due to lax enforcement and the private sector's lack of awareness of their obligations under FOIL, private entities have not complied with the law.¹⁷

¹⁴ The Right to Information Act, 2005, § 24 (India); NDTV.com, *Government defends CBI's exemption from RTI, Cites National Security*, June 21, 2011; Hindustan Times, *CBI as Security, Intelligence Body Enjoys RTI Exemptions*, Aug. 10, 2011, <http://www.hindustantimes.com/India-news/NewDelhi/CBI-as-security-intelligence-body-enjoys-RTI-exemption/Article1-731406.aspx>.

¹⁵ Craig D. Feiser, *Privatization and the Freedom of Information Act: An Analysis of Public Access to Private Entities Under Federal Law*, 52 Fed. Comm. L.J. 21, 23 (1999) ("Feiser, Privatization"); Alasdair Roberts, *Blacked Out: Government Secrecy in the Information Age* 152-162 (Cambridge Univ. Press 2006).

¹⁶ Eduardo Bertoni & Gladisley Sánchez, *Draft Model Law for African Union States on Access to Information* *2, Center for Studies of Freedom of Expression and Access to Information, Palermo University School of Law.

¹⁷ Alasdair Roberts, *Blacked Out: Government Secrecy in the Information Age* 152-163 (Cambridge Univ. Press 2006).

South Africa: Challenges to Seeking Compliance by Private Bodies

Mukelani Dimba, Deputy Executive Director of the Open Democracy Advice Centre (ODAC) in South Africa, which provides assistance to public and private institutions on best compliance strategies for South Africa’s Right-to-Information laws, and Richard Callard, a professor in the Public Law Department at the University of Cape Town, note that only 11% of private entities had implemented the Act by centralizing information and maintaining proper files. According to the authors, the low compliance rate was due to a lack of awareness in the private sector of their obligation under FOIL.

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Moreover, in some countries such as the United States, there have been isolated events where the government used disclosure laws—not FOIL—to intimidate and harass civil rights groups. If Egypt is to include private entities within the scope of FOIL it must examine the impact such a provision would have on civil society, media organizations and other private entities.

B. Expansive Affirmative Disclosure and Electronic Reading Rooms

When crafting affirmative disclosure provisions, it is critical that drafters require the government to automatically publish a broad range of information in a forum that is most accessible to the people. Based on the experiences of Mexico, India, Hungary, and several international and regional conventions, including 2002 United Nations Convention Against Corruption, 1998 Aarhus Convention on Access to Information, Council of Europe’s 2009 Convention on Access to Official Documents, and 2002 Declaration of Principles on Freedom of Expression In Africa, a new minimum standard for affirmative disclosure is emerging. The chart below lists the classes of information that comprise this minimum standard.

¹⁸ See Mukelani Dimba & Richard Callard, *Freedom of Information Law in South Africa: A Country Study*, 13-16 (describing how a “coalition brought together prominent organizations from several key sectors of civil society [including] labor, churches, human rights groups and the legal community” to pass South Africa’s FOI law), http://www.humanrightsinitiative.org/programs/ai/rti/international/laws_papers/southafrica/Calland%20&%20Dimba%20-%20FOI%20Country%20Study.pdf.

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Class of Information ¹⁹	Information relating to:
Institutional information	Internal regulations of the body Function and powers of the body
Organizational Information	Organizational structure of the body Directory of personnel and compensation structure
Operational Information	Strategy and plans of the body Policies, activities and procedures of the body
Decisions and Acts	Decisions and formal Acts, particularly those that impact the public
Public Services Information	Description of services offered to the public Information on fees and deadlines relating to such services
Budget Information	Projected budget and audit reports Actual income and expenditures
Subsidies Information	Information on beneficiaries of subsidies and amount of subsidies
Public Procurement Information	Detailed information on public procurement process, criteria Outcomes of decision making on tender applications
Decision-making & Public Participation	Information on decision making procedures including mechanisms for consultations and public participation in decision-making
Open Meetings Information	Information on meetings held, including which are open and hot to attend these meetings
Lists, registers, Databases	Information on lists, registers, or databases held by the public body.
Publications Information	Information on publication issues including whether publication is free of charge
Information Held	An index or register of documents held; details of information held in databases
Information about FOIL Right to Information	Information of the right of access to information and how to request information, including contact information for the responsible person in each public body

In addition to these minimum requirements for affirmative disclosure, some countries have adopted an innovative, user-driven “push” method. Mexico, Slovenia, and the United States require automatic disclosure of information if a person has previously requested a record and that record is likely to be requested again.²⁰

Expanding the class of information affirmatively disclosed has little meaning unless the government has an effective way of disseminating the information to the public. Countries must

¹⁹ Chart derived from Darbshire, Helen. *Proactive transparency: The Future of the right to information?* 20 (2010) available at http://siteresources.worldbank.org/WBI/Resources/213798-1259011531325/6598384-1268250334206/Darbshire_Proactive_Transparency.pdf.

²⁰ *Id.* at 17.

tailor publication requirements to the unique circumstances of its people. For example, in countries with high literacy and Internet penetration rates, like Mexico and the United States, the government increasingly uses electronic reading rooms to push out information. In countries with lower literacy and Internet penetration rates, however, both traditional and innovate publishing techniques are employed.

As mentioned, Mexico has an adult literacy rate of 93% and an Internet penetration rate of 36.9%.²¹ Consequently, Mexico consolidated all affirmative disclosure in one place and published them via the Internet. The image below is a screenshot of Mexico’s centralized online electronic reading room. From this website, visitors can access an abundance of information, including various federal agencies’ organizational structure, contact information, and budget.

10 años de transparencia ifai

Portal de Obligaciones de Transparencia

Administración Pública Federal

INICIO

I Estructura Orgánica	Portal of Transparency and Access to Public Government Information		Conventions IFAI - APF   Opinion Survey  Buscador de Solicitudes de Información 
II Facultades	Portal of Transparency and Access to Public Government Information		
III Directorio	The Federal Law of Transparency and Access to Public Government Information aims to strengthen the democratization of the country and establish a relationship between the government and society based on accountability. In compliance with this law, we publish the information specified in Article 7 regarding transparency obligations of agencies of the Federal Public Administration.		
IV Remuneración Mensual	I Operational organizational structure	II Faculties	
V Unidad de Enlace	This section presents the organizational structure, basic and nonbasic counterparts in the agencies. Search by Institution	In this section, the powers and duties of the administrative units of the agencies. APF Search Search by Institution	
VI Metas y Objetivos	III Directory	IV Remuneration	
VII Servicios	This section presents a directory of public servants. It can be accessed alphabetically, by area and an advanced search. APF Search Search by Institution	This section presents the monthly remuneration and compensation system applicable to public servants and staff recruited by fees, as well as vacancies for the agencies. APF Search Search by Institution	
VIII Trámites, requisitos y formatos	V Liaison	VI Goals and objectives	
IX Presupuesto, Asignado y Ejercido	This section presents the data to contact the Liaison Unit (which receives requests for information), the site manager, members of the committee on information and qualified public servants of various departments.	This section presents the goals and objectives of each administrative unit, as well as physical and financial progress of the budget allocated to the agencies.	
X Auditorías			
XI Programas de Subsidios			
XII Concesiones, Permisos y Autorizaciones			
XIII Contrataciones			
XIV Marco Normativo			
XV Informes			

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As Egypt explores FOIL, broad affirmative disclosures with a centralized electronic publication like Mexico may be a useful model. While Egypt’s 66% adult literacy rate is

²¹ The World Bank Country Database, Mexico, available at <http://data.worldbank.org/country/mexico>; Internet World Stats, Mexico, <http://www.internetworldstats.com/central.htm#mx>.

²² Mexico’s Transparency Portal available in Spanish at <http://portaltransparencia.gob.mx/pot/>.

significantly lower than Mexico's, its Internet penetration rate of 26.4% places it in a good position to consider electronic publication of information.²³ Given Egypt's recent efforts to expand Internet access generally and automate some governmental records, innovative use of technology to publish information could make broad affirmative disclosures a reality.

C. Three-tiered Review Process

As stated above, an independent review process is critical for the success of FOIL. Constructing an enforcement model that incorporates three levels of review is thought to assist countries to overcome challenges of inefficiency, corruption, and lack of public confidence that often derail the proper functioning of FOI regimes.

Model Three-Tiered Review Process

- Internal Agency Review: Internal agency review entails review by a higher authority or more senior official within the agency from which the records have been sought. This initial level of appeal provides speedy, accessible, and cost-efficient correction of errors, while also ensuring internal consistency and building confidence among lower-ranking officials to disclose information.
- Independent Oversight Body Review: Independent oversight body review allows a requester to appeal the denial of a FOI request to an independent and impartial body, such as an information commission, an ombudsman, or a human rights commission. Agency decisions may be biased in the agency's favor and may result from a culture of secrecy within the agency. Intermediate review acts as a check against internal agency decisions and appeals and allows for a more accessible and affordable means of redress than direct recourse to the courts. Such a body can also exercise powers beyond adjudicating appeals, including monitoring implementation of the FOI law, setting FOI policy and issuing recommendations, training and assisting agency officials, and raising public awareness.
- Judicial Review: Judicial review is a final level of appeal to the courts. Although often costly and time-consuming, judicial review can act as a check against corruption and incompetence within the bureaucracy, allow for standardization of decision-making across agencies, and ensure that difficult legal concepts and the public interest are afforded the level of attention that they deserve.

²³ The World Bank Country Database, Egypt, *availabel* at <http://data.worldbank.org/country/egypt>; Internet World Stats, Egypt, <http://www.internetworldstats.com/africa.htm#eg>.

Most nations limit the time for the requester to appeal and for the agency to review the decision. If extensions are permitted, they are typically fixed for reasonable periods and granted only for specific reasons.

Strict time limits can be especially important in nations where administrative hurdles and slow procedures reportedly pervade the bureaucracy.²⁴ Furthermore, if strict time limits for agency appeal do not exist, public bodies may have an incentive to ignore the request until the material is no longer important to the requester or the public.²⁵ Ultimately, the goal in setting time limits is to balance the public's right to receive information promptly with the everyday demands on public bodies.

Although these time limits differ nation to nation, most allow about 30 working days for the requester to appeal and another 30 days for the internal agency to act on that appeal. These time limits include:

- India: A requester must file an internal appeal within 30 days of a negative decision, and a senior agency officer must decide the appeal within 30 days, or an extended period of up to 45 days, with reasons for any extension in writing.²⁶
- Indonesia: A requester must file an internal appeal to a more senior agency official within 30 working days of the negative decision, and the official must respond within 30 working days of receipt.²⁷
- Liberia: No time limit for requester to file internal appeal, and the senior agency official or internal information request review body must respond within 30 working days.²⁸
- Tunisia: A requester must lodge an internal appeal within 15 days of notification of the negative decision, and the agency head must respond within 10 days of the submission.²⁹

²⁴ Center for International Private Enterprise, *Tackling the Leviathan: Reforming Egyptian Bureaucracy for Improved Economic Growth*, 9, 19 (2009), <http://www.cipe-arabia.org/files/pdf/Bureaucracy-EN.pdf>.

²⁵ See Scott A. Hodes, *FOIA Facts: FOIA Appeals, the Unspoken Problem*, LLRX.com (October 14, 2005), <http://www.llrx.com/columns/foia25.htm>.

²⁶ See Toby Mendel, *Freedom of Information: A Comparative Legal Survey*, United Nations Educational Scientific and Cultural Organization (UNESCO), 60 (2d ed. 2008), <http://unesdoc.unesco.org/images/0015/001584/158450e.pdf>.

²⁷ Public Information Disclosure Act 2008, Art. 36 (Indonesia).

²⁸ Freedom of Information Act 2010, § 6.2 (Liberia).

- South Africa: A requester must file an appeal within 60 days (or within 30 days if third party notice is required), and the agency official must decide the appeal as soon as reasonably possible, but within 30 days after the appeal was received.³⁰
- United States: No time limit for requester to file internal appeal specified – though some agencies establish time limits for administrative appeal through regulation and inform requesters of the limit in the letter containing the negative decision³¹ – and the agency official must decide the appeal within 20 working days of filing, with possibility of a 10-day extension by written notice.³²

D. Narrow Exemptions

While FOIL exemptions are necessary to prevent governments from dismissing the law as unreasonably intrusive, drafters must artfully craft exemptions to prevent circumvention of disclosure. Poorly worded or broadly defined exemptions enable the government to circumvent its duty to disclose by over-classifying information within one of the exemptions. Experts and countries employing FOIL have identified the following 3 best practices when drafting exemptions:

- 1) Exemptions should be narrowly defined and should exclude only information the government claims will *harm* the following interests:
 - a. Law Enforcement Interests: Information regarding crime prevention, investigation, and prosecution;
 - b. Privacy Interests: Information where such disclosure would invade the privacy of a natural third party;
 - c. Commercial and Confidentiality Interests: Information where disclosure constitutes an actionable breach of confidence, reveals a trade secret, or publicizes information obtained from another State or international organization where disclosure of such information would harm relations with such entity;

²⁹ See Article 19, *Comment: On the Decree on Access to the Administrative Documents of Public Authorities of Tunisia*, 14 (July 2011), <http://www.article19.org/data/files/pdfs/analysis/tunisia-comment-on-the-decree-on-access-to-the-administrative-documents-of-p.pdf> (“Article 19 Tunisia Comment”).

³⁰ See Toby Mendel, *Freedom of Information: A Comparative Legal Survey*, United Nations Educational Scientific and Cultural Organization (UNESCO), n.1 at 97 (2d ed. 2008), <http://unesdoc.unesco.org/images/0015/001584/158450e.pdf>.

³¹ See, e.g., 28 C.F.R. 16.9 (U.S. Department of Justice requires requesters to file an internal appeal within 60 days of the letter informing the requester of the adverse determination).

³² See U.S. FOIA Citizen’s Guide, *supra* note 29, at 21; Mendel, *Freedom of Information*, *supra* note 1, at 132; Toby Mendel, *Freedom of Information: A Comparative Legal Survey*, United Nations Educational Scientific and Cultural Organization (UNESCO), 132 (2d ed. 2008), <http://unesdoc.unesco.org/images/0015/001584/158450e.pdf>.

- d. Public Safety Interest: Information where such disclosure would endanger the life, health, or safety of any individual;
- e. Effectiveness and Integrity of Government Decision Making Process: Information where such disclosure would harm the formulation of government policy, frustrate the success of a policy by premature disclosure, inhibit the free and frank exchange of views in the policy making process, or undermine testing of an auditing procedure used by the government; and
- f. National Security Interest: Information where such disclosure would cause harm to the defense or national security of the country.

Defining National Security

It is critical that FOIL define the scope of the national security interest for purposes of FOIL exemptions. Without a definition, countries may be incentivized to over-classify information under this exemption. The Johannesburg Principles are standards for the crafting of national security exemptions adopted in 1995 by a group of leading experts in international law, national security and human rights. According to these experts, a “legitimate national security interest” is defined as one related to the protection of “a country’s existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government.” Expressly excluded are attempts “to protect a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology, or to suppress industrial unrest.”

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- 2) FOIL must require exemptions to pass a “substantial harm-public interest” test. Even if information is related to one of the above interests, government should disclose such information unless,
 - a. there is evidence that disclosure would cause substantial harm to the interest **AND**
 - b. the harm to the government interest is greater than the public interest in having the information.

Many states, including India, South Africa, Japan, and Bosnia, use this test.³⁴

- 3) All exemptions to disclosure must be contained within the FOI law itself. In many countries, FOIL is adopted into a legal landscape that contains pre-existing laws that

³³ Article 19, *The Johannesburg Principles on National Security, Freedom of Expression and Access to Information*, October 1995, <http://www.article19.org/data/files/pdfs/standards/joburgprinciples.pdf>.

³⁴ Public International Law & Policy Group, *Freedom of Information Laws: Core Elements and Comparative State Practice*, 5 (November 2011) (on file).

undermine transparency. Allowing secrecy laws to co-exist with FOIL significantly undermines its efficacy. For example, in 2005, the Turkish government successfully argued that a pre-existing Tax Procedure Law that guaranteed the confidentiality of financial records superseded its duty to respond to a FOIL information request regarding the failure of a gold mining company to clean up a chemical spill. Ideally, FOIL must explicitly state that it supersedes these prior laws. South Africa and India have adopted such provisions. Other countries, such as Sweden and the United States, have opted to allow some pre-existing secrecy laws to exist with FOIL, but expressly identify those laws.

Egypt currently has several pre-existing laws that would directly conflict with FOIL best practices. It is imperative that FOIL explicitly addresses how these laws interact with FOIL. The best practice here is to clearly state that FOIL supersedes all previous laws.

E. Adoption of Complementary Legislation

It is a best practice to adopt complimentary legislation that will assist in the enforcement of FOIL. Two of the most important complimentary laws are laws that protect employees from prosecution for disclosing information in good faith and records management laws.

In order for FOIL to be successful, employees responsible for responding to FOIL requests must be assured that they will not be prosecuted for complying with the law. To this end, many countries include provisions that protect employees from civil and criminal prosecution and any retaliation at the place of employment so long as the employees acted reasonably and in good faith. Such provisions are especially important in countries like Egypt where pre-existing laws do punish government employees for disclosing a wide variety of information.

Additionally, it is a best practice for countries to adopt wide spread and affective records management laws in tandem with FOIL. FOIL rests on the presumption that government records exist. If the government does not keep proper records of its decisions, policies and budget, a FOIL law giving people access to non-existent records is useless.

III. CONCLUSION

As shown in this report, many countries with comparable socio-economic circumstances as Egypt have successfully used freedom of information laws to bolster government accountability towards establishing a more equitable and prosperous nation. Egyptian lawyers, judges, and policy makers can learn much from examining other countries' experiences as they define what model works best for Egypt.

In sum, this report highlights best practices as they relate to the FOIL provisions discussed above. These best practices can be summarized as follows:

- Scope of FOIL

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- FOIL should apply to all public bodies and non-public bodies engaging in public functions.
- Never exempt entire bodies in an effort to exempt sensitive information.
- Affirmative Disclosures
 - Require the government to affirmatively disclose a broad class of information.
 - Require such information to be published through methods most accessible by the public, including the Internet.
- Review Process
 - Adopt a three-tiered review process and set reasonable time limits on the appeals process.
- Exemptions
 - Exemptions should be narrowly defined and should exclude only information the government claims will *harm* the following interests.
 - Exemptions must pass the “substantial harm-public interest” test.
 - All exemptions to disclosure must be contained within the FOI law itself.
- Adoption of Complimentary Laws
 - Adopt laws that protect employees from prosecution for disclosing information in good faith and establish good records management practices.