Note on the Draft Myanmar National Records and Archives Law

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The government of Myanmar has prepared a draft National Records and Archives Law (draft Law) which was made public around the middle of July 2019. Although the draft Law ostensibly addresses the management of records and transfer of important records to the Archives for safekeeping, it also sets very strict rules for access to those records (i.e. once they have been transferred to the Archives). As such, it has important, and mainly negative, implications for the right of the public to access information held by public authorities, or the right to information. In particular, it would place serious constraints on public access to information stored in the Archives.

Due to its important implications for the right to information, our local partner, Pyi Gyi Khin (PGK), has asked us to prepare a quick analysis of the draft Law. Although we received notice of the draft Law on 19 July, it was only available in Burmese. We have had a quick unofficial translation done and, based on that, this Note on the draft Law has been prepared by the Centre for Law and Democracy (CLD) with the support of International Media Support (IMS), FOJO Media Institute (FOJO) and PGK.

This Note is based on international standards, including international guarantees of the right to information, as well as better national practice in terms of archiving rules. It aims to help interested stakeholders be able to advocate more effectively for changes to the draft Law so as to bring it more fully into line with international standards, in particular those relating to the right to information. It is divided into two main parts, one focusing on the provisions in the draft Law that impact directly on the right to information and one focusing on wider archiving issues.

1. Provisions in the Draft Law Directly Impacting the Right to Information

A number of provisions in the draft Law directly affect the right to information in different ways. These are divided below into rules on secrecy, rules on access, rules on fees, the public interest provisions and rules on taking information abroad.

- Rules in the Draft Law on Secrecy

The key provisions in the draft Law on secrecy are Articles 10 and 11. Article 10 provides that when public authorities hand records over to the Archives (referred to in the draft Law as the Directorate, in reference to its formal title, Directorate of the National Archives), they should consider whether to decrease the security status of those records. That is positive since it somehow recognises that the sensitivity of information declines over time. However, Article 10 goes on to provide that records should be provided to the Archives with one of four levels of classification, namely Top Secret, Secret, Internal Affairs or Restricted. For its part, Article 11 provides that the period of secrecy for these levels of classification shall be, respectively, from the date relevant tasks relating to the records have been "carried out completely", 30 years, 25 years, 20 years and five years. Finally, Article 16 provides that nobody may view or copy any record or archive (defined as records which need to be preserved for a longer time) for which the period of classification has not expired without the official permission of the Director General (of the Archives).

A first concern here is that there is no 'open' category among the list of classification levels. As such, the law seems to operate on the assumption that everything that gets transferred to the Archives would at least be Restricted and therefore classified for five years. This is completely contrary to both common sense – since many documents that are archived are not sensitive at all – and of course the principles behind the right to information which include that there should be a presumption that information is accessible.

A second concern is that there is no definition or description of what the different levels of classification represent. It would thus appear to be entirely up to public authorities to determine how to classify. Once again, this is completely contrary to the principles of the right to information, which mandate that information should be open unless it falls within the scope of a clear and narrow regime of exceptions.

A third concern is that the periods of classification are extremely long. While 30 years is in line with much international practice for Top Secret information (although better practice here is to set shorter periods even for this), periods of 25 years for merely Secret information and 20 years for Internal Affairs information are far too long. Looked at differently, three of the four classification levels are in the top one-third of the maximum time period for classification (i.e. between 20 and 30 years).

A fourth concern is that while it is legitimate to classify information and to have set periods of time that such information is presumed to be sensitive, this should simply serve as an internal instruction to officials to be careful with the information. When a request for the information is made, that request should not be determined on the basis of the classification but, rather, on whether the information falls within the scope of the regime of exceptions. Even ten years is a long time in terms of the sensitivity of information and a document which a public authority thought would be sensitive for 30 years may not in fact be sensitive after ten years. As the rules on access (see below) indicate, no proper provision is made for reassessing sensitivity at the time of a request for information. Indeed, Article 16 suggests that access to such records is at the discretion of the Director General.

Recommendations:

- An open classification, such as Not Classified or Open, should be added to the list of classification levels in Article 10.
- The law should either directly provide definitions of the different levels of classification or require this to be set out in rules. Those definitions should conform to international standards on the right to information, namely that there should be a presumption that information is open and that a confidential classification mark may be added to a record only if its disclosure would pose a risk of harm to one of a limited list of overriding legitimate interests, such as national security or privacy.
- The periods of classification – at least for the Secret and Internal Affairs levels – should be reduced so that the four periods are essentially spread evenly over the maximum period for classification.
- The law should make it clear that, in light of a request for a record, classification of that record should not be the determining consideration. Rather, the sensitivity of the record, in the sense of the harm that would be caused if it were released, should be assessed at the time of the request.

- Rules in the Draft Law on Accessing Information in the Archives

The draft Law contains a number of rules on accessing information held in the Archives. Article 5(f) sets as one of the responsibilities of the Supervisory Committee for the Archives to determine whether anyone may access records and archives which have been secured for a long term (presumably records for which the period of classification is still running). Article 6(j) then sets as one of the responsibilities of the Director General to seek permission from the Chairman of the Supervisory Committee before granting access to secured records and archives. Article 7(e) essentially repeats the standard in Article 6(j) about providing access to records and archives which have secured status only after gaining permission from the Supervisory Committee. Article 13 also provides that researchers may “read and study” secured records if the person in charge of the respective public authority (i.e. presumably the one which provided the record to the Archives in the first place) provides a letter authorising this.

Article 7(d) provides that it is within the power of the Director General to grant access to records and archives which do not have any security limits. Somewhat contradicting Article 7(d), Article 12(a) provides that, even after the classification period has expired, the Archives shall not allow records to be accessed, unless this is necessary (note that the translation is not entirely clear here).

In terms of actually gaining access, Article 12(b) states that to access records and archives at the Archive (for example to copy, extract or excerpt from them), an application must be made on the stipulated form following which the Director General shall give access in accordance with the relevant rules. For its part, Article 14 states that access to records and archives shall only be given if consent has been obtained from the Director General, if the fee has been paid (see below), and if the person seeking access promises to follow the rules in the Printing and Publishing Enterprises Law before printing the record.

It is clear from Articles 5(f), 6(j) and 7(e) that access to records and archives for which the period of classification (as set out in Article 11) has not expired will be at the discretion of the Supervisory Committee (unless, pursuant to Article 13, the relevant public authority has granted permission to a researcher to access the records). No standards are set out in the draft Law for how the Supervisory Committee should exercise that discretion. This is clearly not in line with international standards which, as outlined above, call for access to be given unless that would cause harm to a legitimate interest protected by the regime of exceptions (i.e. such as national security or privacy).

Even when a record is not classified, according to Article 7(d) access shall still be given only at the discretion of the Director General. This is again completely contrary to international standards which require access to be given when information is not sensitive (which is automatically the case for records which are not classified). Similarly, once the period of classification has expired, access should be given as of right unless, through an exceptional process, the period of classification is extended. In other words, there should be a strong presumption of access after classification has expired, whereas the draft Law creates a presumption against access.

The requirement, in Article 12(b), to fill out a form before access may be granted is legitimate as long as the form is easy to fill out and does not require the applicant to provide excessive and irrelevant information. As regards Article 14, we have already noted that the consent of the Director General is not a legitimate approach here. On the fee, see below. The third condition in Article 14, that the person seeking access needs to commit to abide by the rules in the Printing and Publishing Enterprises Law, is completely illegitimate. Printing and publishing enterprises are already covered by that law. There is absolutely no legitimate reason to try to subject others seeking to use the information, even by publishing it, to those rules (just as they are not subjected to those rules for publishing any other information). In other words, there is no reason to apply the rules in the Printing and Publishing Enterprises Law

to people publishing information obtained from the archives when they are not subjected to those rules for publishing any other information.

Recommendations:

- Instead of providing that access to records for which the period of classification has not expired shall be at the discretion of either the Supervisory Committee or the head of the relevant public authority, the law should provide for access to be given unless disclosure of the record would cause harm to a legitimate interest.
- Where records have not been classified, individuals should have a right to access them, rather than this being at the discretion of the Director General.
- Once the period of classification has expired, there should be a strong presumption in favour of access, which may be defeated only through an exceptional process of extending the period of classification, rather than the rule in the draft Law, which creates a presumption against access.
- Article 12(b) should indicate what information may be required to be included on the form for applying for access to information, which should be limited in scope.
- Individuals seeking to publish information obtained from the Archives should not be subjected to the rules in the Printing and Publishing Enterprises Law unless they are printing or publishing enterprises (in which case that Law already applies to them), so Article 14(c) should be removed.

- Rules in the Draft Law on Fees for Accessing Information

According to Article 7(b), the Director General shall fix the fees for "reading and copying" records and archives. Article 7(c) adds that where a person wants to copy records and archives which are capable of being copied at the Archives, this shall be allowed only after they pay the designated copying fee.

According to international standards, fees should be charged only for the cost, if any, of copying and sending information. No fee should be charged simply for reading records at the Archives. It is legitimate for the Director General to set the fees for copying and sending information, but it would be preferable for the legislation to set some ground rules for this, such as that fees are limited to the costs of copying and sending information and that fees need to be reasonable, taking into account market costs for this.

Recommendation:

- The law should limit fees to the costs of copying and sending information (so that reviewing information at the Archives would be free) and require the level of the fee to be reasonable taking into account market costs for these services.

- Rules in the Draft Law Providing for a Public Interest Override

Article 31 of the draft Law provides for a sort of public interest override, stating that the Supervisory Committee shall exempt the application of the rules in the law regarding "the top secret status and confidential status records and archives for the benefit of the State and the Public".

This is positive since it suggests that where this is in the overall State or public interest, the Supervisory Committee should allow access to records for which the period of classification has not yet expired. However, it is not a very precise and clear statement of the public interest override. Also, it is not clear whether the reference to "top secret status and confidential status" refers to all four levels of classification or only the two higher levels. Finally, given how general the public interest is, it would be useful to include a non-exclusive list of some of the types of conditions when this will apply, such as exposing corruption, other forms of wrongdoing or incompetence, criminal behaviour, harm to the environment and so on.

Recommendations:

- Article 31 should state more clearly that the Supervisory Committee should allow access to records where this is in the State or public interest.
- Article 31 should also make it clear that its provisions cover all four levels of classification.
- A non-exclusive list of the types of issues covered by the public interest should be added into Article 31.

- Rules in the Draft Law Prohibiting the Taking of Information Abroad

Article 19 provides that no one may take any record or archive out of the country without official permission. This is legitimate if it is limited to the original copy of the record or archive, since that needs to be protected, but it is not legitimate if it refers to a copy of the record or archive.

Recommendation:

- The rule on taking information out of the country should be limited to the original record.

2. Issues in the Draft Law Relating to Archives

This part of the Note covers issues relating to Archives in the draft Law. The comments here are more general in nature given that this does not affect the right to information as directly as the provisions reviewed in the previous section.

- Mixing up of the Terms 'Records' and 'Archives'

Article 2 of the draft Law carefully defines ‘records’ to cover all means of recording information (documents, maps, photographs, electronic records and so on) and then ‘archives’ to represent those records which “have to be preserved for a long term”. Presumably the intention is for the term ‘records’ to cover everything that public authorities hold and for the term ‘archives’ to cover only those records that need to be preserved in the Archives (Directorate of National Archives).

Despite this conceptual clarity, the draft Law in fact mixes up these terms, for the most part referring to both of them (i.e. “records and archives”) even when the intention is only to cover records which are maintained in the Archives. To give an example, Article 5(f) refers to the issue of persons accessing “the records and archives which have been secured for a long time”. This doesn’t make sense since if something is secured for a long time it is also preserved for a long time and so, by definition, is an ‘archive’ and not just a general ‘record’. This mixing up of terms creates confusion and undermines the very purpose of defining these two terms differently in the first place.

- Preserving Important Records Held by Private Parties

A number of provisions in the draft Law refer to the idea of obtaining privately held records for the purpose of maintaining them well over a longer period of time in the Archives. Thus, Article 3(b) sets as an objective of the law to collect records held by anyone which concern the national interest and which are to be “handed over from those who possessed them”. Article 5(d) sets as a responsibility of the Supervisory Committee to provide instructions as to whether to “transfer back or buy” records which are “in the hands of a foreign State or any other organisation, which is needed by the State”. Article 6(b) calls on the Director General overall to “negotiate to be able to hand over the records” possessed by private parties, “in order not to lose them”. Article 7(a) is a bit clearer, setting as a power of the Director General to “receive or buy” important records held by private parties, in line with the relevant financial rules and regulations. Article 8(c) calls on the Archives to “negotiate” for the transfer of records which are “of national concern” to the Archives.

The idea of maintaining records of national value through preserving them in the Archives is of course a legitimate national interest. However, it is also essential that the government not seek to expropriate private property without appropriate compensation. While some of the provisions noted above seem to suggest that the Archives would need to pay for these records, that is insufficiently clear in others.

It may be noted that in many cases private parties maintain important stocks of records in private collections, whether or not these are open to the public, and that this is perfectly legitimate and also a satisfactory way of preserving them for the future. In other words, it is a mistake to assume that only the public Archives can maintain records of national importance for future generations.

- The Respective Roles of the Archives and Public Authorities

In some places, the draft Law seems to assume that it will make sense to centralise certain activities in the hands of the Archives, which most countries leave to individual public authorities. For example, Article 6(h) sets as a role of the Director General to destroy those records that are to be destroyed after they are no longer needed (and which are not of historical importance). In practice, there is a truly massive volume of such records, since most at least paper records get destroyed, and in most countries this destruction is done by the originating public authority and not the central archives (for which this task would be overwhelming). Of course the Archives may still establish the rules for which sorts of records need to be preserved and it might monitor public authorities to make sure they are applying the rules properly.

Articles 9(a)(1) and (4) deal with the issue of records over time. The former provides that records which have been kept for ten years either need to be destroyed or handed over to the Archives. The latter calls for the Archives to check any records which are still being used at their originating public authorities after ten years and, if they are to be preserved longer-term, for the Archives to set rules for their preservation at the originating public authorities. Once again, it is questionable whether this is necessary. In most countries, the rules leave it up to public authorities to decide when to transfer records to the Archives and to maintain those records in the interim, even if this is longer than ten years.

- Mandatory Transfer of Records to the Archives

Article 9(a)(6) of the draft Law provides for the transfer of three copies of each, among other things, “daily news broadcast, the recorded video clips” to the Archives. It is not clear which videos need to be transferred. Presumably the daily news would cover broadcasters registered in Myanmar while other “video clips” would be limited to those produced by public authorities. In any case this represents an enormous volume of material. Even assuming this is to be transferred in electronic format, because presumably it would not exist in any other format, the storage capacity required to retain all of this information is vast. It is also unclear why, for electronic material, more than one copy would be required.

Recommendations:

- The use of the terms ‘records’ and ‘archives’ in the draft Law should be carefully reviewed and when the intention is to refer only to those documents that are maintained in the Archives, only the term ‘archives’ should be used.
- The rules on preserving important records held by private parties should make it absolutely clear that the Archives can only obtain these records on a voluntary basis from private parties either by agreeing on a price to purchase them or by having private parties willingly donate them to the Archives. Consideration should also be given to recognising the potential importance of private collections in maintaining records of national importance.
- Articles 6(h) and 9(a)(1) and (4) should be reconsidered in favour of an approach which places more control, and trust, in individual public

authorities to determine the destruction and transfer of records, among other things to avoid overloading the Archives with work that it may not be able to handle.

- Consideration should be given to amending the rule in Article 9(a)(6) of the draft Law at least to require only one copy of electronic records to be transferred to the Archives and to clarify in a relatively narrow way what video clips needed to be transferred.