

**A critique of the Mozambique
draft Bill on Access to Sources of Information 2004
Submitted by the
Commonwealth Human Rights Initiative, February 2004**

"The great democratising power of information has given us all the chance to effect change and alleviate poverty in ways we cannot even imagine today. Our task, your task...is to make that change real for those in need, wherever they may be. With information on our side, with knowledge a potential for all, the path to poverty can be reversed."
--- Kofi Annan

1. The Mozambique Chapter of the Media Institute of Southern Africa forwarded a copy of the draft Bill on Access to Sources of Information 2004 to the Commonwealth Human Rights Initiative (CHRI) for review and comment.
2. CHRI understands that the copy of the draft Bill which was provided for review is a translation of the original draft Bill, which was written in Portuguese. Notwithstanding the differences between the translated texts of the draft Bill, CHRI's assessment is that the Bill still needs considerable work to bring its provisions in line with best practice standards. The analysis below suggests areas which should be considered again in more detail, as well as providing examples of legislative provisions which could be incorporated into a revised version of the Bill. Taking account of the number of amendments CHRI has recommended, CHRI suggests that any revised draft Bill be distributed again for a second consultation and review.

THE VALUE OF THE RIGHT TO INFORMATION

3. At the outset, it is worth reiterating the benefits of an effective right to information regime:
 - *It strengthens democracy.* The foundation of democracy is an informed constituency that is able to thoughtfully choose its representatives on the basis of the strength of their record and that is able to hold their government accountable for the policies and decisions it promulgates. The right to information has a crucial role in ensuring that citizens are better informed about the people they are electing and their activities while in government. Democracy is enhanced when people meaningfully engage with their institutions of governance and form their judgments on the basis of facts and evidence, rather than just empty promises and meaningless political slogans.
 - *It supports participatory development.* Much of the failure of development strategies to date is attributable to the fact that, for years, they were designed and implemented in a closed environment - between governments and donors and without the involvement of *people*. If governments are obligated to provide information, people can be empowered to more meaningfully determine their own development destinies. They can assess why development strategies have gone askew and press for changes to put development back on track.
 - *It is a proven anti-corruption tool:* In 2003, of the ten countries scoring best in Transparency International's annual Corruption Perceptions Index, no fewer than nine had effective legislation enabling the public to see government files. In contrast, of the ten countries perceived to be the worst in terms of corruption, not even one had a functioning access to information regime. The right to information increases transparency by opening up public and private decision-making processes to scrutiny.
 - *It supports economic development.* The right to information provides crucial support to the market-friendly, good governance principles of transparency and accountability. Markets, like governments, do not function well in secret. Openness encourages a political and economic environment more conducive to the free market tenets of 'perfect information' and 'perfect

competition'. In turn, this results in stronger growth, not least because it encourages greater investor confidence. Economic equity is also conditional upon freely accessible information because a *right* to information ensures that information itself does not become just another commodity that is corralled and cornered by the few for their sole benefit.

- *It helps to reduce conflict.* Democracy and national stability are enhanced by policies of openness which engender greater public trust in their representatives. Importantly, enhancing people's trust in their government goes some way to minimising the likelihood of conflict. Openness and information-sharing contribute to national stability by establishing a two-way dialogue between citizens and the state, reducing distance between government and people and thereby combating feelings of alienation. Systems that enable people to be part of, and personally scrutinise, decision-making processes reduce citizens' feelings of powerlessness and weakens perceptions of exclusion or unfair advantage of one group over another.
4. It is important to recognise in the context of the current law-making exercise that for right to information legislation to be effective, it needs to be respected and 'owned' by both the government and the public. Experience shows that this is most likely where legislation is developed participatorily. Participation in the legislative development process requires that government proactively encourage the involvement of civil society groups and the public broadly. This can be done in a variety of ways, for example, by: convening public meetings to discuss the law; strategically and consistently using the media to raise awareness and keep the public up to date on progress; setting up a committee of stakeholders (including officials and public representatives) to consider and provide recommendations on the development of legislation; and inviting submissions from the public at all stages of legislative drafting.

ANALYSIS OF DRAFT BILL AND SUGGESTIONS FOR IMPROVEMENT

5. While it is necessary to ensure that the public participates in the drafting process to ensure that the final legislation developed is appropriate for the national context, it is generally well-accepted that there are basic minimum standards which all RTI legislation should meet. Chapter 2 of CHRI's Report, *Open Sesame: Looking for the Right to Information in the Commonwealth*¹, provides more detailed discussion of these standards. The critique below draws on this work.²
6. Overall, CHRI's assessment is that, while the draft Bill in its current form contains some useful provisions, it still requires considerable further work if it is to set up a well-functioning access to information regime which implements the right enshrined in s.74(1) of the Constitution. The analysis below critiques the current provisions of the draft Bill as well as suggesting the inclusion of a number of additional provisions based on best practice right to information standards.

Preamble

7. The value of access to information legislation comes from its importance in establishing a framework of open governance. This should be clearly stated in the Preamble and the objectives provisions of the Act, both of which are commonly used to aid the interpretation of subsequent provisions.
8. Currently, the Preamble focuses too heavily on the background to the law and not enough on its purpose and context. In particular, the Press Law does not warrant so much attention. Unlike the relevant Constitutional provisions, the Press Law does not give additional legal weight to the provisions of the Bill and itself may be amended or repealed. Article 1 of the Bill also contains information which would ordinarily be contained in the Preamble.

¹ http://www.humanrightsinitiative.org/publications/chogm/chogm_2003/default.htm

² All references to legislation can be found on CHRI's website at http://www.humanrightsinitiative.org/programs/ai/rti/international/laws_&_papers.htm

Recommendation 1: CHRI recommends that the Preamble be redrafted to more clearly set out the purpose and parameters of the Act. Article 1 of the draft Bill should be incorporated into the new Preamble. The South African *Promotion of Access to Information Act 2000* contains a good example of a fulsome right to information Preamble.³ The draft Sri Lankan *Freedom of Information Bill* could also be drawn on as a model:

WHEREAS there exists a need to foster a culture of transparency and accountability in public authorities by giving effect to the right of freedom of information and thereby actively promote a society in which the people of Sri Lanka have effective access to information to enable them to more fully exercise and protect all their rights:

Chapter 1: General Provisions

9. The objective of the law should be clearly stated. As with the Preamble, objectives clauses are often relied upon to aid interpretation. The objectives clause should evince a clear commitment to the rule of maximum disclosure. There should be a clear presumption in favour of access. A clear intention should be articulated to impose an *obligation* on bodies to disclose information and to confer/reaffirm the *right* of the public to access and receive information. Any person at all should be able to access information, whether a citizen or not. People should not be required to provide a reason for requesting information.

Recommendation 2: The draft Bill currently contains two objectives clauses – Article 2 and Article 4. CHRI recommends that these Articles be combined and that a single objectives clause be drafted which should become Article 1. This clause should be drafted to cover off the issues raised in paragraph 9 above. The clause should further note the decision to include both government and private bodies within the ambit of the law (see paragraphs 11-13 below). Consideration should be given to including an additional proviso expressly stating that the law should be interpreted to facilitate the Act's objectives. Section 3(2) of the Trinidad & Tobago *Freedom of Information Act 1999* provides a good model:

The provisions of this Act shall be interpreted so as to further the object[s] of the Act]...and any discretion conferred by this Act shall be exercised as far as possible so as to facilitate and promote, promptly and at the lowest reasonable cost, the disclosure of information.

10. Currently, the Bill contains no clear statement entrenching a “right” to information. Article 5 at least imposes an obligation on certain bodies to provide information, but there is no mention of a concomitant right vested in all people.

11. The provisions in Chapter I suffer from the fact that, in setting up the parameters of the law, the drafters have used terminology which centres on access to “official sources of information”. Although the term “official sources” is defined in Article 2 to include private sources “whenever the public good is at stake”, CHRI questions the need for such a convoluted definition. This may confuse the public as well as the officials implementing the law. Confusion is exacerbated by Article 5 which currently states that “the bodies and institutions of the Public Administration, public companies, and private entities, whenever the public good is at stake, are obliged to provide written or oral information”. From the structure of the provision, it is not clear whether the test of the public good being at stake applies only when private entities are involved (as Article 2 implies) or covers the entirety of the preceding phrases and applies the test to public bodies as well. If the latter, this would be unjustifiably restrictive. The public should have a right to access information held by public bodies in all cases, except where a legitimate exemption applies.

³ http://www.acts.co.za/Prom_of_Access_to_Info/Index.htm

Recommendation 3: Article 5 should become Article 2 and should be redrafted to actively confer a right to information on the public. Article 5 should be drafted to make it clear that people can access documents from public bodies for any reason whatsoever. Section 11 of the Australian *Freedom of Information Act 1982* provides a useful model:

- (1) *Subject to this Act, every person has a legally enforceable right to obtain access in accordance with this Act to: [insert details of information covered:*
 - (a) *The bodies and institutions of the public administration and public companies (based on current Article 5);*
 - (b) *Private bodies (see Recommendation 4 below)].*...
- (2) *Subject to this Act, a person's right of access is not affected by:*
 - (a) *any reasons the person gives for seeking access; or*
 - (b) *the agency's or Minister's belief as to what are his or her reasons for seeking access.*

12. It is commendable that the draft Bill currently seeks to include private bodies within the ambit of the law. This approach recognises the fact that in this age where privatisation and outsourcing is increasingly being undertaken by governments, the private sector has increasing influence and impact on the public and therefore cannot be beyond their scrutiny. However, the need for the request to relate to an issue where the public good is at stake is a confusing and overly broad requirement. The issue of what comprises the public good is extremely subjective - who will decide?

13. The South African *Promotion of Access to Information Act 2000* is the only right to information legislation in the world which comprehensively deals with access to information from private bodies. Part 3 of the Act considers the issue of the right to information from private bodies in detail. South Africa's legislature has made access dependent on rights being affected. This test, while still broad, has more support in law than the test included in the draft Bill; the issue of rights has often been litigated, with the body of law relating to human rights particularly well-established.

Recommendation 4: Article 5 should more tightly define the parameters of the right to access information from private bodies. Section 50 of the South African *Promotion of Access to Information Act 2000* provides a good model:

- A requester must be given access to any record of a private body if--*
- (a) *that record is required for the exercise or protection of any rights;*
 - (b) *that person complies with the procedural requirements in this Act relating to a request for access to that record; and*
 - (c) *access to that record is not refused in terms of any ground for refusal contemplated in [the Act].*

14. To ensure that maximum disclosure occurs in practice, the definition of what types of information are covered should be drafted broadly. Enshrining a right to access "information" in whatever form it may be held or created, rather than only "records", "documents" or "written or oral material" is preferred, as it allows for the broadest interpretation.

15. Articles 3 and 5 of the draft Bill currently deal with this issue. Article 5 states that bodies covered by the Act are obliged to provide "written or oral information". This could have a restrictive effect on access if interpreted strictly. Article 3(1) is confusingly worded. It appears to cover sources that are only "documental or oral" but then adds the further proviso "whatever their nature". It is not clear how these two phrases will interact in practice. Article 3(2) is unnecessarily restrictive in requiring written sources to be "authentic". Proving authenticity in practice may be very difficult. Further, it is not clear what "authentic" means. Even if so-called non-authentic documents do exist, there is a strong argument that access should anyway be granted to them, on the basis that the public has the right to see such documents in order to scrutinise why in fact such documents were created. Officials can simply provide such documents with a proviso noting that they are "not authentic". Article 3(3) is similarly unnecessarily restrictive in excluding sources of information

which are anonymous. If proper records management systems are in place, the provision should not be necessary because all documents will be traceable to their source. If the provision is retained, officials wishing to keep information from release may simply remove the author's name and claim it is exempt from disclosure. In any case, the public has a right to scrutinise documents whether their authorship is known or not. The public should be able to decide what credence it gives information which comes from anonymous sources.

Recommendation 5: Taking into account Recommendations 3 and 4 above, CHRI recommends that Article 5, howsoever it is finally worded, not include the words "written or oral" and refer only to information. Articles 3(2) and (3) should be deleted and Article 3(1) redrafted for clarity and to broaden its coverage. Section 2(d) of the Indian *Freedom of Information Act 2002* provides a good model:

"information" means any material in any form relating to the administration, operations or decisions of a[n authority subject to the Act];

16. In accordance with best practice, bodies covered by the Bill should not only have a duty to disclose information upon request, but should also be required to proactively publish and disseminate documents of general relevance to the public, for example, on their structure, norms and functioning, the documents they hold, their finances, activities, any opportunities for consultation and the content of decisions/policies affecting the public. Such proactive disclosure clauses are commonly included in right to information legislation on the basis that the public has a right to automatically be provided with basic information without having to spend their own time and money requesting it.

Recommendation 6: CHRI recommends inclusion of provisions on proactive disclosure. Section 7(1) of the Trinidad & Tobago *Freedom of Information Act 1999* and s.4 of the Indian *Freedom of Information Act 2000* provide good examples:

Trinidad & Tobago: (a) *cause to be published in the Gazette and in a daily newspaper circulating in Trinidad and Tobago [and on their website and to keep copies for inspection at all of their offices] as soon as practicable after the commencement of this Act -*

- (I) *a statement setting out the particulars of the organisation and functions of the public authority, indicating, as far as practicable, the decision-making powers and other powers affecting members of the public that are involved in those functions and particulars of any arrangement that exists for consultation with, or representation by, members of the public in relation to the formulation of policy in, or the administration of, the public authority;*
- (II) *a statement of the categories of documents that are maintained in the possession of the public authority;*
- (III) *a statement of the material that has been prepared by the public authority under this Part for publication or inspection by members of the public, and the places at which as person may inspect or obtain that material;*
- (IV) *a statement listing the literature available by way of subscription services;*
- (V) *a statement of the procedure to be followed by a person when a request for access to a document is made to a public authority;*
- (VI) *a statement specifying the officer responsible within each public authority for the initial receipt of, and action upon, notices under section 10, requests for access to documents under section 13 and applications under section 36;*
- (VII) *a statement listing all boards, councils, committees and other bodies constituted by two or more persons, that are part of, or that have been established for the purpose of advising, the public authority, and whose meetings are open to the public, or the minutes of whose meetings are available for public inspection;*
- (VIII) *if the public authority maintains a library or reading room that is available for public use, a statement of that fact including details of the address and hours of opening of the library or reading room; and*

(b) during the year commencing on 1st January next following the publication, in respect of a public authority, of the statements under paragraph (a) that are the statements first published under that paragraph, and during each succeeding year, cause to be published in the Gazette and in a daily newspaper circulating in Trinidad and Tobago statements bringing up to date the information contained in the previous statements.

India: *(b) publish [widely and in a manner easily accessible to the public]...*

- (i) the particulars of its organisation, functions and duties;*
 - (ii) the powers and duties of its officers and employees and the procedure followed by them in the decision making process;*
 - (iii) the norms set by the public authority for the discharge of its functions;*
 - (iv) rules, regulations, instructions, manuals and other categories of records under its control used by its employees for discharging its functions;*
 - (v) the details of facilities available to citizens for obtaining information; and*
 - (vi) the name, designation and other particulars of the Public Information Officer;*
- (c) publish all relevant facts concerning important decisions and policies that affect the public while announcing such decisions and policies;*
- (d) give reasons for its decisions, whether administrative or quasi-judicial to those affected by such decisions;*
- (e) before initiating any project, publish or communicate to the public generally or to the persons affected or likely to be affected by the project in particular, the facts available to it or to which it has reasonable access which in its opinion should be known to them in the best interests of natural justice and promotion of democratic principles.*

17. In order to support maximum information disclosure, the law should also provide protection for “whistleblowers”, that is, individuals who disclose information in contravention of the law and/or their employment contracts because they believe that such disclosure is in the public interest. Whistleblower protection is based on the premise that individuals should be protected from legal, administrative or employment-related sanctions for releasing information on wrongdoing. The inclusion of strong whistleblower protection is important in order to send a message to the public and officials that the government is serious about opening up to legitimate scrutiny.

Recommendation 7: CHRI recommends that an additional article be included dealing with whistleblower protection. Section 47 of the Article 19 Model FOI Law⁴ provides a good model:

(1) No one may be subject to any legal, administrative or employment-related sanction, regardless of any breach of a legal or employment obligation, for releasing information on wrongdoing, or that which would disclose a serious threat to health, safety or the environment, as long as they acted in good faith and in the reasonable belief that the information was substantially true and disclosed evidence of wrongdoing or a serious threat to health, safety or the environment.

(2) For purposes of sub-section (1), wrongdoing includes the commission of a criminal offence, failure to comply with a legal obligation, a miscarriage of justice, corruption or dishonesty, or serious maladministration regarding a public body.

18. While keeping in mind the overarching principle of maximum disclosure, it is nevertheless well-accepted that there can be a small number of legitimate exemptions in any access regime. Exemptions to the rule of maximum disclosure should be kept to an absolutely minimum and should be narrowly drawn. Broad categories of exemption should be avoided and blanket exemptions for specific positions (eg. the President) or bodies (eg. the Armed Services) should not be permitted; in a modern democracy there is no rational reason why such exemptions should be necessary. The law should require that other legislation be interpreted, as far as possible, in a manner consistent with its provisions.

⁴ <http://www.article19.by/publications/freedominfoaw/>

19. Paragraph 2 of Article 5 currently contains the major exemptions under the Act. Considerable further consideration should be given to these provisions as they are currently much too broadly worded. For example, Article 5 states that the law “does not cover matters the publication of which is forbidden by other legal diplomas”. Such a provision contravenes best practice, which suggests that a right to information law should specifically state that it overrides all other inconsistent legislation. A right to information law should be comprehensive, both in the right it extends and the restrictions it recognises. The list of exemptions should be inclusive and other laws should not be permitted to extend them. If other laws restricting the right are kept on the law books, there will be confusion about which provisions have priority – secrecy or openness. In this instance, Article 5 actually operates to explicitly permit secrecy laws to have overriding effect, which will only serve to undermine the law.

20. The key principle underlying any exemption is that its purpose must be to genuinely protect and promote the public interest. Even where exemptions are included in legislation, they should not apply to documents more than 10 years old. Further, ALL exemptions should be subject to a blanket “public interest override”, whereby a document which falls within the terms of a *general* exemption provision should still be disclosed if the public interest in the *specific* case requires it. The test for exemptions (articulated by Article 19) is in 3 parts:

(i) Is the information covered by a legitimate exemption?

(ii) Will disclosure cause substantial harm?

(iii) Is the likely harm greater than the public interest in disclosure?**Recommendation 8:** CHRI recommends that paragraph 2 of Article 5 be deleted and replaced with a small number of more tightly drawn exemptions, all of which are made subject to a public interest override. Sections 22-31 of the Article 19 Model FOI Law should be considered in this context.

Recommendation 9: CHRI recommends that an additional article be included which explicitly provides that the law will override inconsistent legislation. Section 14 of the Indian *Freedom of Information Act 2002* provides a good model:

Act to have overriding effect

The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in the Official Secrets Act...and any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.

21. Article 6 correctly makes the legal duty to comply with the law the responsibility of the head of the relevant body. Notably however, while Article 6(2) correctly states that those who fail to comply will be held responsible, the provision is weakened by its failure to specify what the penalties will be and who they will be imposed on.

Recommendation 10: CHRI recommends that an additional article be included setting out the penalties regime available to discipline officials failing to comply with the terms of the law. The new article should also specifically state who – the Supreme Mass Media Council, the courts or any other body – can impose the penalty. A number of provisions have been included below for consideration:

- s.12 of the Maharashtra (India) *Right to Information Act 2002*:

(1) *Where any Public Information Officer has without any reasonable cause, failed to supply the information sought, within the period specified...the appellate authority may, in appeal impose a penalty of rupees two hundred fifty, for each day's delay in furnishing the information, after giving such Public Information Officer a reasonable opportunity of being heard.*

(2) *Where it is found in appeal that any Public Information Officer has knowingly given -*
(a) *incorrect or misleading information, or*
(b) *wrong or incomplete information ;*

the appellate authority may impose a penalty not exceeding rupees two thousand, on such Public Information Officer as it thinks appropriate after giving such officer a reasonable opportunity of being heard...

(4) The penalty under sub-sections (1) and (2) as imposed by the appellate authority, shall be recoverable from the salary of the Public Information Officer concerned, or if no salary is drawn, as an arrears of land revenue.

- s.54 of the UK Freedom of Information Act 2000:

(1) If a public authority has failed to comply with [a notice of the appeals body, the appeals body] may certify in writing to the court that the public authority has failed to comply with that notice.

(2) Where a failure to comply is certified under subsection (1), the court may inquire into the matter and, after hearing any witness who may be produced against or on behalf of the public authority, and after hearing any statement that may be offered in defence, deal with the authority as if it had committed a contempt of court.

- s.49 of the Article 19 Model Law:

(3) It is a criminal offence to wilfully: -

- a. obstruct access to any record contrary to this Act;*
- b. obstruct the performance by a public body of a duty under this Act;*
- c. interfere with the work of the [appeals and/or monitoring body]; or*
- d. destroys records without lawful authority.[..or*
- e. conceals or falsifies records.]*

(4) Anyone who commits an offence under sub-section (1) shall be liable on summary conviction to a fine not exceeding [insert appropriate amount] and/or to imprisonment for a period not exceeding two years.

Chapter II: Exercise of the Right

22. A key test of an access law's effectiveness is the ease, inexpensiveness and promptness with which people seeking information are able to obtain it. The law should include clear and uncomplicated procedures that ensure quick responses at affordable fees. Applications should be simple and ensure that the illiterate and/or impecunious are not in practice barred from utilising the law. All public bodies should be required to establish open, accessible internal systems for ensuring the public's right to receive information.

23. The procedural provisions in the draft Bill are relatively thin. Although a basic process for requesting information is set out, the bareness of the provisions are likely to cause difficulties at the implementation stage. Currently, Articles 6, 7 and 9 read together set out the process for applying for and receiving information. In accordance with Article 7, a petitioner is only required to specify the information they wish to receive and identify themselves. It is not clear whether the request must be in writing or can be received orally, nor whether written applications should be hand-delivered, posted or can be sent electronically. It is not clear to whom requesters should send their requests, although Article 6 appears to suggest the head of the relevant body will be the recipient of requests in the first instance. In contrast, many Acts specifically designate that each relevant body will designate an Information Officer who will be responsible for receiving and dealing with information requests in the first instance. (The body's head will still be responsible overall for ensuring the body's compliance with the Act.)

24. The draft Bill also fails to address a number of additional issues commonly covered under the procedural sections of right to information legislation, including:

- Requiring officials to assist requesters with formulating their requests: see for example, sections 18(3) and 19 of the South African *Promotion of Access to Information Act 2000*:

18(3) (a) *An individual who because of illiteracy or a disability is unable to make a request for access to a record of a public body in accordance with section 18(1) [the section dealing with making requests], may make that request orally.*

(b) *The information officer of that body must reduce that oral request to writing in the prescribed form and provide a copy thereof to the requester.*

19 (1) *If a requester informs the information officer of—*

(a) *a public body that he or she wishes to make a request for access to a record of that public body; or*

(b) *a public body...that he or she wishes to make a request for access to a record of another public body,*

the information officer must render such reasonable assistance, free of charge, as is necessary to enable that requester to comply with s.18(1).

(2) *If a requester has made a request for access that does not comply with section 18(1), the information officer concerned may not refuse the request because of that non-compliance unless the information officer has—*

(a) *notified that requester of an intention to refuse the request and stated in the notice:*

(i) *the reasons for the contemplated refusal; and*

(ii) *that the information officer or another official identified by the information officer would assist that requester in order to make the request in a form that would remove the grounds for refusal;*

(b) *given the requester a reasonable opportunity to seek such assistance;*

(c) *as far as reasonably possible, furnished the requester with any information*

(including information about the records, other than information on the basis of which a request for access may or must be refused...held by the body which are relevant to the request) that would assist the making of the request in that form; and

(d) *given the requester a reasonable opportunity to confirm the request or alter it to comply with section 18(1).*

- Requiring bodies to transfer requests, in whole or in part, if the subject matter is dealt with by another body (eg. sections 8 and 7(4) of the Jamaican *Access to Information Act 2002*).

8.—(1) *Where an application is made to a public authority for an official document—*

(a) *which is held by another public authority; or*

(b) *the subject matter of which is more closely connected with the functions of another public authority, the first mentioned public authority shall transfer the application or such part of it as may be appropriate to that other public authority and shall inform the applicant immediately of the transfer.*

(2) *A transfer of an application pursuant to subsection (1) shall be made as soon as practicable but not later than [X] days after the date of receipt of the application.*

7.—(4) *A public authority shall respond to an application as soon as practicable but not later than—*

(a) *[X] days after the date of receipt of the application; or*

(b) *in the case of an application transferred to it by another authority pursuant to section 8, [X] days after the date of the receipt by that authority,*

so, however, that an authority may extend the period of [X] days for a further period, not exceeding [X] days, in any case where there is reasonable cause for such extension.

Recommendation 11: CHRI recommends that further consideration be given to how the request procedures will operate in practice, in particular to address the omissions and ambiguities identified in paragraphs 23-24 above.

25. It is positive that Article 9(1) requires requests to be responded to within 10 days. However, the minimum required content of that response should be set out in the Bill. Ordinarily, positive

responses should advise when, where, how at what cost the requester can access the document. Section 25(2) of the South African *Promotion of Access to Information Act 2000* provides a useful example:

If the request for access is granted, the notice in terms of subsection (1)(b) must state--

- (a) the access fee (if any) to be paid upon access;*
- (b) the form in which access will be given; and*
- (c) that the requester may lodge an [appeal], as the case may be, against the access fee to be paid or the form of access granted, and the procedure (including the period) for lodging the [appeal], as the case may be.*

26. Negative responses should provide details regarding the reason(s) the request has been rejected (so that the applicant has sufficient information upon which to appeal) as well as how the requester can appeal the decision, the time limits and the cost. Section 26 of the Australian *Freedom of Information Act 1982* provides a useful example:

Where, in relation to a request, a decision is made relating to a refusal to grant access to a document in accordance with the request or deferring provision of access to a document, the decision-maker shall cause the applicant to be given notice in writing of the decision, and the notice shall:

- (a) state the findings on any material questions of fact, referring to the material on which those findings were based, and state the reasons for the decision;*
- (b) where the decision relates to a document of an agency, state the name and designation of the person giving the decision; and*
- (c) give to the applicant appropriate information concerning:*
 - (i) his or her rights with respect to review of the decision;*
 - (ii) his or her rights to make a complaint to the Ombudsman in relation to the decision;**and*
 - (iii) the procedure for the exercise of the rights referred to in subparagraphs (i) and (ii); including (where applicable) particulars of the manner in which an application for review under section 54 [dealing with internal reviews] may be made.*

27. The draft Bill does not include any provisions allowing for partial disclosure of information. This option should be provided to ensure that bodies do not deny disclosure if it is at all possible to sever exempt information from a document and release the remainder. Section 10 of the Indian *Freedom of Information Act 2002* provides a useful example:

(1) If a request for access to information is rejected on the ground that it is in relation to information which is exempted from disclosure, then notwithstanding anything contained in this Act, access may be given to that part of the record which does not obtain any information that is exempted from disclosure under this Act and which can reasonably be severed from any part that contains exempted information.

(2) Where access is granted to a part of the record in accordance with sub-section (1), the person making the request shall be informed,--

- (a) that only part of the record requested, after severance of the record containing information which is exempted from disclosure, is being furnished; and*
- (b) of the provisions of the Act under which the severed part is exempted from disclosure.*

Recommendation 12: CHRI recommends that further consideration be given to how the reply procedures will operate in practice, in particular to address the omissions and ambiguities identified in paragraphs 25-27 above.

28. Article 8 sets out the forms of access that are permitted. Article 8(b) allows for the imposition of fees for provision of copies of information. Best practice requires that any fees which are imposed

for gaining access should not be so high as to deter potential applicants. Fees should be limited only to cost recovery, and no charges should be imposed for applications nor for search time. The latter, in particular, could easily result in prohibitive costs and defeat the intent of the law. Section 17 of the Trinidad and Tobago *Freedom of Information Act 1999* and section 11 of the Article 19 Model FOI Law provide useful examples:

Trinidad & Tobago: 17(2) *Where access to an official document is to be given in the form of printed copies, or copies in some other form, such as on tape, disk, film or other material, the applicant shall pay the prescribed fee.*

- (3) *Notwithstanding subsection (2), where a public authority fails to comply with section 15, any access to official documents to which the applicant is entitled pursuant to his request shall be provided free of charge.*
- (4) *Notwithstanding subsection (2), where a public authority fails, to give an applicant access to an official document within seven working days of the payment of the relevant fee pursuant to section 16(1)[c], the applicant shall, in addition to access to the official document requested, be entitled to a refund of the fee paid.*

Article 19: 11(2) *Payment of a fee shall not be required for requests for personal information, and requests in the public interest.*

- (3) *The Minister may, after consultation with the Commissioner, make regulations providing: -*
 - (a) *for the manner in which fees are to be calculated;*
 - (b) *that no fee is to be charged in prescribed cases; and*
 - (c) *that any fee cannot exceed a certain maximum.*

29. Provision should also be made for waiving fees where appropriate. Section 30A of the Australian *Freedom of Information Act 1982* provides a useful example:

- (1) *Where:*
 - (a) *there is, in respect of an application to [a body] requesting access to a document or under subsection 54(1) requesting a review of a decision relating to a document, an application fee (whether or not the fee has been paid); and*
 - (b) *[the body] considers that the fee or a part of the fee should be remitted for any reason, including either of the following reasons:*
 - (i) *the payment of the fee or of the part of the fee would cause or caused financial hardship to the applicant or a person on whose behalf the application was made;*
 - (iii) *the giving of access is in the general public interest or in the interest of a substantial section of the public;*

the agency or Minister may remit the fee or the part of the fee.

Recommendation 13: CHRI recommends that further consideration be given to how access will be granted in practice, in particular, how fees will be levied, to address the omissions identified in paragraphs 28-29 above.

30. It is positive that Article 9(2) deems that an unsatisfactory reply will be treated as if it were a refusal and provides recourse to an independent appeal body, namely the Supreme Mass Media Council (CSCS). To strengthen the appeals regime, Article 9(3) should set a time limit on disposal of appeals by the CSCS. Detail should also be provided regarding the CSCS's powers to investigate in support of their oversight and appeal function. The powers granted to the Canadian Information Commissioner under s.36 of the Canadian *Access to Information Act 1982* provide a good example:

- (1) *The Information Commissioner has, in relation to the carrying out of the investigation of any complaint under this Act, power:*
 - (a) *to summon and enforce the appearance of persons before the Information Commissioner and compel them to give oral or written evidence on oath and to produce such documents and*

things as the Commissioner deems requisite to the full investigation and consideration of the complaint, in the same manner and to the same extent as a superior court of record;

(b) to administer oaths;

(c) to receive and accept such evidence and other information, whether on oath or by affidavit or otherwise, as the Information Commissioner sees fit, whether or not the evidence or information is or would be admissible in a court of law;

(d) to enter any premises occupied by any government institution on satisfying any security requirements of the institution relating to the premises;

(e) to converse in private with any person in any premises entered pursuant to paragraph (d) and otherwise carry out therein such inquiries within the authority of the Information Commissioner under this Act as the Commissioner sees fit; and

(f) to examine or obtain copies of or extracts from books or other records found in any premises entered pursuant to paragraph (d) containing any matter relevant to the investigation.

(2) Notwithstanding any other Act of Parliament or any privilege under the law of evidence, the Information Commissioner may, during the investigation of any complaint under this Act, examine any record to which this Act applies that is under the control of a government institution, and no such record may be withheld from the Commissioner on any grounds.

31. It is positive that Article 9(4) grants the CSCS enforcement powers. Rights needs remedies, and without the ability to compel compliance and impose penalties, the CSCS's ability to discharge its mandate will be weakened. In accordance with Recommendation 10 above, consideration should be given to providing the CSCS with additional enforcement powers. Criminal proceedings are a very serious matter, such that the CSCS could usefully be given the power to impose fine for lesser offences.

Recommendation 14: CHRI recommends that further consideration be given to how the CSCS will perform its investigation and appeals function, taking account of the issues identified in paragraphs 30-31 above.

32. CHRI has not been able to locate information regarding the general mandate and powers of the Administrative Tribunal referred to in Article 9(6). As such, CHRI is not able to comment on the adequacy of the Tribunal's investigative and enforcement powers in terms of discharging its appeals function effectively. Recognising the significant limitations on this analysis, CHRI nevertheless notes that it appears positive that Article 9(6) allows a further appeal to the Administrative Tribunal. This comment is premised on the assumption that that Tribunal is genuinely independent of government interference and empowered to enforce compliance. The key criteria against which the appeals process should be judged is that it should be accessible to all, cheap, procedurally simple and quick.

33. Although it is not strictly necessary to specify that the courts have jurisdiction to adjudicate disputes under the Bill, consideration should be given to including an additional article explicitly stating that recourse to the courts is permissible following the exhaustion of administrative remedies under the Bill.

Recommendation 15: Taking account of the issues in relation to appeals identified in paragraphs 30-31 above in relation to appeals to the CSCS, CHRI recommends that further consideration be given to how the Administrative Tribunal will perform its appeals function within the overall appeals framework set out in the Bill. The Tribunal's practical interaction with the Supreme Mass Media Council should be considered and more clarity provided regarding the role of the Supreme Mass Media Council, the Tribunal and the Courts.

Chapter III: Final Provisions

34. Article 10 should be amended taking into account the comments above, in particular, paragraphs 11 and 19, regarding the use of the phrase “official sources of information” and the need for the Bill to override other inconsistent legislation.

35. Article 11 is satisfactory.

Suggested Additional Provisions

36. The draft Bill does not include a number of provisions commonly included in right to information legislation. The remainder of this analysis suggests a number of extra provisions that should be included in the final Bill to strengthen the overall access regime and enable the regime to operate more effectively in practice. The recommendations are in no particular order. In any case, in the event that the provisions suggested in this analysis are accepted, the structure of the entire Bill should be reconsidered to ensure that the final Bill reads can be sensibly read as a whole.

37. Officials responsible for making decisions regarding disclosure of information may legitimately be concerned that wrong decisions on their parts, that is, decisions which result in the disclosure of information that their superiors believe should not have been released, could result in action being taken against them. Similar concerns could be harboured at an institutional level. In order to encourage openness and guard against this possibility, provisions should be included which protect officials/bodies acting in good faith to discharge their duties under the law.

Recommendation 16: CHRI recommends that an additional article be included to protect officials and the relevant bodies from liability for their actions under the Act. Section 89 of the South African *Promotion of Access to Information Act 2000* and section 38 of the Trinidad and Tobago *Freedom of Information Act 1999* provide good examples:

South Africa: *No person is criminally or civilly liable for anything done in good faith in the exercise or performance or purported exercise or performance of any power or duty in terms of this Act.*

Trinidad & Tobago: *(1) Where access to a document has been given in accordance with the requirements of this Act or in good faith, in the belief that it was required to be given in accordance with this Act, unless malice is proved –*

- (a) no action for defamation, breach of confidence or infringement of copyright may be brought against the public authority or against the responsible Minister, or an officer or employee of the public authority as a result of the giving of access;*
- (b) no action for defamation or breach of confidence may be brought, in respect of any publication involved in the giving of access by the public authority, against –*
 - (I) any person who was the author of the document; or*
 - (II) any person as a result of that person having supplied the document or the information contained in it to the public authority;*
- (c) no person shall be guilty of an offence by reason only of having authorised, or having been involved in the giving of the access.*

(2) The giving of access to a document, including an exempt document, in consequence of a request shall not be taken for the purposes of the law relating to defamation, breach of confidence or copyright, to constitute an authorisation or approval of the publication of the document or its contents by the person to whom access is given.

(3) Nothing in this Act affects any privilege, whether qualified or absolute, which may attach at common law to the publishing of a statement.

38. The huge volume of information in governments’ hands requires that information be carefully managed so that authorities can locate and provide requested information in a timely and efficient way. The key is to ensure a comprehensive framework is in place which is capable of supporting

the objectives of the access legislation. Under s.46, United Kingdom *Freedom of Information Act 2000*, the Lord Chancellor is actually made responsible for developing a Code of Practice or other such regulation to provide guidance to bodies covered by the Act on how to keep, manage and dispose of their records.

Recommendation 17: CHRI recommends that an additional article be included which requires that appropriate record keeping and management systems are in place to ensure the effective implementation of the law. For example, “*Every public body is under an obligation to maintain its records in a manner which facilitates the right to information as provided for in this Act.*” Consideration should also be given to empowering an appropriate body to develop guidelines or a Code on records management.

39. Many laws now include specific provisions empowering a specific body, such as an existing National Human Rights Commission or Ombudsman, to monitor and support the implementation of the Act. They are also usually required to submit annual reports to Parliament and are empowered to make recommendations for consideration by the government on improving implementation of the Act and breaking down cultures of secrecy in practice.

Recommendation 18: CHRI recommends that an additional article be included placing the responsibility on a specific body for monitoring the Act and reporting to Parliament on its efficacy. Sections 38 and 39 of the Canadian *Access to Information Act 1982* and section 40 of the Trinidad & Tobago *Freedom of Information Act 1999* provide useful examples:

Canada: 38. *[Insert name of body] shall, within three months after the termination of each financial year, submit an annual report to Parliament on the activities of the office during that financial year.*

39. (1) *[Insert name of body] may, at any time, make a special report to Parliament referring to and commenting on any matter within the scope of the powers, duties and functions of the [the body] where, in the opinion of [the body], the matter is of such urgency or importance that a report thereon should not be deferred until the time provided for transmission of the next annual report of [the body] under section 38*

Trinidad & Tobago: 40.(1) *The Minister shall, as soon as practicable after the end of each year, prepare a report on the operation of this Act during that year and cause a copy of the report to be laid before each House of the Parliament.*

(2) *Each responsible Minister shall, in relation to the public authorities within his portfolio, furnish to the Minister such information as he requires for the purposes of the preparation of any report under this section and shall comply with any prescribed requirements concerning the furnishing of that information and the keeping of records for the purposes of this section.*

(3) *A report under this section shall include in respect of the year to which the report relates the following:*

- (a) *the number of requests made to each public authority;*
- (b) *the number of decisions that an applicant was not entitled to access to a document pursuant to a request, the provisions of this Act under which these decisions were made and the number of times each provision was invoked;*
- (c) *the number of applications for judicial review of decisions under this Act and the outcome of those applications;*
- (d) *the number of complaints made to the Ombudsman with respect to the operation of this Act and the nature of those complaints;*
- (e) *the number of notices served upon each public authority under section 10(1) and the number of decisions by the public authority which were adverse to the person's claim;*
- (f) *particulars of any disciplinary action taken against any officer in respect of the administration of this Act;*
- (g) *the amount of charges collected by each public authority under this Act;*

- (h) particulars of any reading room or other facility provided by each public authority for use by applicants or members of the public, and the publications, documents or other information regularly on display in that reading room or other facility; and
- (i) any other facts which indicate an effort by public authorities to administer and implement the spirit and intention of this Act.

40. Although not ordinarily included in early forms of right to information legislation, it is increasingly common to include provisions in the law itself mandating a body to promote the Act and the concept of open governance. Such provisions often specifically require that the government ensure that programmes are undertaken to educate the public and the officials responsible for administering the Act.

Recommendation 19: CHRI recommends that an additional article be included placing the responsibility on a specific body for public awareness and training on the Act. Section 20 of the Article 19 Model FOI Law and section 83 of the South African *Promotion of Access to Information Act 2000* provide good models:

Article 19: *Every public body shall ensure the provision of appropriate training for its officials on the right to information and the effective implementation of this Act.*

South Africa: (2) *[Insert name of body], to the extent that financial and other resources are available--*

- (a) *develop and conduct educational programmes to advance the understanding of the public, in particular of disadvantaged communities, of this Act and of how to exercise the rights contemplated in this Act;*
 - (b) *encourage public and private bodies to participate in the development and conduct of programmes referred to in paragraph (a) and to undertake such programmes themselves; and*
 - (c) *promote timely and effective dissemination of accurate information by public bodies about their activities.*
- (3) *[Insert name of body] may--*
- (a) *make recommendations for--*
 - (i) *the development, improvement, modernisation, reform or amendment of this Act or other legislation or common law having a bearing on access to information held by public and private bodies, respectively; and*
 - (ii) *procedures in terms of which public and private bodies make information electronically available;*
 - (b) *monitor the implementation of this Act;*
 - (c) *if reasonably possible, on request, assist any person wishing to exercise a right contemplated in this Act;*
 - (d) *recommend to a public or private body that the body make such changes in the manner in which it administers this Act as [insert name of body] considers advisable;*
 - (e) *train information officers of public bodies;*
 - (f) *consult with and receive reports from public and private bodies on the problems encountered in complying with this Act;*

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