

# Analytical View on the Kuwaiti Right of Access to Information Law No. 20 of 2020

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## **Abstract**

The article addresses the executive regulation no. 62 of 2021 for the new law of right of access to information No. 12 of 2020 as the latter has come into force few months ago as an implication to the international system. The aim of this article is to attempt to create a brief on the law with analytical views on its provisions in the light of the practice of other jurisdictions, recommendations of related international entities and the international regulations. And about the methodology this article used a library-based research. It lacks a discussion of the Kuwaiti case law in related area (as it has recently come into force) although references were made to other jurisdiction's case law, laws and scholars' opinions. On the conclusion and recommendations: In a nutshell, this article arrived at a conclusion that the law in question lacks clarity in some areas; it does not imply maximum disclosure of information by the public entity, prolonged period to publish information and imposes an obligation on the part of the applicant to provide justification for his/her requested information. This article will be providing recommendations throughout the discussion.

**Keywords:** Entity, persona information, disclosure, application, regulation.

### Introduction

Several national governments have adopted the law of right to access information or freedom of information<sup>(1)</sup> as an essential element of the rights of personal freedom of opinion and expression<sup>(2)</sup>, human rights, trust in public disclosure, transparency and fighting corruption at international level<sup>(3)</sup>. It is recognized in Kuwait by the Right of Access to Information Law No.12 of 2020. This law imposes, inter alia, two important obligations; the duty of the public entity to publish, on the website of each entity, information as listed under the law.

It also requires the entity to allow access to information through submission of application. This article demonstrates the extensive of obligation to publish and disseminate information, procedures for requesting information, time taken to response to the applicant, right of appeal when the request for information is refused and the need for timely response to the applicant.

This article attempts to answer, in the light of the international standard that emerged from the legislation<sup>(4)</sup>, the question whether in the light of the exceptions an appropriate balance was struck between the maximum exposure of the right to know and the list of exceptions to protect key certain public and private interests. It must be highlighted that the Access to Information law is a recent law which has not received attention in peer-reviewed published articles.

Thus, this article is largely dependent on the provision of the law and documents and news briefings provided by the Kuwaiti government as the main source of information. Also, reference to international articles is made throughout the article.

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(1) The terms 'right of access to information' used interchangeably with 'freedom of information' and hold similar meaning.

(2) Article 5(5) of the Access to Information Law No. 12 of 2020, imposes an obligation on the part of the public body to create on their websites a mechanism to allow individuals to express their opinion on matters related to the activities of the public authority.

(3) Toby Mendel, *Freedom of Information: A Comparative Legal Survey*, (2<sup>nd</sup> edition, UNESCO, 2008) "Democracy also involves accountability and good governance. The public have a right to scrutinize the actions of their leaders and to engage in full and open debate about those actions. They must be able to assess the performance of the government, and this depends on access to information about the state of the economy, social systems and other matters of public concern. One of the most effective ways of addressing poor governance, particularly over time, is through open, informed debate.", at p.4.

(4) Although right of information regimes are applied differently, there are also a significant number of similarities to an extent that provides common standards in many areas related to the right of access to information.

### **The source of right of access to information**

In the recent years, the Kuwaiti administration suffers from corruption and abuse of functions. Bureaucrats allegedly postpone administrative decisions to incite the public to pay bribes or facilitation payments to expedite process. Unfairness and practice of favoritism are widespread within Kuwaiti administration, and administrative decisions are sometimes arbitrary and can involve corruption, thus fostering unfair competition.

It must be mentioned that the democratic systems, including the National Assembly, have shown ill democracy for not fighting corruption and authoritarianism. This required a robust measure to be taken and thus legal reform is inevitable. Access to information law, if properly implemented, will provide a tool that fits perfectly with what is expected of members of a democratic society. Having access to public information makes it possible to protect rights and prevent abuses by the State. It might also suppress corruption and defeat authoritarianism<sup>(5)</sup>.

The Minister of Justice issued, on 27<sup>th</sup> January 2021, the executive regulation (No. 62 of 2021) relating to access to information under Law No. 12 of 2020. This was done in compliance with the timeframe stipulated in the text of the Law<sup>(6)</sup> adopted by the National Assembly on 5 August 2020. Such law is one of the most important requirements of the UN Convention against corruption and should contribute to improving Kuwait's position internationally on relevant indicators of freedoms and anti-corruption<sup>(7)</sup>.

By adopting this law, Kuwait joins more than 120 countries with similar legislation and has become the seventh Arab Country to adopt a specialized regulatory framework in this regard, along with Jordan, Yemen, Sudan, Tunisia, Lebanon and Morocco, in addition to a local law adopted by Iraq's Kurdistan Regional Government.

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(5) Access to information is also a particular useful tool for the informed exercise of other rights, such as political or social and economy rights. This is especially relevant when it comes to the protection of marginalized or excluded segments of society that do not always have systematic, reliable ways of acquiring information on the scope of their rights and how to exercise them. See Inter-American Commission on Human Rights, *The Right to Access to Information in the Americas: Inter-American Standards and Comparison of Legal Frameworks*, (30 December 2011), cited in [www.cidh.org/relatoria](http://www.cidh.org/relatoria), last visited on 9.7.2021.

(6) Article 16 of the Law No. 12 of 2020.

(7) The Corruption Perception Index, CPI is an index published annually by Berlin-based Transparency International Since 1995 which ranks countries "by their perceived levels of public sector corruption, as determined by expert assessments and opinion surveys."

This is while noting that most of these laws have not entered into force or are not being properly implemented on the ground. Kuwait's Law no. 12 of 2020 was published in the Official Gazette on 6<sup>th</sup> September 2020 which means that it has entered into force in March 2021 (six months after being published in the Official Gazette). This law and the related regulations are considered part of the country's efforts to implement the Kuwait Integrity and Anti-Corruption Strategy (KIACS), which was developed with the UN's support and announced on 15 January 2019.

It is in line with Article 10 of the UN Convention against Corruption to which Kuwait became party in 2007. The statement issued by the Kuwait Anti-Corruption Authority on the occasion considered the right of access to information law to represent "a new building block in preventing corruption and strengthening transparency and integrity in the public sector".

Kuwait has moved forward in the direction of accepting Article 19 rights under the Universal Declaration of Human Rights and Agenda 2030 of the Sustainable Development Goal 16 on peace, justice, and the development of strong institutions.<sup>(8)</sup>

Providing for right of access to information meant to enhance transparency, enabling accountability, and reducing opportunities for corruption. Further, allowing access to information is likely to encourage human rights as indicated in Article 19 of the Universal Declaration on Human Rights which provides that "Everyone has the right of freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers"<sup>(9)</sup>, and<sup>(10)</sup> as emphasized by Agenda 2030's 16<sup>th</sup> Sustainable Development Goal (SDG) on peace, justice and strong institutions.

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(8) At the core of the 2030 Agenda lies a clear understanding that human rights, peace and security, and development are deeply interlinked and mutually reinforcing. Through its entirety, the importance of enhancing access to justice, ensuring safety and security, and promoting human rights for sustainable development are reflected, while Sustainable Development Goal 16 marks the intersection between sustaining peace and the 2030 Agenda.

(9) This right is also provided for by articles 19 and 17 of the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Rights of the Child 1989. As a regional effort, the EU has established the provisions of the European Convention for the Protection of Human rights and Fundamental Freedoms (ECHR) and the practice of the European Court on Human Rights are in the same vein. Further, the Recommendation No. R (81) 19 of the Committee of Ministers of the European Council dated 25.11.1981 which states the principles that underlie the right of access to information.

(10) It provides: "Ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements".

Prior to that, in 1946, there was the first session of the General Assembly of the United Nations unanimously adopted a resolution on freedom of information which provides that “Freedom of information is a fundamental human right and is the touchstone of all the freedoms to which the United Nations is consecrated”<sup>(11)</sup>.

In the light of the above quotations, one may ask; what does “Freedom of Information” mean? The definition varies in the provisions of different international instruments. The 1947 UN report has adopted a broader meaning of freedom of expression and information as a whole through the freedom to seek,<sup>(12)</sup> receive and disseminate information<sup>(13)</sup>.

Whereas, a narrower definition of the freedom of information implies that it is the right of individual to request or copy documents held by government bodies<sup>(14)</sup>. In the view of the Kuwaiti law, the latter has been defined as the right of access to information<sup>(15)</sup>.

It can be summarized that the state is put under two obligations; it must refrain from actions which obstruct the right of access to information and ensure that their right is accessible.

### **The law of right of access to information**

The law is divided into seven chapters comprising seventeen articles. Chapter 1 defines the terms used in the law including the entities/institutions<sup>(16)</sup> that are subject to the law. Chapter two provides that it is the right of every person to review and obtain information in possession of the (governmental) institution without breach of the Law No. 12 of 2020 and the related supporting regulations.

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(11) Resolution 59 (I).

(12) Chapter 4, 1947 Report of the submission on freedom of information and the press at the United Nations, addressed to the Commission of Human Rights.

(13) Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 19 of the International Covenant on Civil and Political Rights.

(14) This expression is used in the legislation of the USA and Australia. Further details can be found in Patric Birkinshaw, *Freedom of Information. The Law, the Practice and the Ideal*, London, 1988.

(15) See Council of European, *Consultant Study on Access to Official Information* by Ton Beers, Strasbourg 1996, 7.

(16) “Entities: including ministries, public committees and institutions and other public legal persons, in addition to Kuwaiti companies to which the state or one of the aforementioned entities contribute to more than 50% of its capital, and private companies and institutions that keep information or documents on behalf of these entities.”

Each individual is entitled to access administrative decisions affecting his/her rights and access to information contained in any document of which he/she is the subject.<sup>(17)</sup> Entities subject to this law are required to provide easy access to information for individuals and guarantee unveiling them in the way and timing as indicated in this law<sup>(18)</sup>. Entities are also required to appoint information officers who will be responsible of processing requesting the information<sup>(19)</sup>.

Such entities are required to also organize, classify and index information available to make it easily accessible when requested. This should be carried out within two years of the law entering into force<sup>(20)</sup>. Chapter three provides that from the date of entry into force, entities subject to this law shall proactively publish information on their websites, especially information and documents including: laws, regulations, decisions under which entities operate, general public policies affecting peoples' lives, decision-making processes, supervision and accountability mechanisms, organizational structures, job descriptions, contact information of persons in leading positions, information about projects and activities, circulars and announcements on new posts, specify a feature on the entity's website to submit recommendations and proposals with matters related to the core business of the entity<sup>(21)</sup>, among other information specified in article 5.

Chapter four determines the process of submitting an information request based on a specific template<sup>(22)</sup>. Information requests should be made in writing along with the required documents which support his/her request<sup>(23)</sup>. The entity in question should notify the applicant of the receipt<sup>(24)</sup> and respond within ten days<sup>(25)</sup>.

The period could be extended up to three months after notifying the applicants, if the information requested is significant, or access to the information requires

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(17) Article 2.

(18) Article 3.

(19) Article 3.

(20) Article 4

(21) Article 5.

(22) Article 6.

(23) Article 6.

(24) Article 7.

(25) Article 8.

consulting another entity. On the acceptance of the request, the applicant shall prove access to the information and provide him/her with the required documents after paying the specified fees<sup>(26)</sup>. If confidential information as indicated in this law is included within the required document, the access of information will be rejected by the entity, if the separation of the confidential information is impossible<sup>(27)</sup>.

If the entity does not respond to the application or if the information request is rejected, the applicant may submit a complaint to the entity in question, which must respond within two months<sup>(28)</sup>. The refusal of a grievance should be justified, and recourse to courts is possible afterward<sup>(29)</sup>.

In chapter five, the law specifies ten types of information that are excluded from the right to access information, including, but not limited to, information affecting national security, public security and defense capabilities, information deemed secret by the constitution, laws or decisions of the government, information related to peoples' private lives, trade secrets, information that may create conflicts or disturb the relationship with another country, information that can cause serious harm to the economy of the country, information that cause harm to the personal or information related to family disputes<sup>(30)</sup>.

Crimes and penalties related to this law are defined in chapter six<sup>(31)</sup>, which also assigns the Public Prosecutors as the authority responsible for investigating and prosecuting these crimes<sup>(32)</sup>.

The seventh and last chapter comprises final provisions related to releasing the executive regulations after six months from the entry of this law into force. The law achievements are yet to be seen. This is possible only on the proper implementation of the law. Public authorities have not acted adequately other than posting on their websites forms and obscure brief on the law.

The government must promote for the law through publicity drive to educate

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(26) Article 9.

(27) Article 10.

(28) Article 13.

(29) Article 11 of chapter 4.

(30) Article 12.

(31) Article 14.

(32) Article 15.

the public and the state authorities for the implementation of the law.<sup>(33)</sup> On the other side, public authorities can familiarize their individuals by providing seminars, training and written procedures on how to benefit from the use of the law.

### **The obligations of the state and its entities**

In direct reference to the right of access to information law text, though ambiguously drafted, an obligation of the state to regulate access to information by law can be articulated. This obligation should be classified and differentiated, for instance, from an obligation of state entities to publish official information (so-called active transparency) and an obligation to ensure access to source of information (so-called passive transparency).

In other words, the right of access information encompasses two types of obligations; first, dissemination of information which, by force of law, should be made public or published. The second obligation is executed after the right has been granted through making a request for information. Obligation to publish information gives practical effect to the right of access to information<sup>(34)</sup>.

#### ***a- Obligation on entities to publish official information***

The granting of information under this obligation emerges from the initiative of the respective entities as obliged by Article 5 of the Right of access to information. This information includes description of the structure and competence of a given entity, the structure of the organization, names of the hierarchy management and their duties, the text of law which regulates its activity, the service it performs, the acts it issues and the categories of information it process, KPI's<sup>(35)</sup> of the entity, future projects and their social service procedures and beneficiaries, jobs and career vacancies and the relevant recruiting results.

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(33) The UN Special Rapporteur on Freedom of Opinion and Expression, The Public's Right To Know: Principles on Right to Information Legislation, (2016) cited in [www.article19.org](http://www.article19.org).

(34) This is reflected in the UN Standards: "Freedom of information implies that public bodies publish and disseminate widely documents of the significant public interest, for example, operational information about how the public body functions and the content of any decision or policy affecting the public..." Report of the Special Rapporteur, Promotion and protection of the right to freedom of opinion and expression, UN Doc. E/CN.4/2000/63, 18 January 2000, para. 44

(35) Key Performance Indicators.



The right of access to information has also been linked to the right to the environment, to information about human rights and to the right to take part in public affairs. Hence, information, such as location, emissions, level of harm and nature of the dangerous and harmful substances are required to be published, including mines and fields of wars.

This latter obligation is only required from specific public entities, such as the Environmental Public Authority etc. It is imposed on the part of the entity to also present guidance on the procedure on access to information. Listed information should be free of charge as it is made public to everyone. For the sake of efficiency of granting of information and when required by applicant and legal persons, it may be necessary for entities to set up registers and information data bases for the documents issued by the corresponding department.

These registers should be accessible for everyone. It is worth mentioning that entities have an ongoing obligation to update their published information on a regular basis<sup>(36)</sup>. Because matters related to rights are continuously improving.<sup>37</sup> The provision of the law imposes, under Article 5(5), on the part of the entities an obligation not only to impart information but also seek and receive opinions, information and complaints from the public.

On proper implementation of this provision, the connotation of freedom to speak will be recognized as a free flow of information between entities and individuals. It is legitimate to say that the longer period goal, e.g. three years as per Article 5 of the Right of Access to Information Law, should be to make information available proactively, so as to minimize the need for individuals to have to resort to request to access information.

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(36) Central banks of some jurisdictions, Irish Central Bank and the Central Bank of Bulgaria in compliance with the obligation of right of access to information; they publish and publicize information on a weekly and monthly basis about disasters and calamities. It is noticeable that Kuwait National Bank merely provides the passive access of the obligation. See, [https://www.cbk.gov.kw/en/images/roa-guidelines-153782\\_v10\\_tcm10-153782.pdf](https://www.cbk.gov.kw/en/images/roa-guidelines-153782_v10_tcm10-153782.pdf), visited on 5.4.2021

(37) The European Court of Human Rights in *Tyrer v United Kingdom* has held that the European Convention on Human Rights “is a living instrument which must be interpreted in the light of present-day conditions.” Also, in *Mayagna (Sumo) Awas Tingni Community v Nicaragua*, 31 August 2001, Series C, No. 79, para. 146 the Inter-American Court of Human Rights in, 25 April 1978, Application No. 5856/72, para. 31. has held that international “human rights treaties are live instruments whose interpretation must adopt to the evolution of the times and, specifically, to current living conditions.”

***b- Obligation on entities after making a request for information by the applicant***

The law demands a written form for the application when requesting access to information. This is necessary, not merely to create a channel for rendering information by the applicant, but for the entity in performing of its duty to arrange for the right information in an efficient time and way.

Three possible scenarios are likely to occur when application is submitted: approval of application for access and provision of full information required; partial provision of the required information if parts of the requested information are covered by an exception; and, total rejection of application for access through a reasoned decision or the expiry of legal deadline.

Nonetheless, in all cases, entities are under obligation to properly act and provide adequate assistance to the applicant to access the requested information. If the application for access is related to information previously published by the concerned entity, the person in charge of access must inform the applicant of this and determine the location where it was published, its publication format, date and the way to review it.

However, if the applicant discovers that the information, he/she received is incomplete, the concerned entity must help him/er to get the supplementary and necessary data and clarifications they require. In this case, it shall not argue that the information has been given to her/him and that it has responded to the application.

In case the rejection of the application for access is based on a justified response, the effect of rejection ends with disappearance of the reasons for the rejection set forth in the response to the application.

**Procedure to obtain access to information**

Article 6 of the law No.12 of 2020 imposed on the entities to create their own application form designed to requesting access and/or obtaining information must reasonably describe the information sought. Further details of the content of the application form are enumerated under Article 2 of the executive regulations No. 62 of 2021, which should include the personal's data, the date of submitting the application, the party to which the request was submitted, the information required to be viewed or obtaining the supporting documents related to the application and the justification for requesting such information.

This should be easier to comply with once the entity adhered to the imposed obligation as per Article 4 to organize, classify and index information available to make it easily accessible when requested. This obligation carried out within two years of the law entering into force. Until then, the applicant will face difficulties completing his/her application form with information such as the title, file number, and date that describe the records being sought.

The entity will examine the applicant's eligibility as to whether the request is related to the applicant's rights or not and within 10 days after receipt of the request for the person to whom the request was made (and assigned to carry out the tasks of reviewing requests for information or obtaining documents related to the request) must respond to the applicant by providing him/her a notice indicating the application number, the date of its submission, and the type of information requested<sup>(38)</sup>.

The entity must take one of the following actions: deny, in writing, access to all or a portion of the requested documents; produce the record for inspection at the entity office; or advise the applicant that the record is in custody and make arrangements for copying and payment of fees at a later date. If more than 10 days are needed to respond to the request, the entity must notify the applicant approximately when the response will be forthcoming, and briefly explain the reason for the delay.

The law provides that the entity's response to the applicant indicating whether access is granted or denied may be extended to three months in two situations; a- if a third party must be consulted, or b- in the case the requested information relate to more than one piece of record/document, with notification to the applicant<sup>(39)</sup>. A question emerges; does the prolonged period is justifiable before responding to the applicant if the access of information can be granted? The law provides for extension which may be abused by the entities and thus may disturb the purpose of this law. The extension is provided in two occasions:

***a- Prolonging the period due to consulting a third party***

It remains unknown in which circumstances the entity may seek permission to consult a third party as per Article 8. For example, it is not clear whether such consultation means to take the permission from the third party to whether agree or not regarding granting the applicant to access the concerned information.

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(38) Article 8.

(39) Article 8.

This might be in the case that such information is concealed by the third party for its confidentiality. It would be difficult for the applicant to decide to whom he/she should communicate with in this matter having no clue who would be the concerned party. Further, with lack of definition of the ‘third party’ in the law, the entity whom the applicant has submitted the request to may not be the custodian of the information and that it is held by another agency.

It is not mentioned in the provision of the law that if the record is not within the custody of the entity applied for, the entity must certify that the record cannot be found after a diligent search, that the record is in the custody of another specified entity or that the information does not exist. Perhaps the entity is confused whether the information is confidential or not, but is seeking some third party, e.g. legal firm, for the eligibility to provide the access of the requested information.

This is possible especially during the two years grace period given to the entities to ascertain confidential from non-confidential information. In any case, the law should impose an obligation where if other entity holds the information, the applicant’s request should be referred directly to that entity or advise the applicant of the relevant public authority to whom he/she may direct the request.

### ***b- Prolonging the period for information related to more than one piece of record/document***

This exception does not serve part of the purpose on which the law was created by providing the applicant the requested information in reasonable time. The delay by using a three-month extension might be justifiable within the first two years from the time the law entered into force during which the entity is required to be proactive and create records to be readily available to public as per Article 5.

After an entity has prepared records, it would be unjustifiable to delay deciding on particular information up to three months. One purpose of the filing system required by entities is to make information accessible by the public in a timely manner<sup>(40)</sup>. Requests may slow the applicant down and/or make it more sluggish, e.g. no diligence in processing requests, for the governmental entity to respond to the applicant’s request.

It is noticeable that the law does not allow any prolong for the entity to

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(40) David S., The social layer of freedom of information law, 90 N.C. L. Rev. 1687 (2012), p. 1729.

respond for reasons other than the two above circumstances even if the entity has backlog in responding to several requests. In an American case,<sup>(41)</sup> the Immigration and Naturalisation Service (INS) has not fared well in court with Free of Information Act (FOIA).

A federal judge entered an injunction compelling the agency to comply with the 10 working day statutory response time, but limited his ruling to INS' San Francisco office. The Court rejected the agency's claim that its ordinary backlog in responding to requests created exceptional circumstances permitting it to exceed the statutory time limit. In particular, the judge's criticism to INS' was due to failure to modify its processing procedure to reflect the exigence of a requester's need for the information.

The requester is an attorney who sought the data to defend deportation and exclusion proceedings, in which no discovery is permitted, and he claimed that the agency had a pattern and practice of failing to respond timely. The Court's decision was a departure from cases which tended to defer agency claims of backlog provided they showed appropriate diligence in processing request.

The period to send a notification indicating receipt of the application and the period within which an entity grants documents should be reduced from the terms indicated by the law, especially in case of an identified document, it should be granted within the shortest possible period.

There are no immediate penalties for non compliance within the time to response. It is necessary that the government should ensure that public authorities must response within the legal time limit. The central government<sup>(42)</sup>, should issue enforcement notice requiring authorities to deal immediately with all requests in swiftly manner. Failure to comply could be treated as a contempt of court.

### **Fees of copying information**

The information may be accessed without obtaining a copy and that is free of charge<sup>(43)</sup>. Whereas, obtaining a copy of the information accessed involves a

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(41) *Mayock v Immigration and Naturalisation Service*, 714 F Supp 1558 (ND Cal 1989). In another case *Gun Choe v Immigration and Naturalisation Service*, No C87-1764R (W D Wash) (6 June 1989), a federal judge in Seattle also held that INS had failed to show 'exceptional circumstances' to warrant delaying processing of a request by the subject of a deportation hearing.

(42) Perhaps through the Council of Ministers General Secretariat Kuwait. It can be suggested that this can be dealt with by an independent information authority, e.g. Information Commissioner.

(43) The Aarhus Convention by the United Nations Economic Commission for Europe (The

fee of KD 5 for each document of no more than 10 pages, and KD 0.5 is added for each extra page, as indicated in the executive regulation. One can imagine the cost of copying documents worth thousands of pages; this could shield unnecessarily potential applicants from public view.

The law, at least, should be amended to make it up to the entities to waive the fee<sup>(44)</sup>. It is advisable that the fixed fee which the applicant is to pay upon receipt of copy of the information should not exceed the expenses of copying<sup>(45)</sup>.

### Requesting procedures

The applicant must fill the application form of the entity in question. The law, nonetheless, has left it to the entity to create its own application form in the light of the ascertained conditions enumerated under Article 2 of the executive regulation<sup>(46)</sup>. As a result, the entity might abuse such right by imposing further conditions on the part of the applicant and thus will obstruct access to information.

It is believed that amendment is necessary to omit the provision which required the applicant to state the reasons behind requesting the information and the interest in obtaining it for four reasons: a- to make it easier for the applicant to gain access to the information especially that the person who demands the information is not familiar with content of the requested information; b- the regulation does not give guidance on the requested supporting document and it is left for the discretion of the entity to decide on case by case basis whether the information is to be publicize or not; c- it is not the intention of the provision of the law to limit the access of the information which does not fall within the

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Convention on Access to information, Public Participation in Decision-Making and Access to Justice in Environmental Matters) has reasonably detailed rules on fees, with Article 4(8) providing that: "Each party may allow its public authorities [entity] to make a charge for supplying information, but such charge shall not exceed a reasonable amount. Public authorities intending to make such a charge for supplying information shall make available to applicants a schedule of charges which may be levied, indicating the circumstances in which they may be levied or waived and when the supply of information is conditional on the advance payment of such a charge."

- (44) The New York Administration Code gives any entity, e.g. keeper of information, the freedom to waive the fees. N.Y. Admin. Code tit. 7, 5.36 (1978), further see Eure, G., Linn, R. The New York freedom of information law: how to obtain copies of official regulations, decisions, etc., *Columbia Human Rights Law Review*, 16 (Issues 1&2), 57-70, p. 60
- (45) The current cost of copying may be set for requesting to obtain and copy document within a shorter period.
- (46) Some governmental entities have created their own application form, without adhering to the required information stated in the executive regulations.

restricted information under article 12 of the law<sup>(47)</sup>; d- the provisions of the law should not violate the clear intention of the international regulation on the access to information so that it should take a uniform style with the rest of the related international regulations in order to serve the purpose of such regulation, that is to ease access to information.

For urgent cases, the law, perhaps, may impose information on the part of the applicant to get the relevant entity to respond to the application within the shorter time limits set forth in law. Applicants may in such a case indicate why urgently the required information is needed and how this may affect their case.

### **Exceptions**

The law provides for certain exceptions to the general rule of access to information. Entities may deny access to records or parts of records that:

- (a) Are specifically exempted from disclosure by state such as information which may compromise national security, public safety, or defense capabilities.
- (b) Information classified as confidential by the Constitution or virtue of a law, or information and documents the Cabins of Ministers issues a decision to consider confidential, specifying a timeframe for this confidentiality, upon the request of the competent minister.
- (c) Information which could be detrimental to justice or could compromise other parties' interests<sup>(48)</sup>.
- (d) Information that relates to one's private life, medical records, personal status, bank accounts and transfers of an individual, unless the individual gives consent for access.
- (e) Information that reveals trade secrets which could compromise the concerned parties' trade and financial interests.
- (f) If the State had received the information from another country or international organization and the revelation could prove detrimental to relations with that country or organization.

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(47) H. Altaiyqi, the right to obtain the information: between the constitution and the recommendations of the committees of the parliament, *The Moroccan Journal for Public Politics*, 2012, 90-103, p. 99.

(48) For example, information related to medical reports of the individuals or information related to court hearings.

- (g) Information which could cause serious and grave danger that would affect the State's economy, compromise public trust in the national currency, or compromise public health and the environment.

Discretion of the administration to judge whether and interest is proved or not, creates the danger of abuse due to these exceptions which must have a narrow scope of interpretation<sup>(49)</sup>. The applicant who has been denied access can file a grievance to the entity in question. Article 13 of the law and Article 5 of the executive regulation gave entities the right to exercise discretion to decide on whether the information requested is not confidential and thus to release it to the applicant.

Under the American law, another instance that confidential information can be release when the information is made available to the individual's lawyer or the lawyer who represents the opponent party of the applicant in a law suit (or a defendant in a criminal case), and the information contained in the document is relevant to an issue in the case, but not information that may disclose another matter with relation to a personal dispute<sup>(50)</sup>.

One can suggest that governmental documents can be classified to levels<sup>(51)</sup> depending on the degree of their sensitivity; top confidential<sup>(52)</sup>, confidential<sup>(53)</sup>, concealed<sup>(54)</sup>, and restricted distribution. Also, to specify the manner in which information of each class is, or is intended to be published<sup>(55)</sup>. Top confidential, confidential and concealed are information which cannot be released by the entity, such as matters related to the security of the state or with the law enforcement. Hence, discretion can be exercised by the entity for concealed information only.

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(49) The Commission approved the Inter-American Declaration of Principles on Freedom of Expression which recognizes the right to information as "4. Access to information held by the state is a fundamental right of every individual. States have obligations to guarantee the full exercise of this right. This principle allows only exceptional limitations that must be previously established by law in case of a real and imminent danger that threatens national security in democratic societies." 108<sup>th</sup> Regular Session, 19<sup>th</sup> October 2000. Available at: <http://www.iachr.org/declaration.htm>.

(50) N.Y. Admin. Code tit 7, S. 5.23 (1984).

(51) Article 03 of Algerian Law 387-84 (22 Dec. 1984).

(52) Information which may compromise national security, public safety, or defense capabilities.

(53) Information classified as confidential by the Constitution or virtue of a law, or information and documents the Cabins of Ministers issues a decision to consider confidential, specifying a timeframe for this confidentiality, upon the request of the competent minister.

(54) Information which could be detrimental to justice or could compromise other parties' interests.

(55) Under the English Law P.1 sec.19(2) (Publication Schemes)(a) specify classes of information which the public authority publishes or intends to publish.



This can reduce the number of correspondences between the entity and the applicant and thus prompt turnaround can be achieved, because classifying documents will make it easier and quicker for the entity to decide on the level of sensitivity of the information. Further, it can be suggested that classifying information may relieve entities of the burden of assembling and maintaining for applicants matter in which the applicant could not reasonably be expected to have an interest.

Furthermore, classified information based on the level of sensitivity would stop entities from abusing the law by blocking information which falls within the statutory language of the freedom of information law. This is explained further in the American case, *Zuckerman v New York Bd. Of Parole*<sup>(56)</sup>, where the petitioner sought disclosure of the minutes of the business meetings of the Parole Board.

The court held that the minutes were not per se exempt from disclosure under the Freedom of Information Law. Then, the court ordered the Supreme Court judge to review the minutes in private to determine to what extent, if any, the minutes might be exempt from disclosure as unwarranted invasion of personal privacy or as investigatory files compiled for law enforcement purposes.

The important thing about the decision in this case is that the court suggested that the regulations issued by the entity which made “all [or most] department records initially confidential in a broad and sweeping manner”<sup>(57)</sup>, violated the clear intention of the Freedom of Information Law.

The court went on to say that “a regulation cannot be inconsistent with a statutory scheme...and that the Freedom of Information Law specifically state that exemptions can only be controlled by other statutes, not by regulations which go beyond the scope of specific statutory language”<sup>(58)</sup>.

Any restriction on the right to information must be provided for by law. Restrictions that do not have a legal basis, for example, because they occur as a result of the simple exercise of administrative discretion, are not legitimate<sup>(59)</sup>. Hence, restrictions numerated in the law should not be drafted in a way restricting the access of information to pursue other aims which serve the

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(56) *Zuckerman v. New York Bd. Of Parole* 53 A.D.2d 405, 385 N.Y.S.2d 811 (3d Dept. 1976).

(57) *Zuckerman v. New York Bd. Of Parole* 53 A.D.2d 405, 385 N.Y.S.2d 811, 813 (3d Dept. 1976).

(58) *Zuckerman v. New York Bd. Of Parole* 53 A.D.2d 405, 385 N.Y.S.2d 811, 813 (3d Dept. 1976).

(59) Toby Mendel, *Freedom of Information: A Comparative Legal Survey*, (2<sup>nd</sup> edition, UNESCO, 2008), at p. 30.

government, for instant to prevent embracement to the government<sup>(60)</sup>.

### Refusal and appeals

If the applicant who has been denied access wishes to file a grievance, he/she must submit it within the period specified by the law, which is sixty days from the date the applicant knew of the rejection of his/her application or from the date of the expiration of the period specified for reviewing the request<sup>(61)</sup>.

The grievance must include the name of the applicant, date of the request, reference number assigned to the request, date of decision regarding access, and justification for the grievance. Supporting documents must also be attached. The aggrieved will be handed, a written or electronic notice indicating the date of the grievance<sup>(62)</sup>.

Response to the grievance is given within 60 days from date of its receipt, with an explanation of the reasons for the rejection. In case of not responding within this period, the grievance is considered rejected<sup>(63)</sup>.

Three points are worth mentioning at this point. First, the executive regulation does not coincide with the provision of the law. Article 13 of the law provides that in case of not responding within the determined period by law (60 days), the grievance is considered rejected.

This part of the procedure has not been mentioned under the executive regulation. The latter obliged the entity, under articles 5 and 8, to reply to the grieved within 60 days from the date of submission of the grievance.

The entity must give the applicant a notice which serves as a response containing the reason for refusal, specifies the exemption in question and states why the exemption applies. The applicant may want to file a case against the entity because<sup>(64)</sup>, according to Article 13 of the law, the grieved

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(60) The reasons given by the government to justify the restriction must be “relevant and sufficient” and restriction must be “proportionate to aim pursued”, see *Lingens v. Austria*, 8 July 1986, Application No.9815/82, 8 EHRR 407, paras. 39-40 (European Court of Human Rights).

(61) Article 13 of the Right of Access to information law (12 of 2020). Article 5 of the executive regulation

(62) Article 13 of the Right of Access to information law (12 of 2020).

(63) Article 13 of the Right of Access to information law (12 of 2020). Article 5 of the executive regulation

(64) Under the English law P.1 section 17(1) provides that “A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which (a) state that fact, (b) specifies the exemption in question, and (c) states (if that would not otherwise be apparent) why the exemption applies.”

is not allowed to file a case against the entity before it has decided on the grievance application.

Second, 60 days period for the entity to response to the aggrieved person is a long time especially that the applicant had to wait for a period that can reach 90 days. The law must reduce this period to a reasonable time as the entity in question is supposed to have known all about the application initially. Therefore, the entity must promptly notify the grieved of the decision without further delay.

Third, submitting a grievance is not likely to give a greater possibility to overturn the first decision of refusal to obtain information since no independent review of any refusal is available, but the same entity has rejected the application and nothing much can be done by the applicant to convince the entity of the right of access to the required information.

However, entities must realise that since the emerging of the law there is now a general presumption that all information should be made accessible to the applicant except those specifically excluded<sup>(65)</sup>.

Furthermore, the entity has the burden of proving that an information falls within the list under the exclusionary provision<sup>(66)</sup>. Courts in the US have held that law regarding the Right of Access to Information law is to be liberally construed<sup>(67)</sup> and that statutory exemptions, such as Article 12 of the Kuwaiti Law, from disclosure must be narrowly construed to allow maximum access to information<sup>(68)</sup>.

The Council of Europe (COE)<sup>(69)</sup> recommendation contains by far the most

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(65) The UN Special Rapporteur on Freedom of Opinion and Expression adopted in their 2004 Joint Declaration stated that “The right to access information held by public authorities is a fundamental human right which should be given effect at the national level through comprehensive legislation [for example Right of Access to Information Law) based on the principle of maximum disclosure, establishing a presumption that all information is accessible subject only to a narrow system of exceptions.

(66) N.Y. Pub. Off. Law S 89(4)(b) (McKinney Supp. 1984-1985) Available at: <http://www.unhcr.ch/hurricane/hurricane.nsf/0/9A56F80984C8BD5EC1256F6B005C47F0?opendocument>.

(67) See, e.g., *Burke v Yudelson*, 81 Misc. 2d 870, 368 N.Y.S.2d 779, (Sup. Ct. Monroe Cty. 1975), affirmed, 51 A.D.2d 673, 378 N.Y.S.2d 165 (4<sup>th</sup> Dept. 1976).

(68) See, e.g., *Matter of Dwyer*, 85 Misc. 2d 104, 378 N.Y.S.2d 894 (Sup. Ct. N.Y. Cty 1975).

(69) It is an intergovernmental organization currently composed of 47 Member State, devoted to promoting human rights and educational culture. One of its foundation documents is the European Convention for the Protection of Human Rights and Fundamental Freedom (ECHR) which guarantees freedom of expression and information as a fundamental human right.

detail on process, establishing a number of specific standards, including the following:

- Requests should be dealt with by public body which holds the information, on an equal basis with a minimum of formality.
- Applicants should not have to provide reasons for their requests;
- Requests should be dealt with promptly and within established time limits;
- Assistance should be provided “as far as possible”
- Reasons should be given for any refusal to provide access; and Applicants should be given access in the form they prefer, either inspection of the record or provision of a copy.

### **Penalties**

Penalties are an important tool to tackle those entities which willfully conceal information or impede the access to information, in any form including by destroying or flogging records, according to Article 14 incurring a criminal and civil penalty. One may suggest that this law should incur one type of penalties, e.g. a criminal penalty.

However, this might suggest that prosecutions will be very rare. Administrative, civil and criminal penalties would have advantage in addressing the non conformity with the provisions of this law. It is believed that entities with poor conformity should be exposed through annual report on the execution of right of access to information law.

### **Challenges facing the implication of the law**

The government yet has a lot to provide for the proper implementation of the law. The government should encourage sectors and individuals to carryout researches to estimate number of requests under the law and the cost of implementation<sup>(70)</sup>. Collecting some data and reports from governmental sectors are also important to determine information about the number of requests made to each department, the timeliness of response, the initial

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(70) Universities in the UK, for example, conduct research projects to examine the effectiveness of the FOI Act. See, Judy Goodall and Oonagh Gay, Freedom of Information: the first five years, (2010, Parliament and Constitution Centre, p.4.

outcomes of the requests, the use made of each of the exemptions and the number of internal reviews requested and complaints made to the public entities<sup>(71)</sup>.

This is important in order to determine whether it would be difficult for public entity to handle large numbers of requests and complaint, given that the limited number of resources available to some sectors. This would also help to ascertain whether an independent authority, for example, the Information Commissioner's Office in the UK<sup>(72)</sup>, to set up to hold information rights in the public interest, promoting openness by public entities and data privacy for individuals. This is an important aspect of the effectiveness of implication of the legislation.

One of the advantages for an independent authority is to handle matters that prosecutors may not be able to investigate, especially that this is a highly specialized area of law requiring regulatory investigation and enforcement as preferable to the ordinary criminal law.

Given that the implementation of access to information law was not phased in but was instead applied to all public authorities after a month from its entry into force,<sup>(73)</sup> it is suggested that a biannual survey of responses of public bodies and individuals would be a useful starting point to gain momentum for a proper implication of the law. The government has done nothing toward the proper implementation of the law.

Thus, public authorities, researcher, individuals and NGO's are encouraged to send their feed-back in order to keep monitoring and assessing to improve and properly implement the provisions of the law. The Information Commissioner's Office in the UK has created on their website self-assessment toolkit. It is recommended that this toolkit can be used in all the public authorities as it helps them to assess their access to information performance and provide indicators of where efforts should be focused in order to improve. There are reputational and financial benefits from efficient and effective access to information practices<sup>(74)</sup>.

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(71) The Ministry of Justice in the UK publishes quarterly and annual reports with statistics on the number of requests made to central government departments. See, <http://www.justice.gov.uk/publications/freedomofinformationquarterly.htm>

(72) The UK's independent authority. See, [www.ico.org.uk](http://www.ico.org.uk)

(73) It took five years for the UK's Freedom of Information Act 2000 to come into force to allow time for public authorities to implement the act.

(74) See, <https://ico.org.uk/for-organisations/foi-self-assessment-toolkit/>.

### Conclusion

It was argued that the right of access to information is a fundamental human right, guaranteed under international law as an aspect of the right to freedom of expression. The most fundamental principle for the Right of Access to Information Law is the principle of maximum disclosure, which establishes a presumption that all information held by public entity should be subject to disclosure unless there is an overriding public interest justification for non-disclosure.

This principle also implies the introduction of effective mechanisms through which the public can access information, including request driven system as well as proactive publication and dissemination of key material<sup>(75)</sup>. Under the international law, a general guarantee of the right of access to information establishes a general presumption in favor of the disclosure of information held by the public.

In order to achieve that, a system must put in place to give practical effect to the law and interpretation of the provisions of the law which should be construed in the light of the meaning of the international law.

It must be noted that Access of information law in Kuwait has given longer statutory time limit for the entity to respond to the applicants, whereas other jurisdictions provide 10 days for the entity to respond as opposed to a period of time that can be extended to 3 months under the Kuwaiti law. On this it has been said that longer periods of time would contribute to conceiving the right of access to information<sup>(76)</sup>.

The law should make provision for public education and the dissemination of information regarding the right to access information, the scope of information which is available and the manner in which such rights may be exercised. It is doubtful that the prosecutor can handle such activities thus, it is suggested that this can be undertaken both by individual public bodies and a specially designated and adequately funded official body. Either the one which reviews requests for information, or another body established specifically for this purpose.

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(75) Toby Mendel, *Freedom of Information: A Comparative Legal Survey*, (2<sup>nd</sup> edition, UNESCO, 2008), p.1

(76) H. Altaiyqi, *The right to obtain the information: between the constitution and the recommendations of the committees of the parliament*, *The Moroccan Journal for Public Politics*, 2012, 90-103, p. 100

Many rights of access to information laws provide protection from liability for officials who, in good faith, disclose information pursuant to right of access to information law<sup>(77)</sup>. Access to information law in Kuwait is silent and there is no evidence that general law can protect for disclosure of information on good faith.

It is important that access to information related legislations must be reviewed frequently to find out the effectiveness of the provisions of the law and its proper implementation. Generally, the new law should be kept under scrutiny in terms of implementation and effectiveness.

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(77) See Principle of the African Declaration states.

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