

## **Room for Improvement: The Case for Amending the *Freedom of Information Act 2002***

*“In a government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can be but few secrets. The people of this country have a right to know every act; everything that is done is a public way, by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearings.”*

*Raj Narain v State of U.P*  
Supreme Court of India

### **The Importance of the Right to Information**

For a relatively small cost and investment of time, the entrenchment of an effective access to information regime can empower people to more meaningfully engage in development and democratic processes. It also increases government transparency, reduces corruption, and supports economic growth and increased investment.

All Members of Parliament would do well to support the enactment and implementation of an effective right to information regime. Support for the entrenchment of a right, which is so beneficial for the common person, will reflect positively on MPs and increase their standing with voters.

Ensuring easier access to information is also very useful for MPs themselves. Experience in other countries shows that MPs have been active in utilising the law to access information from Ministries and public agencies which has been used to inform policy papers, media articles and to ask and answer questions in Parliament.

### **State of the Right to Information in India Today**

The Supreme Court has recognised the constitutionality of the people’s fundamental right to access information from government bodies in a number of cases. Consequently, nine states in India have now enacted right to information legislation. At the national level, the *Freedom of Information Act 2002* was passed by Parliament in December 2002 and received Presidential assent in January 2003. To date however, the Act has not been brought into force. In any case the Central Act needs substantial amendment to bring it into line with international best practice regarding right to information legislation.

It is positive that the newly elected United Progressive Alliance Government has put the issue of effective right to information legislation back on the policy agenda. The Government’s Common Minimum Programme specifically states: “The Right to Information Act [sic] will be made more progressive, participatory and meaningful” and this has been endorsed by the President of India.

### **Amending the Central Act**

It is anticipated that, rather than developing an entirely new law, the Government will likely attempt to amend the current *Freedom of Information Act 2002*. Below is a list of our key recommendations for your consideration: Below, is a list of key issues for consideration by legislators when developing and/or reviewing any amendments to the Central law:

### Constitutional issues

- Clarify the interaction between the central law on rights to information and state laws. Will the Central Act override all state laws or can centre and state laws operate concurrently?
- Clarify the constitutionality of the current exemptions taking into account that fundamental rights under the Constitution can only be limited in accordance with limits listed in the Constitution.

### Broaden Coverage

- Make the Act explicitly applicable to all arms of government – the Executive, legislature and judiciary. The exemptions provisions will ensure that any sensitive information held by these bodies will still be protected from disclosure;
- Extend the scope of the Act to cover “bodies which undertake public functions on behalf of the Government” and “private bodies where access is necessary for the exercise or protection of any right”. These amendments recognise that in this age of increased privatisation and outsourcing of government activities, the private sector has increasing influence and impact on the public and should therefore not be beyond their scrutiny;
- Enable the Act to be utilised by non-citizens. The right to information is a fundamental right under the Constitution under Articles 19 and 21 and said rights belong to all people;

### Tighten Exemptions

The design of the exemptions regime is crucial to ensuring that in practice the Act works effectively to ensure maximum disclosure of information to the public.

- In the event that the current exemptions are constitutionally valid:
  - (a) Delete all exemptions for agencies/classes of documents. Such broad exemptions do not accord with international best practice which requires that exemptions are tightly drawn; and
  - (b) Review the remaining exemptions to ensure they:
    - (i) Protect only legitimate public interests; and
    - (ii) Adopt a sufficiently high threshold of harm to justify non-disclosure (ie. it is not enough, for example, for information to *relate* to national security; disclosure should also be likely to cause *substantial prejudice* to national security)
- Include a new public interest override provision which covers all exemptions. This should require that information subject to an exemption must still be released if the public interest in disclosure outweighs the public interest non-disclosure.

### Establish Independent Appeals Regime

The Act's failure to include an independent appeals regime is one of its most serious deficiencies. The entire appeals regime should be overhauled.

- Delete the requirement for two internal appeals. One internal appeal can serve as a cost-effective way for the government to verify its own decisions. However, there is no need for a second internal appeal, which would simply increase the bureaucracy's administrative burden and increase costs.
- In accordance with best practice, substantially amended the appeals provisions to include the establishment of a dedicated Information Commission with a comprehensive mandate to review refusals to disclose information and other procedural matters, compel release and impose sanctions for non-compliance. The Information Commission should have full investigatory powers and their decisions should be binding.

- Remove the bar against appeals to the courts. The courts will always have jurisdiction over cases regarding fundamental constitutional rights, such as the right to information.

#### Include Penalties

- Include offences and penalty provisions, including for unreasonable delay in processing requests, unjustifiable withholding of information, obstruction of the appeals process, non-compliance with appeal decisions, destruction of records and knowing provision of incorrect information. Good lessons can be learned from the Indian states with right to information laws.
- Penalties must be sufficiently large to act as a deterrent and should be able to be imposed on individual officers, including heads of department, rather than just the organisation itself. Without personalised penalty provisions, many public officials may shirk their duties, safe in the knowledge that their employer will suffer the consequences, rather than themselves.

#### Ensure Simple and Cheap Access Procedures

- Make it explicit that no reason needs to be provided for requesting information;
- Clarify that PIOs must be appointed at the panchayat, district, taluka and block levels;
- Clarify that applications can be made in any Indian languages and that information can be accessed in official languages, at least where translation is considered in the public interest;
- Reduce the time limits for disposing of applications to 15 days
- Include a deeming provision so that where time limits are ignored, inaction is 'deemed' a refusal and appeals mechanisms can then be invoked;
- Amend the fees regime to:
  - (a) to require no fees to be paid for applications;
  - (b) impose fees, if any, only to cover reproduction costs, up to a limit, and not for search time;
  - (c) allow for fees to be waived in the public interest or where financial hardship would occur.

#### Amend Inconsistent Legislation

- Amend the Official Secrets Act and other laws or civil services rules which entrench secrecy. Allowing contradictory provisions to remain on the books may cause confusion for officials responsible for implementing the law.

#### Support Effective Implementation

- Include a specific date for implementation, preferably immediately but no more than one year, if additional time is genuinely needed to prepare the bureaucracy;
- Include provisions mandating a body to monitor implementation of the Act, actively promote the concept of open governance and the right to information and to provide training and education to the bureaucracy and the public.

#### Broaden Sui Moto Disclosures

- Extend the sui moto disclosure provisions to require the proactive publication of a wider range of information of general relevance to the public and explicitly require that public bodies publish the required information to ensure maximum accessibility by the public;

#### Include Whistleblower Protection

- Include a provision on whistleblowers to protect employees who go outside their employment contracts and/or the law to "blow the whistle" on suspected wrongdoing.

## **The Way Forward**

While it is imperative that an improved right to information law be enacted and implemented as a matter of priority, nonetheless it remains important that the law-making process is participatory and inclusive. This can be done in a variety of ways, for example, by: putting the draft Act on the internet inviting submissions from the public within a set timeframe; convening a representative group of stakeholders with expertise in the area to consider amendments; holding regional public consultations to discuss the Act; and by using the media to raise awareness and keep the public up to date on progress.

MPs, both in Government and in Opposition, are urged to take up this issue in earnest, in the interests of their constituents. As a first step, MPs are encouraged to write to the Government requesting a timetable for development of the law and noting the importance of ensuring public participation in the law-making process. MPs are also asked to draw attention to this important issue in the media as a means of enhancing public engagement with the issue and ensuring that it remains a priority for Parliament.

If MPs want more detailed information about how the Act should be amended, they can contact CHRI, which has prepared a clause by clause analysis of the law included model clauses. It is hoped that with a concerted effort by MPs, a new and improved law that will serve the interests of the public will be passed by Parliament as a priority.

*The Commonwealth Human Rights Initiative (CHRI), an independent, non-partisan, international non-governmental organisation, mandated to ensure the practical realisation of human rights in the countries of the Commonwealth.*