

Central FOI Act To Get Another Look

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We, the people have the right to information about all that the government does, why it does it and how it does it. To have access to information that the Government has created and used to reach its decisions is a fundamental right in any democracy. In India, this right is guaranteed under the Constitution and by statute. That is the theory at least. But the reality is more questionable.

The *Central Freedom of Information Act 2002* has been languishing on the law books for more than 18 months, without being operationalised. Nine states have their own laws, but it is unclear what their status will be if and when the Central Act comes into force. Other states may want to pass similar laws, but are holding back in anticipation of a Central law. Activists are concerned that what is on the books is weak, mean-spirited and insufficient to combat the culture of secrecy which is currently so prevalent in the Indian bureaucracy.

So it is very encouraging that the Congress Party in its election manifesto clearly specified: "All government agencies but particularly those that deal with citizens on a day-to-day basis must operate in a responsive and accountable manner. The Right to Information Act at the Centre will be made more progressive, meaningful and useful to the public". The President reiterated this in a speech to the joint session of Parliament on 7 June 2004, and this commitment has now been captured in the Common Minimum Programme.

However, governments are known for saying one thing to get elected and doing another thing once they are actually in power. The key test now is whether the UPA will stick to its commitments and take action to finally give India the right to information law the people deserve if they are ever to have a chance at meaningfully engaging in their own governance.

It is positive, at least, that the new National Advisory Council, which has been set up to monitor the Government's implementation of the CMP, has already been actively promoting the importance of an improved FOI Act to the Government. The FOI Act was discussed at the first two meetings of the NAC in July. At the same time, activists have been busy telling MPs and bureaucrats what is wrong with the Act and providing recommendations to right it.

At the very least, amendments need to address a number of issues which were left outstanding when the current Act was passed. Firstly, the Government needs to ensure that any Central law does not override good State laws, at least in relation to information on State subjects under the Constitution. States such as Delhi and Maharashtra already have access laws which are being used to good effect by activists. It would be worrying if these laws were undermined by a Central law which provided a narrower right to information.

The Government should also clarify the constitutionality of the provisions which list the types of information which can exempted from disclosure. Exemptions must accord with the limits on fundamental rights which are permissible under the Constitution. At the very least, exemptions given for whole agencies (eg intelligence/security agencies) or classes of documents (eg. Cabinet papers) should be deleted because access should be determined on a case-by-case basis. Overarching the entire regime, a new "public interest override" should be

included which operates so that information subject to an exemption must *still* be released if the public interest in disclosure outweighs the public interest in non-disclosure.

It is essential that the Act be amended to establish an independent appeals mechanism, such as an Information Commission. Throughout the world, independent right to information appeals bodies work – more quickly and cheaply than the courts – to ensure that the Government is not the final judge in its own case. Any independent appeals body should have full investigatory powers and a comprehensive mandate to review refusals, make binding decisions to compel release and impose sanctions. Sanctions should cover offences such as unreasonable delay in processing requests, non-compliance with appeal decisions, destruction of records and knowing provision of incorrect information. Any fines must be sufficiently large to act as a deterrent and should be imposed on individual officers. Without proper penalty provisions, bureaucrats may simply ignore the Act, safe in the knowledge that they cannot be penalised. Consideration should also be given to making the independent body responsible for monitoring implementation and providing training and education on the right to information to the bureaucracy and public.

The Act should be reviewed to ensure that access procedures are simple and cheap. Specifically, Public Information Officers (who are responsible for receiving and processing requests) should be appointed at all administrative levels to ensure maximum accessibility; requests should be able to be made in any of India's recognised languages; time limits for processing applications should be reduced from 30 to 15 days; and any fees which are imposed should cover only actual reproduction costs, up to a limit, and not search time and should be waived in the public interest or where financial hardship would occur.

The Government should also extend the current Act's *suo moto* disclosure provisions to require the proactive publication of a wider range of information of relevance to the public. At the same time, the Official Secrets Act and other laws or civil services rules which entrench secrecy need to be amended and/or repealed. Allowing contradictory provisions to remain on the books may cause confusion for officials responsible for implementing the law.

It is imperative that an improved right to information law be enacted and implemented as a matter of priority. However, the law-making process must be participatory and inclusive, with civil society and the public actively engaged by the Government. If India is to prosper as a democratic nation serving all of its people transparently, accountably and effectively, right to information legislation must be enacted which empowers people to more meaningfully exercise their human rights and engage in their own democracy and development.