
An analysis of the Uganda draft Access to Information Bill (Bill No 7 of 2004)

**Submitted by the
Commonwealth Human Rights Initiative, May 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. HURINET (Uganda) has forwarded a copy of the draft *Access to Information Bill 2004* to the Commonwealth Human Rights Initiative (CHRI) for review and comment.
2. The Bill has been drafted by the Government of Uganda and was tabled in Parliament on 14 April 2004. CHRI welcomes the opportunity to comment on the Bill. However, we note that with concern that the Bill was not made available to the public for consideration and comment prior to its submission to Parliament. Experience has shown that a participatory law-making process can be a major factor in laying a strong foundation for an effective right to information regime. Implementation is strengthened if right to information laws are 'owned' by both the government and the public. Best practice requires that officials proactively encourage the involvement of civil society groups and the public in the legislative process. This can still be done in a variety of ways, for example, by: setting up a committee of stakeholders (including officials and public representatives) to consider and provide recommendations on the draft Bill; inviting submissions from the public before Parliament votes on the Bill; convening public meetings to discuss the proposed law; and strategically and consistently using the media to raise awareness and keep the public up to date on progress.

THE VALUE OF THE RIGHT TO INFORMATION FOR UGANDA

3. At the outset, it is worth reiterating the benefits of an effective right to information regime:
 - *It strengthens democracy:* The right to access information gives practical meaning to the principles of participatory democracy. The underlying foundation of the democratic tradition rests on the premise of 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 for themselves 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 from opportunity or unfair advantage of one group over another.

ANALYSIS OF DRAFT BILL AND SUGGESTIONS FOR IMPROVEMENT

4. 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 CHRI has suggested amendments, areas for improvement and issues for further consideration.
5. Overall, CHRI's assessment is that the Bill is relatively comprehensive, although there are some key areas which CHRI suggests should be reconsidered; in particular, the scope of the law – that is, the exclusion of private bodies from its provisions - and the breadth of the exemptions.

Memorandum to the Bill

6. The Memorandum and the introductory paragraph to the Bill clearly state that the Bill attempts to give effect to the constitutional right to information in s.41. The extension of constitutional protection to a right is important because it enshrines an absolute minimum standard which cannot be violated by parliament.
7. However, it should be recalled that while constitutional rights cannot be restricted (other than as permitted by the Constitution), they can be extended. Thus, in accordance with Article 41, it would still be legally permissible to develop legislation which covers not only state bodies, but also private bodies (as in South Africa, for example, where private bodies are covered if information is "required for the exercise or protection of any rights"). Likewise, it would be permissible to extend the right to information to non-citizens. Article 41 only requires that, *at a minimum*, "every citizen has a right of access to information in the possession of the State or any other organ or agency of the State".

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

-
8. The parameters of the draft Bill should be reconsidered, with a view to entrenching the principle of maximum disclosure which should be at the heart of the all right to information legislation. In so doing, the drafters should take into account that the Constitution lays down only minimum standards for the right.
 9. Paragraph 7 of the Memorandum and s.3 of the Bill, which both set out the objects of the law, are very good statements of purpose. One small suggestion is that s.3(e) should clarify that the public is entitled to scrutinise all decisions of Government, not only those that affect them.

Part I - Preliminary

10. Section 1(2) gives the Minister power to devise a timetable for implementation of the Act. While a number of jurisdictions have adopted a similar staged implementation approach, best practice has shown that the law should include a maximum time limit for implementation, to ensure that there is no room for the provision to be abused and implementation to be stalled indefinitely. This latter problem has been seen in India where the law is still not in force more than 18 months after it was passed. Experience suggests a maximum limit of 1 year between passage of the law and implementation should be sufficient (see Mexico for a good example).
 11. Section 2(1) fails to clearly make the law applicable to all arms of government - executive, legislative and judicial. It is not clear whether the reference to "other Government organs" is intended to include the judiciary and executive. This problem is compounded by the fact that s.2(2) goes further and specifically includes a blanket exemption for Cabinet and Cabinet Committee records.
 - There is no reason why the executive, and Cabinet and its Committees specifically, should entirely be excluded from the application of the law. The historical exemption of the executive is a hangover from the days of monarchs and dictators. In a properly functioning democracy however, the people have the right to access information about executive decisions and discussions, as with any other arm of government (see paragraph 55 below for further discussion on this point), unless disclosure of such information would prejudice the protection of legitimate interests. Notably, such legitimate interests are protected via the exemptions provisions, such that a broad exemption for entire bodies is unnecessary and unjustifiable.
 - Taking into account the exemptions that have been included in the Bill to ensure that disclosure of information does not prejudice a pending trial, the judiciary can legitimately (and explicitly) be brought within the purview of the law. Notably, it is a matter of public policy that the judicial system and the trial process are kept open to the public. In this context, care must be taken to ensure that the exemptions contained at s.2(2)(b) and (c) do not make unjustifiable inroads into judicial openness and exempt public access to trial/court information to which the public is currently entitled.
 12. It is positive that s.4 defines both "information" and "records". The inclusion of the previous term serves to broaden the application of the law because allowing access to "information" means that applicants are not restricted to accessing only information which is already collated into a "record" at the time of the application. Also, the use of the term "record" can exclude access to items such as videos, models or materials. This can be a serious oversight because it has been shown in many countries that the public's ability to oversee government activities and hold authorities to account, in particular those bodies which deal with construction or road works, is enhanced by allowing them to access samples of materials and the like. Consideration should be given to reworking the current definitions of "information" and "record" to specifically include physical materials and models, such as those used in construction/infrastructure activities.
 13. The definition in s.4 of "public body" does not currently make sense, as it is currently defined to "include a government". This should be amended. The current definition is also unjustifiably narrow. At the very least, access to information laws should cover all bodies controlled by the
-

government. However, best practice indicates that, taking account of the fact that many public services are increasingly being provided by private bodies, the definition of public body should also include bodies substantially funded and/or controlled by the government and private bodies which carry out public functions. This will ensure that the public is not prevented from scrutinising the implementation of key activities simply because they have been outsourced.

14. Furthermore, consideration should be given to extending the scope of the Bill to cover information held by private bodies which is necessary to exercise or protect a person's rights as well. This accords with the best practice, as demonstrated in Africa by Part 3 of the South African *Promotion of Access to Information Act 2000* (POAIA). Private bodies are increasingly exerting significant influence on public policy, and they should not be exempt from public scrutiny simply because of their private status.

Part II – Access to Information and Records

15. Section 5 provides for an unnecessarily restrictive right to information. Currently, the provisions correctly covers information and records, but then limits access to “citizens” who are only entitled to access what is “in the possession of the State or any public body”.

- Taking account of the discussion in paragraph 7 above, consideration should be given simply to allowing all persons, whether citizens, residents or non-citizens, access to information under the law. This best practice approach has been followed in a number of jurisdictions, including America and Sweden, the two countries with the oldest access laws.
- Consideration should also be given to reworking the provision to extend the right to information and records “held by or under the control of”, rather than only “in the possession of”, relevant bodies. The latter formulation is very narrow and may allow bodies to avoid their obligations simply by ensuring that information and records is held by other bodies not covered by the law.
- Paragraphs 13 and 14 above argue for an extension of the right beyond public bodies (as they are currently defined in s.4).

16. It is positive that s.7 sets up a basic framework which requires bodies to proactively publish and disseminate documents of general relevance to 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. Consideration should be given to broadening the current provision however, which only provides for basic information to be proactively provided to the public. Section 7(1) of the Trinidad & Tobago *Freedom of Information Act 1999* and s.4 of the Indian *Freedom of Information Act 2000* provide some ideas:

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.

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;*

17. Sections 7(2) and 8 currently require information to be updated only once every two years. This is quite a long time in terms of the public policy development and implementation cycle, such that information could become considerably outdated. Consideration should be given to reducing this requirement to 6 or a maximum of 12 months.
18. Section 7(3) should be drafted in more fulsome terms to specifically place a duty on bodies to publish the information “in a manner directed towards achieving the law’s objectives”. At a minimum, bodies should publish the required information on their website, if they have one, and make it available for inspection at all the body’s offices.
19. The final line of s.10 currently does not make sense. This provision should be amended for clarity.
20. Section 11, which deals with the form requests must be made in, should be reviewed to ensure that the requirements it places on requesters are not such as to undermine the purpose of the law, namely to ensure maximum access to information by the public. Currently, s.11 places unjustifiable procedural burdens on requesters. Notably, although s.12(2) requires assistance to be provided to requestors whose applications do not comply with s.11 before requests are finally rejected, the fact remains that some of the current requirements in s.11 are unnecessary and should simply be done away with to improve efficiency of the access regime and reduce the administrative burden on officials. For example:
 - S.11(1) requires a request to be “in the prescribed form”. This is an unnecessary requirement. Requiring requesters to submit a specific form may in practice prove an obstacle to access, as some people may not have easy access to said forms, for example because they cannot download it from the internet or because they are not proximate to a government office where they can be obtained. As long as the request meets the further requirement that it is sufficiently detailed for the record or information to be identified, the form of the request should not be an issue.

-
- S.11(1) requires a request to be “in writing” Clarification should be provided as to whether written requests can be submitted electronically (see for example, the UK *Freedom of Information Act 2000*, s.8(2)).
 - S.11(2)(a)(ii) requires the prescribed form to identify the person requesting the information. Although this requirement may be necessary to determine whether third party information can be accessed, it should not be compulsory for all requests, as the identity of the requestor and the reason for their request should not be a relevant consideration. Notably, it is important to note that studies have shown that in some jurisdictions, officials who have known the identity of requestors (for example, the media) have actually accordingly handled requests differently.
 - S.11(2)(b) requires requestors to indicate the form of access they require. While this information may eventually be required, it should not form grounds for rejecting or failing to process a request. Rather, a more appropriate practical alternative is for the default form of access to be inspection, at which point the requestor can advise what other access they may require, if they have not done so already.
 - S.11(2)(e) permits the imposition of a “request fee”. Best practice requires that no fees should be paid for submitting requests, but only at the point of access (if at all). Locating information and determining its sensitivity to disclosure is a routine and expected task of government. As such the cost of processing requests should not, as a matter of policy, be passed on to the public.
21. S.11(1) requires a request to be made “to the public body in control of the record”. The reference to “control” does not accord with current wording of the right to information in s.5 which refers to information and records “in the possession” of relevant bodies. See paragraph 15 above for further discussion on this point. Additionally, s.11(1) should explicitly be made subject to ss.12(4) and 13 which deal with transfers of requests, to ensure that applications are not rejected simply because they are not made to the correct body.
22. Section 12(4) should be moved to sit with s.13 and both provisions reviewed to ensure there is no duplication, as both provisions currently deal with transfers of requests. In this context, at the least:
- Consideration should be given to deleting s.12(4)(a). To ensure certainty for the public and to minimise the risk of public officials shirking their responsibilities, there should be no room for officials to require applicants to redirect their requests. Public officials have access to the internal workings of government and can much more easily ensure effective transfers of requests. Further, if applicants are required themselves to transfer the request, they may also be required to pay a new fee by the new body receiving the request. This problem could be exacerbated if a request for one piece of information needs to be handled by multiple bodies.
 - Consideration should be given to amending the time limit in s.13(2) for determining transfers to 5 working days or 7 ordinary days, to ensure that the overall time limits for processing requests can still be met by those bodies to whom requests are transferred.
23. Section 14(4) is a useful inclusion. However, it is not clear how it will work in practice. Within what time period will an Information Officer be responsible for responding to a request which has previously been denied? How are Information Officers expected to keep track of such rejections and to know when previously lost information is found?
24. Section 15 has not been provided in full and s.16 is missing. From the table of contents it appears that these sections dealt with the essential issues of (i) time limits for responding to requests and (ii) the contents of approval and rejection notices. Unfortunately, it is not possible to analyse these critical provisions. However, at a minimum, it should be noted that best practice requires that :
- Time limits for processing requests should be no more than 30 days.
-

-
- Consideration should be given to including an additional clause requiring applications for information which relate to life and liberty to be responded to within 48 hours. This requirement has been included in s.7(1) of the Indian *Freedom of Information Act 2002* and serves an important role in facilitating timely access to information in cases of extreme urgency.
 - Ordinarily, positive responses should advise when, where, how at what cost the requester can access the document. It appears that s.16(2) currently deals with these issues. Notably, s.25(2) of the South African *Promotion of Access to Information Act 2000* provides a useful model for consideration:

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.*

- 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. It appears that s.16(3) sets out these requirements. However, s.16(3)(c) currently refers only to internal appeals or appeals to the courts, but does not mention appeals to the Inspector-General of Government under Part V. This provision should be reconsidered. Section 26 of the Australian *Freedom of Information Act 1982* provides a useful example on which to model a revised provision:

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.*

25. Section 18 is an extremely useful provision. Experience with implementation of access to information regimes has shown that many officials avoid the application of the law by simply ignoring requests. This provision ensures that inaction will equate to active refusal, thereby allowing appeal provisions to be invoked.

26. Section 20(1) clearly envisages the imposition of access fees. Ideally, no fees should be imposed for accessing information, particularly government information, as costs should already be covered by public taxes. However, if access fees are permitted, consideration should be given to including explicit wording stating that any such fees should be reasonable and should not be so high as to deter potential applicants. Best practice requires that fees should be limited only to cost recovery, and that 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. Consideration should also be given to including in an explicit statement that fees may be waived in certain circumstances. 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;*

(ii) *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.

27. Section 20(2), which deals with forms of access, is very detailed. Notably, while s.20(2)(v) provides a catch-all clause intended to cover any unforeseen forms of access, consideration should be given to revising s.20(2) to take account of the analysis in paragraph 12 above in relation to access to models and materials and other such "information".

28. Section 20(3)(a) inadvertently operates as an exemption provision, as it allows for non-disclosure for reasons of copyright infringement. This issue should be removed from this section and dealt with in Part III: Exemptions.

29. Sections 20(5) and (6) should deal not only with providing for information and/or records in alternative formats to assist people with disabilities, but also in different languages where appropriate. Translations should be permitted and no additional fees incurred by a requestor where a translation is in the public interest.

30. Section 21, which deals with disclosure of medical records, effectively operates as an exemption provision and should therefore be moved to Part III: Exemptions. This is important because Part III is designed to ensure that all exemptions are subject to the public interest override available under s.32. In any case, consideration should be given to simply deleting the provision as the issues it covers are adequately covered by the third party privacy provisions contained in s.24.

31. Section 22 could usefully be made explicitly subject to s.48 which deals with offences and penalties under the law, including tampering, destruction and falsification of records.

32. Section 22 could also usefully be developed to deal more comprehensively with issues of records management and maintenance. 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. Consideration should be given to including an additional provision requiring 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.

Part III – Exemptions from Access

33. 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 absolute minimum and should be narrowly drawn. 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”.

34. Section 32, in particular s.32(b), of the draft Bill is an excellent public interest override provision. It is very positive that the override applies to all of the exemptions in Part IV. This accords with best practice and is to be commended. Consideration could be given to moving s.32 to become the first provision in Part IV, so that the provision clearly overlays the reading of all the provisions that follow.
35. Even with the inclusion of a public interest override it remains important to ensure that the exemptions included in the law are tightly drawn and are the minimum required to protect legitimate interests. Currently, the list of exemptions included in the draft Bill is too long and too detailed. While it is laudable that the draft Bill has attempted to draft the exemptions in detail, presumably to ensure they are not so broad as to encourage misuse, this same detail may well allow lazy, ignorant or overly cautious bureaucrats to automatically exempt a wide range of information simply because it has been specifically mentioned in the law.
36. Section 24 is satisfactory. It is legitimate that third party rights in relation to personal information be balanced against the public’s right to know. Notably, s.24(2)(e), which is specifically designed to ensure that public officials cannot hide themselves from scrutiny by using privacy exemptions, is a positive inclusion.
37. Section 29 attempts to deal with commercial information in which third parties have an interest. Best practice allows for such information to be protected from disclosure in certain circumstances, but the current provision is drafted too broadly.
- S.25(1)(a) is too broad. The definition of “proprietary information” in s.4 is drafted in very wide terms, for example, it includes information relating to any manufacturing process”. It is not justifiable that all such information be automatically exempted, without any additional requirement that disclosure would also result in substantial harm. In any case, s.25(1)(c) (taking into account the analysis below) should be sufficient to cover these interests.
 - The harm test in s.25(1)(b) is too low. Disclosure merely has to “cause harm”. This test should be tightened to require harm to be “serious” or “substantial”. Further, harm currently has to be to “interests or proper functioning” of a public body. This is much too broad – what is an “interest” of a public body? At the very least, harm should be required to be caused to “legitimate public interests”.
 - Similarly, the harm test in s.25(1)(c) is too low. Disclosure must put a third party “at a disadvantage” or “prejudice” a third party. Best practice requires a higher standard of harm, namely, “serious disadvantage” and/or “substantial harm”.
38. Section 26(1)(a) allows for information to be exempt where disclosure would constitute an action for breach of confidence. This provision should be reconsidered as it is currently drafted so broadly that it is open to abuse; public officials keen to keep commercial information secret for corrupt reasons may simply include a clause in government contracts requiring all information relating to the transaction to be kept confidential. Although the public interest override in s.32 provides a good guard against such strategies, it is still of concern that the provision may be used by unscrupulous public officials to undermine the law.
39. Section 27 attempts to protect against disclosures which would result in the endangerment of individuals and/or property. While this is a legitimate aim, the harm test is currently set too low. Consideration should be given to replacing the current “prejudice or impair” test with a requirement that “substantial prejudice or harm” be likely. Furthermore, s.27(b)(i)(cc), (ii)(bb) and (ii)(cc) are currently much too loosely worded and are therefore open to abuse. For example, s.27(b)(i)(cc)

allows information to be exempt where disclosure “is likely to prejudice or impair the security of any other property”. “Any other property” is an incredibly broad phrase. This clause should be deleted.

40. Section 28 is a common inclusion, aimed at protecting information which would prejudice legitimate law enforcement activities. The objective of the section is appropriate, but consideration should be given to redrafting ss.27(1) and (2) to ensure that all of the sub-section apply narrowly to only restrict disclosures that “may substantially prejudice”, “be likely to cause serious harm”, etc to law enforcement activities.
41. Section 30 is a common exemption dealing with disclosures which could affect security or international relations. To accord with international best practice, s.30(1), which sets out the broad parameters of the exemption, should be amended to include an overarching harm test, applicable to all 3 sub-sections, which operates to restrict disclosures that “may substantially prejudice” or “be likely to cause serious harm”. The current harm test, which requires disclosure only to be “likely to prejudice” the stated interests, is too low.
42. Section 30(2) should apply to information covered by the whole Bill and should reduce the maximum exemption time limit from 20 years to 10 years. This accords with international best practice standards.
43. It is of concern that s.30(3), which expands on s.30(1), does not explicitly contain any limiting requirement that disclosure of the information it refers to must be likely to cause serious harm/prejudice. The absence of any such limiting phrases *may* be interpreted by officials to allow the exemption of a record simply because it falls into one of the categories listed in s.30(3)(a)-(h), whether or not disclosure would be likely to be cause substantial harm or serious prejudice. Thus for example, under s.30(3)(b), is a record which relates to the quality of weapons used for the detection of hostile activities automatically exempt? Even if it is not a time of war and the information is necessary to prove corruption in the procurement contract relating to the weapons? A number of the provisions in s.30(3) are also unjustifiably broad. For example, s.30(3)(d)(i) covers information “held for the purposes of intelligence *relating to the defense of Uganda*”. Section 30(3)(h) covers any “diplomatic correspondence...or official correspondence exchanged with diplomatic missions. Under this provision, even routine correspondence which is in now way sensitive, appears to be covered. All of the sub-sections in s.30(3) should be made subject to a harm test to ensure that their scope is appropriately limited.
44. Section 31 should be reconsidered. The provision allows for the exemption of records relating to advice, discussions and deliberations internal to the bureaucracy as well as records of deliberations and decision-making processes. Such an exemption is unjustifiable in a genuinely open democracy and undermines the objective stated at s.3(e), namely to empower the public to effective scrutinise...Government decisions”. Such records contain exactly the type of information that the public *should* be able to access if they are to be able to meaningfully examine government decision-making. It is vital that the public knows what advice and information the Government bases its decisions on and how the Government reaches its conclusions. It is not enough in this context to argue that disclosure of this kind of information would inhibit internal discussions. Officials should be able – and be required – to ensure that their advice can withstand public scrutiny. To fear such transparency raises questions about the soundness of the entire decision-making process. It should also be recalled that the remaining exemptions in Part III operate to ensure that sensitive material is still protected.
45. The only aspect of s.31 which should be retained is the exemption of policy information the premature disclosure of which could frustrate the success of the policy. The State has a legitimate interest in ensuring its policies are not undermined because they are released to the public prematurely. It should be noted though, that this provisions assumes that the information will eventually be disclosed – it is only premature disclosure that is protected. Notably however, sub-

sections (i) and (ii) are unnecessary and should be deleted. The rationale for this provision is not that policies would be frustrated because internal communications would be affected, but simply that prematurely releasing information on a policy could result in its failure, for example, because the market will have time to adjust or because some people will be able to take unfair advantage if they know the policy will soon be implemented.

46. Consideration should be given to including an exemption for information the disclosure of which could cause substantial harm or serious prejudice to the economic interests of the State or the ability of the government to manage the economy of the State. See section 31 of Article 19's Model FOI Law for a useful model.

Part IV: Third Party Intervention

47. Section 33 deals only with third party commercial information. It overlooks the fact that personal privacy rights are also protected by the Bill, such that third parties may need an opportunity to make representations. For example, although privacy rights are generally paramount, if the application of the public interest override suggests that these privacy rights should be overridden in the public interest, the affected third party should be given the chance to respond. Consideration should be given redrafting the provisions in Part IV to cover both personal and commercial third party information.
48. It is not clear how the time limits for representations under s.33(1) and (3)(c) will interact with the time limits in ss.16 and 17 in practice. If third parties must be located and notified within 30 days, and they will then be allowed 20 days to respond, how long will the decision-making process then take? Without access to a copy of s.16, it is not possible to assess whether these issues have been appropriately dealt with. If they have not, consideration may also need to be given to the reworking s.33 and/or s.17.

Part V: Complaint and Appeals

49. It is very positive that the s.35 sets up a regime whereby appeal can be made to the Inspector-General of Government (IGG) under the law. Best practice international standards require that access regimes include an appeals mechanism which is independent of government, as well as cheap, quick and procedurally simple. Notably though, s.35 should clarify that the IGG has jurisdiction over appeals relating to full *and partial* refusals of access, extensions of time limits, and decisions regarding forms of access and fees to be charged.
50. Section 36(1) is unnecessary. Once a complaint is lodged, the IGG should be responsible for determining whether and what investigations need to be made. In fact, consideration should be given to extended s.36 and empowering the IGG to launch investigations on their own motion, where appropriate. This approach has been adopted in Canada.
51. It is positive that s.36(2) grants the IGG the power to determine their own investigation procedures. However, this provision is undermined by s.36(3) which then explicitly prohibits the IGG from conducting hearings in public. The IGG should be empowered to determine this point, taking into account the general prohibition against disclosing information subject to an appeal. Notably, despite s.36(2), the Bill should still set out the parameters of the IGG's investigative powers under the law, in order to ensure that they will not be challenged by bureaucrats during the course of investigations. The powers granted to the Canadian Information Commissioner under s.36 of the *Canadian Access to Information Act 1982* provide a useful model:
- (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.

- 52. Section 37(1)(a) requires a complaint to be lodged in a prescribed form. As noted in paragraph 20 above, such formalities are unnecessary requirement and may in practice prove an obstacle to access, as some people may not have easy access to said forms. As long as the complaint provides the information required by ss.(b)-(c), the form of the request should not be an issue.
- 53. Section 37(1)(d) envisages the imposition of fees for lodgement of complaints. See paragraph 26 above for further discussion on the appropriateness and preferred approach to fees.
- 54. It is positive that s.39(1) sets a time limit for disposing of appeals. However, it is not clear how the third party notification procedure time limits in s.38 will interact with s.39(1) in practice.
- 55. Section 39(2) correctly requires a decision to be notified to all parties. Section 39(2)(d) should be elaborated upon however, and should require notice to include information regarding the appeal process and time limits.
- 56. Section 39(3) fails to satisfactorily detail the decision-making and enforcement powers of the IGG. Later in the draft Bill, section 44 sets out the powers of the Court in relation to appeals. Consideration should be given to providing the IGG with similar powers. At the very least, the IGG should be empowered to impose the penalties permitted under s.48. Provision should also be made for enforcement of the IGG's orders. It is currently not clear what will happen if a body simply ignores the IGG's directions to release a document.
- 57. Consideration should be given to including a "deemed decision" provision within s.39, similar to that in s.18 of the draft Bill, to ensure that if no action is taken on the appeal the complainant will not be restrained from invoking the remaining appeals processes.
- 58. It is very positive that s.40 explicitly permits complainants to appeal to the High Court. Likewise, it is highly commendable that s.42 requires that the High Court be given access to all documents when it is considering an appeal. As noted in paragraph 51 above, the same power should also be granted to the IGG. Likewise, it may be appropriate to replicate ss.42(2) and (3) for the IGG.
- 59. Section 43(3) sets out the burden of proof. For clarity, consideration should be given to simply requiring that the burden of proof is always on the body refusing disclosure and/or otherwise applying the law to justify their decision. It is unfair for members of the public – who would never have seen the document they are requesting– to be forced to carry the burden of proof.
- 60. Section 44 should explicitly empower the Court to impose the penalties detailed in s.48.

Part IV [sic]: Miscellaneous

61. It is very positive that s.45 places an obligation on public bodies to monitor and report annually on the implementation of the law. Consideration should be given to drawing on the best practice of other access regimes and providing more guidance to bodies on the nature of their reporting requirement. Section 40 of the Trinidad & Tobago *Freedom of Information Act 1999* provide a useful example:

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.*

62. It is positive that s.48 creates offences and penalties for non-compliance with the law. Rights need remedies. In reality, without penalty provisions, public authorities may just deny access to information in the first instance, secure in the knowledge that no negative consequences will follow for them if their decision is eventually overturned on appeal. Without the threat of sanctions, recalcitrant public authorities may simply choose to ignore appeal decisions they disagree with. Consideration should be given to strengthening the current provisions however, to ensure that all key offences are covered and that appropriate penalties can be imposed for non-compliance. In relation to the latter, consideration should be given to removing the current maximum limit on the amount of any fines that can be imposed. Corruption – the scourge that access laws assist to tackle – can result in huge windfalls for bureaucrats. The threat of fines and imprisonment can be an important deterrent, but to serve this purpose, they must be large enough to balance out the gains from corrupt practices. As such, the maximum limits in ss.48 and 49(2) should be deleted so that the appeals bodies are left with a discretion to impose a fine appropriate to the offence. In terms of strengthening the offences and penalties provisions more generally, a number of model provisions have been included below for consideration:

- s.49 of the Article 19 Model Law:
 - (1) *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.]
- (2) 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.
- 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 [xxxx], 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 [xxxx], 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:
 - (3) 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.
 - (4) 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.

Suggested Additional Provisions

63. A good access law should include an explicit provision which makes it clear that the new law 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 included in the law should be exhaustive 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. Consideration should be given to including an additional clause 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.

64. 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 law. Consideration should be given to including an additional provision which places the responsibility on a specific body(s) 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;*

For more information or to discuss this paper, please contact:

Ms Charmaine Rodrigues
Right to Information Programme
Commonwealth Human Rights Initiative (New Delhi)
Email: charmaine@humanrightsinitiative.org
Phone: +91-11 2686 4678 / 2685 0523
Fax: +91-11 2686 4688