

Detailed Analysis of Bangladesh draft *Right to Information Bill 200* as drafted by Manusher Jonno

CHRI's Recommendations for Amendments

"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



Submitted by the
Commonwealth Human Rights Initiative
November 2006

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

Mrs Maja Daruwala, Director or Ms Cecelia Burgman, Programme Officer
Right to Information Programme
Commonwealth Human Rights Initiative (New Delhi)
Email: Cecelia@humanrightsinitiative.org
Phone: +91-11 2686 4678 / 2685 0523; Fax: +91-11 2686 4688

Analysis of the Bangladesh draft Right to Information Bill 200

1. The Commonwealth Human Rights Initiative (CHRI) was forwarded a copy of a draft *Right to Information Bill 200* by Manusher Jonno, a Bangladesh non government organization. Manusher Jonno has been working to promote greater awareness amongst the public and legislators about the value of the access to information legislation in civil society networks in Bangladesh. It is understood that the Bill that has been drafted will be presented to Government and its introduction in Parliament will be advocated.
2. CHRI has now analysed the draft Bill, which appears to be modeled closely on the India's *Right to Information Act 2005*. Consequently, this paper has not only critiqued the draft Bill on the basis of international best practice standards (in particular, good legislative models from the Commonwealth), but also draws heavily on interpretation and implementation experiences of the India's *Right to Information Act 2005*. CHRI's analysis suggests areas which could be reconsidered, providing examples of legislative provisions which could be incorporated into a revised version of the Bill, as well as minor drafting changes that may make the Bill easier to read and interpret. Attached is a version of the draft Bill that incorporates all of CHRI's suggestions – both more substantive and minor drafting suggestions.

ANALYSIS OF DRAFT BILL AND SUGGESTIONS FOR IMPROVEMENT

3. 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 right to information 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
4. Overall, CHRI's assessment is that the Bill in its current form is relatively comprehensive and to a large extent includes provisions on par with best practice international standards. Nonetheless, this analysis suggests certain amendments may improve the implementation of the law and better promote the fundamental principles of: maximum disclosure; minimum exceptions; simple, cheap and user-friendly access procedures; independent appeals; strong penalties; and effective monitoring and promotion of access. Most notably, the exemptions sections and the appeals provisions needs to be reworked to ensure they can be implemented effectively in practice.

Preamble

5. The Preamble can be an important tool for the courts when interpreting the operative provisions of the law. It establishes the context of the new law and provides an over-riding statement of the intention of Parliament when they pass the law. Consequently, it is an important opportunity to set out a clear list of the objectives of the Bill. The current Preamble goes a long way to providing a statement of the objectives of the law by recognising the benefits to democracy of a right to information law, that is in preventing corruption, increasing accountability and transparency.
6. However, the Preamble could be drafted to explicitly recognize the standing of the right to information as a fundamental human right in and of itself that should be given primacy, and not simply as a part of the right to freedom of expression. Bangladesh has recognised the right to information as a fundamental human right through its ratification of the International Covenant on Civil and Political Rights and its membership of the United Nations. The Preamble could also state explicitly the two alternative ways the legislation will provide that information to the public – that is, through proactive disclosure and through providing a mechanism for the public to apply for other information. CHRI recommends that the Preamble should avoid noting the possibility for a Public Authority to control and restrict access to information (a power that the Public Authority only has in

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

very limited circumstances) because this clause could be relied upon by resistant bureaucrats to undermine the law when it is being applied in practice.

Recommendations:

- Replace the first paragraph with a statement that explicitly recognises the right to information as a human right in and of itself. For example:
'WHEREAS the right to information is a fundamental human right which will contribute to strengthening democracy, improving governance, increasing public participation, promoting transparency and accountability and reducing corruption.'
- Delete paragraphs 4 and 5 of the current Preamble, which unnecessarily refer to the ability of the Public Authority to control information.
- Insert a paragraph at the end of the Preamble that clarifies the two mechanisms that the law establishes for accessing information. For example:
'NOW THEREFORE this law establishes voluntary and mandatory mechanisms or procedures to give effect to right to information in a manner which enables persons to obtain access to records of Public Authorities, and Private Bodies in a swift, effective, inexpensive and reasonable manner.'

Chapter I – Preliminaries

Section 1 – Short title - Extent - Commencement

7. Section 1(3) provides for the immediate implementation of the Act except for certain specific listed provisions. It is positive that the Act attempts to include a specific timeline for implementation. This is consistent with international best practice which has shown that the Act should leave no room for implementation to be stalled indefinitely. However, the provisions referred to in subsection 1(3) for delayed implementation seem to be incorrectly referenced in the draft Bill – for example, it is not clear why the salaries of Information Commissions will be delayed for 180 days if Information Commissioners will have to work to prepare for implementation?
8. It is also troubling that the list of provisions which only come into force in 180 days is incomplete. Rather than leave this to be filled in by officials, the model Bill should specify all sections which will not be implemented immediately. It would be best to limit the number of sections given a later date for implementation to ensure that the Act has its full and intended effect as soon as possible. However, this needs to be weighed against the need to give agencies sufficient time to prepare for implementation. Notably, the 180 days delay – the equivalent of almost six months – for some provisions to come into force is quite a long delay. However, it may be that government needs time to prepare to implement the law properly. Consideration could be given to phasing in different obligations over different time frames. For example, perhaps Information Commissions could be set up and staffed within a few months, proactive disclosure requirements from section 4 could be implemented within four months, and requests could start being received within six months. This staggered implementation has not been included in our attached suggested draft, as the appropriate time frames for implementation is something you might like to consider further.

Recommendations:

- Reconsider the timeline for implementation of the different provisions in the Bill, for example:
 - Whether it is necessary to wait six months before people can make requests;
 - Whether a delay (eg. two months) should be allowed for the Information Commission to be set up;
 - Whether a delay (eg. four months) should be allowed for Public Authorities or Private Bodies to implement section 4 proactive disclosure requirements.
- Insert a complete and correct (it is not clear whether subsections 5(1) and 14(1) are accurate references) list of provisions which will be subject to delayed implementation.

Section 2 - Definitions

9. The current definition of “Public Authority” is consistent with best practice internationally, as it is relatively broad and attempts to extend coverage of the Act widely. However, the definition could be improved by making it explicit that the Act covers all three arms of government: the executive, legislature and judiciary subject to the exemptions. Consideration should also be given to separating out paragraphs (v) and (vi) and defining them separately as “Private Bodies”, so that in subsequent provisions, a distinction can be made regarding the different obligations on public bodies and Private Bodies, if appropriate. For example, is it expected that Private Bodies will be required to comply with all of the s.4 proactive disclosure requirements in the Bill? This could be very onerous for Private Bodies, especially small companies with few resources. In addition, where Private Bodies are covered by the law, the bodies that should ideally be covered are not only those contracted or owned by Government - but those that are undertaking functions that effect the public’s wellbeing. The principles of transparency and accountability apply whenever the public is being affected.
10. Section 2 defines the term “Right to Information” to provide for how information can be given. However, throughout the draft Bill, most provisions refer to “access to information” not “right to information”. Accordingly, consideration could be given to defining “access” and this term would then make sense in later provisions which allow for “access to information”. Some provisions which currently refer to the “right to information” – most notably, subsection 3(1) – would need to be amended to refer to the “right to access information”.
11. The term “Information Commission” is defined in the draft Bill only in section 12, but it is used in provisions in the Bill before the reader knows anything of the Commission’s role or responsibilities. Therefore, a definition of Information Commission could be included in the section 2 to prevent confusion to a reader who comes across the name of the Commission in section 3.
12. Section 2 defines “third party” to include Public Authorities. However, this is inappropriate considering that Public Authorities are currently defined to include government bodies. One government body should not be considered a third party in respect of another government body to whom an application is directed. They both comprise part of the second party to any application, - namely the Government. It is expected that as a matter of routine public bodies should consult with other Public Authorities as necessary. In practice, this can be quickly and easily done with a simple phone call. Taking into account the recommendation in paragraph 9 above regarding inserting a separate definition of “Private Bodies”, it may be more appropriate to remove the reference to Public Authorities and insert a reference to Private Bodies, who may indeed have third party rights.

Recommendations:

- Amend the definition of “Public Authority” to make it explicit that the law applies to all three arms of government: the executive, legislature and judiciary.
- Separate out paragraphs (v) and (vi) of the definition of “Public Authority”, into a separate definition of “Private Bodies”. Include in the definition of “Private Bodies” all bodies that affect the wellbeing of the public.
- Change the definition of “Right to information” to a definition of “access”, and include the term “access” or “right to access information” throughout the Bill when referring to the actual giving of the information to the public.
- Include a definition of “Information Commission” in the section 2 definitions, which refers to the Commission constituted in section 12 of the Bill.
- Amend the definition of “third party” to remove the reference to other Public Authorities and insert a reference to “Private Bodies”.

Chapter II – Right to Information

Section 3 – Right to information

13. Section 3(1) provides a positive and broad right of every person to information. (Note that in accordance with the recommendation in paragraph 10 above, this provision should be amended to refer to a right to “access” information.) While subsection 3(1) refers to every “person”, the terms “citizen” and “person” are used inconsistently throughout the draft Bill which could lead to confusion about who can access information (for example subsection 3(2) refers to any “citizen” requesting information). The right to information is an internationally recognized individual human right that attaches to an individual, not because of their citizenry of a particular nation, but because of their humanity. There is no reason why non-citizens should be excluded from the purview of the draft Bill, as the exceptions provided would cover any situation in which there is serious danger posed by the dissemination of information. In addition, introducing notions of citizenry would require the person applying for information to prove citizenry – a matter that may be used to exclude the accessibility to the provisions to the marginalized in society who do not necessarily hold evidence of their citizenship. Consequently, any reference to “citizen” throughout the draft Bill should be removed and replaced with “person” to prevent any unintentional narrowing of the scope of the Act.
14. Occasionally, the draft Bill refers to information in a Public Authority’s “possession” rather than information “held by it or under its [a Public Authority’s] control” as in subsection 3(1). The latter phrase has a wider interpretation as the information does not need to be physically in the possession of a Public Authority or Private Body to fall within the ambit of the provisions. This terminology is preferred – as long as the Public Authority or Private Body has the right to gain possession of the information somehow (that is, because it is “held by it or under its control”), then the public should also be able to access it and scrutinise it. All references to “possession” of information in the Bill should be changed to “held by it or under its control”.

Recommendations:

- In accordance with the recommendations in paragraph 10 above, amend subsection 3(1) and all other provisions as necessary to refer to the right to “access information”.
- Ensure that throughout the Bill, the term “person” is used rather than “citizen”.
- Ensure that the Bill refers to information “held by or under the control of” Public Authorities, not information which is in the “possession” of Public Authorities.

Section 4 – Publication of Information by Public Authority or Private Body:

15. Subsection 4(1) requires the publication of various types of information by Public Authorities or Private Bodies at least once every two years. However, in order to ensure that the information is useful it must be current, and as such, needs to be published much more regularly. Additionally, the different categories of information may need updating at different times because some information will change more rapidly than other types. Therefore, at a minimum, all of the information should be updated every 3-6 months. Consideration should also be given to either breaking the list in section 4 up into separate groups of information with separate updating schedules or the Bill could allow that subsidiary regulations can specify shorter timeframes for the updating of certain categories of information.
16. Subsections 4(3) and 4(4) provide for broad dissemination of information, but could be redrafted to improve their ease of implementation. Specifically:
- Subsection 4(4) refers to cost effectiveness as a factor that can be considered when deciding on how to disseminate information. The right to information is held by all in society equally and therefore the only consideration should be that it is effectively distributed to everyone including the illiterate, minority groups and those who are located in rural regions. Ideally, the only considerations that should be made when considering dissemination should be the most effective method of communication and the local language.

- Both subsections and the explanation attempt to clarify what constitutes proper dissemination of information. One way of avoiding duplication would be to define “dissemination” in section 2 broadly (for example, in the same terms as the Explanation) and then simply provide for “wide dissemination” in section 4.

Recommendations:

- Amend section 4 to clarify that information should be updated regularly to ensure it is current:
Information shall be updated at least every 6 months
The Information Commission may make rules to specify shorter intervals in which the Public Authority or Private Body must update the information, taking into account how often the information changes to ensure the information is as current as possible.
- Insert a provision stating that the Information Officer of the Public Authority or Private Body is the custodian of this information.
- Remove the reference to “cost effectiveness” from subsection 4(4).
- Insert a definition of “dissemination” in section 2, in accordance with the wording in the Explanation under subsection 4(4) and then use that term throughout the Bill.
- There are a number of important drafting errors in section 4, specifically:
 - Paragraph 4(1)(k) and paragraph 4(1)(p) refer to the “Public Information Officer”, although in section 2 the defined term is “Information Officer”. The term “Information Officer”, which is a defined term in section 2, should be used.
 - Paragraph 4(1)(k) partly repeats paragraph 4(1)(p) such that the latter should be deleted.
 - Paragraph 4(1)(q) should refer to the “Information Commission” not just the “Commission”.

Section 5 – Duties of Information Officers:

17. Information Officers are crucial to the whole request procedure, as the Bill identifies that they are the person who the public approaches to request access to a document. However, there is no specific provision that mandates the nomination of an Information Officer (though section 2 does define what an Information Officer is). There is also no guidance as to how many or at what level these Information Officers should be designated. In accordance with common practice in other countries, consideration should be given to explicitly requiring each Public Authority or Private Body to clearly designate as many officers as “Information Officers” as are necessary to implement the Act effectively. (However, note that the default position of the head of the Public Authority or Private Body being deemed to be the Information Officer as stated in section 2 should remain in case the Public Authority or Private Body does not comply and designate an Information Officer). The roles and responsibilities of Information Officers could also be clarified in the draft Bill.

18. When drafting provisions relating to the role of Information Officers, consideration will need to be given to whether Information Officers need to be appointed in all offices of a Public Authority or Private Body so that the public will not have to go to the body’s headquarters to submit an application in person. This would be prohibitive for the many people in rural areas who may wish to use the law. It is crucial that people can easily submit and track their applications. Alternatively, Assistant Information Officers could be appointed in all sub-offices to receive applications, provide receipts and pass applications on to Information Officers. The roles and responsibilities of such Assistant Information Officers would need to be specifically dealt with in the Bill.

Section 6 – Procedure for accessing information:

19. In terms of the procedures for making and processing applications, certain issues need to be clarified:

- Subsection 6(1) should clarify that where an oral request is reduced in writing by an Information Officer, the Information Officer should provide the requester with a copy of the request for their records.

- Subsection 6(3) should clarify that where an application is not submitted in person, a written acknowledgement of receipt of the application must be provided within no more than 5 days of receipt of the application by the Public Authority or Private Body.
- Subsection 6(3) refers to including in a receipt reference to “any fees paid” but the provisions never impose a fee for application. Best practice internationally is that application fees are not charged as the information is owned by the people, and they pay for the upkeep and production of that information through their taxes. In addition, at the application stage people are not entirely clear on what information they will be able to access. Therefore, it would be in line with best practice and the underlying principles of the right to information to not charge an application fee and accordingly, sub-section 6(3) needs to be amended to delete the reference to fees.
- Subsection 6(4) should make it explicit that written notification of a transfer needs to be provided within no more than 5 days.

Recommendations:

- Include a specific provision requiring the appointment of Information Officer for all Public Authorities and Private Bodies and clarifying at what level such officers must be appointed. Consideration will need to be given to appointing enough Information Officers to ensure that all the obligations under the Act can be carried out effectively, that is, that requesters can easily submit their applications, receive assistance and be provided with receipts.
- Consider including a sub-section clarifying the duties of Information Officers
Information Officers will be the contact within the Public Authority or Private Body for receiving requests for information, for assisting individuals seeking to obtain information, for processing requests for information, for providing information to requesters, for receiving individual complaints regarding the performance of the Public Authority or Public Body relating to information disclosure and for monitoring implementation and collecting statistics for reporting purposes.
- Amend subsection 6(1) to require applicants to provide written copies of oral requests which are reduced to writing by Information Officers.
- Amend subsection 6(3) to require a written acknowledgement of receipt of the application to be provided within no more than 5 days and to remove the reference to a “receipt for any fees paid” as none are due under the law.
- Amend subsection 6(4) to make it explicit that written notice of a transfer is required within no more than 5 days.

Section 7 – Procedure for providing information:

20. Subsection 7(4) limits the duty to give assistance in accessing information to the sensorily disabled. In order to enable all members of the community access to the information – whether they be illiterate, sensorily disabled or disabled in another manner – it would be ideal to include a broader range of people who will be provided with assistance.
21. The principles underlying the right to information – that the people own the information held by Government, who are custodians of the information – requires that no fees should be imposed for accessing information, particularly government-held information, as costs should already be covered by public taxes. Subsection 7(3) refers to a fee that may be paid for the delivery of the information. Fees are dealt with in later sections also. Ideally, all references to fees should be removed as imposing fees can constrain poorer sections of the community from making an application. However, if the provisions imposing fees are to be kept, an additional subsection could be added stating that where the cost of collecting the fee outweighs the actual fee (for example, where only a few pages of information are requested), fees should be waived.
22. Most access laws also include provisions permitting non-payment of fees in some circumstances. It is recommended that provision be made to allow the waiver of fees where the application is in the public interest, such as where a large group of people would benefit from release/dissemination of

the information, or where the objectives of the Act would otherwise be undermined (for example, because poor people would be otherwise excluded from accessing important information). Such provisions are regularly included in access laws in recognition of the fact that fees may prove a practical obstacle to access in some cases.

Recommendations:

- There are important drafting errors in subsection 7(1), specifically:
 - The reference in subsection 7(1) should be to subsection 6(1).
- Amend subsection 7(4) to require the provision of assistance to the “illiterate” and people who “disabled”.
- Include an additional provision requiring that where the cost of collecting any fee outweighs the actual fee, the fees will be waived.
- Include an additional subsection that requires the waiver of fees where the application for information is in the public interest, such as where a large group of people would benefit from release/dissemination of the information, or where the objectives of the Act would otherwise be undermined.
- Specify that all applicants must receive a notice in writing of a decision on their request within the prescribed time limits, even where their application is approved. Specifically, subsection 7(7) should be amended to specify the content of approval decision notices:
 - Where access is approved, the Information Officer shall give a notice to the applicant informing:*
 - (a) *that access has been approved;*
 - (b) *the details of fees due together with the calculations made to arrive at the amount and requesting the applicant to deposit the fees;*
 - (c) *the form of access provided, including how the applicant can access the information once fees are paid;*
 - (d) *information concerning the applicant’s right with respect to review the decision as to the amount of fees charged or the form of access provided, including the particulars of the appellate authority, time limit, process and any other forms*

Chapter III – Circumstances in which limited information may be withheld

23. The key principle underlying any exemption is that its purpose must be to genuinely protect and promote the public interest. All exemptions should therefore be concerned with whether disclosure would actually cause or be likely to cause harm. Blanket exemptions should not be provided simply because a document is of a certain type – for example, a Cabinet document, or a document belonging to an intelligence agency. The key issue should be whether disclosure would actually cause serious damage to a legitimate interest which deserves to be protected. Even where exemptions are included in legislation, they should not apply to documents more than 10 years old because at that point they should be deemed to be no longer sensitive and thus declassified. In accordance with international best practice, every test for an exemption should be considered 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?

Move section 11 – Public interest disclosure:

24. The inclusion of an overriding requirement that all information that is in the public interest will be disclosed ensures that every case is considered on its individual merits and that public officials cannot just assume that certain documents will always be exempt. It ensures that the “public interest” is always at the core of a right to information regime. It is very positive that section 11 attempts to ensure that the public interest underpins the exemptions regime in Chapter III. However, it might be better to insert section 11 before section 8 to identify to officials and the public its overriding importance. Putting section 11 first will require that the public interest be considered while officials contemplate any exemptions.

25. It is confusing that section 11 states that the “Public Authority” shall give access to information where that is in the public interest. In practice, within the Public Authority, who will be responsible for weighing up the public interest? In line with the framework of the draft Bill, the Information Officer should be identified as being responsible for applying the public interest test. In reality, the Information Officer will likely consult colleagues and superiors before making a decision, at least in complex cases. However, by placing responsibility clearly on an official, the said official can be held accountable, which is important if the law is to be properly applied.

Recommendations:

- Move the section 11 public interest test to sit before the exemptions provisions in order to identify to officials and the public its overriding importance and the necessity for all exemption to be applied within a framework of the public interest.
- Clarify that the Information Officer will be responsible for ensuring that the public interest test is applied when all of the exemptions in section 8 are being considered.

Section 8 – Exemptions from disclosure of information:

26. The exemptions clauses are crucial because they set limits on the range of information which can be accessed. Accordingly, it is essential that they are very tightly drafted and carefully worded, to minimise the chance that they might be misused by obstructive officials. In accordance with best practice, the following changes are suggested to the exemptions clauses in the draft Bill:

- (a) Section 8(1)(a) - The key principle underlying any exemption is that its purpose must be to genuinely protect and promote the public interest. All exemptions should therefore be concerned with whether disclosure would actually cause or be likely to cause harm. In this context, the form of the harm test in s.8(1)(a) “prejudicially affect” should be reviewed because it is arguably too ambiguous and too low a test. Consideration should be given to requiring instead that the disclosure would cause “serious harm”. This test is less open to broad interpretation and abuse.
- (b) Section 8(1)(c) – *Parliamentary Privilege*: It is not clear what the necessity is for this provision because while parliamentary privilege is a recognised Westminster convention, it is not clear how disclosure could undermine said privilege.
- (c) Section 8(1)(d) – *Commercial confidence, trade secrets etc*: Who is the competent authority that will determine that the larger public interest warrants the disclosure of such information? And what considerations are to be made when determining what would harm the competitive position of a third party? In order to minimise the room for the exemption to be used inappropriately, the paragraph could be replaced with a slightly more objectively determined exemption with less room for speculation, for example: “*information including commercial confidence, trade secrets or intellectual property, the disclosure of which would cause unfair or serious detriment to the legitimate commercial or competitive interests of a Public Authority or a third party*”.
- (d) Section 8(1)(e) – *Fiduciary relationship*: This paragraph could be removed. It is hard to imagine a situation in which this type of information, if it should be withheld, could not be withheld by other exemption provisions, such as that of personal information. The broad interpretation of the equivalent section in the Indian law has provided an exemption for much information which on first reading was never envisaged.
- (e) Section 8(1)(f) – *Information from foreign governments*: This paragraph can be deleted because the focus of the exemptions is purely on the fact that the information was provided in confidence, whereas the key issue for any exemption should be whether harm would be caused by disclosure. Just because information was given to the Government of Bangladesh in confidence does not mean that it should necessarily remain confidential. At the time it was communicated it may have been sensitive, but at the time it is requested it may be harmless. Why should disclosure be prevented in such cases? As long as the more general protection which guards against disclosures that would prejudice international relations, is retained, the

relevant interests will be protected. This also reduces the chances that the provision will be abused by corrupt officials who may connive with foreign officials in confidence but then seek to hide their activities using this clause. What if the confidential information that was passed on relates to a corrupt deal undertaken by a previous administration? Is it really legitimate that it be withheld? What harm will it cause the nation – in fact, will it not be of benefit in exposing corrupt dealings and making government more accountable?

- (f) *Section 8(1)(h) – Investigations:* Although police investigations should be protected, paragraph 8(1)(h) is too broadly worded. Currently the paragraph is not limited to investigations, apprehensions, or prosecutions of any particular type and the exemption applies as long as it will ‘impede’ the said vague ‘investigation’. Therefore, the drafting could be narrower and leave less potential room for abuse. Firstly, it should be necessary for the disclosure of the requested information to actually cause (serious or substantial) prejudice to warrant continued secrecy and secondly it should be limited to investigations, apprehensions or prosecutions by a law enforcement agency.
- (g) *Section 8(1)(i) – Cabinet papers:* Section 8(1)(i) is inappropriate because best practice maintains that it is improper to provide exemptions for entire classes of information. While *some* information in *some* Cabinet papers may be sensitive - and on that basis, will be covered by one of the other exemption provisions in the Act - it is not the case that *all* Cabinet papers are *always* sensitive. Most certainly, it is completely unwarranted that papers relating to the deliberations of “Secretaries and other officers” should always be exempt. Furthermore, because there is no guidance in the Act as to what constitutes a “Cabinet paper” for the purpose of this clause, the provision could easily be abused; the Government could simply send politically sensitive documents to Cabinet to deliberately protect them against disclosure. Likewise, individual departments could stamp documents as “Cabinet papers” even if they are never seen by Cabinet but only used for preparation purposes, and on that basis the documents could still be exempted.

Although the proviso in s.8(1)(i) paragraph 2 has been arguably designed to permit the disclosure of some level of Cabinet information, the current wording does not necessarily require that actual “Cabinet papers” are disclosed, but only that decisions are published along with “material on the basis of which the decisions were taken”. Again though, this formulation would still allow preparatory Cabinet papers which were not used in the decision-making process to be withheld.

International best practice does not support such a strict approach to protecting Cabinet information. The appropriate protection for Cabinet documents should be directed at whether premature disclosure would undermine the policy process. Thus, an exemption should only be available to protect information submitted to Cabinet where disclosure would “*seriously frustrate the success of a policy, by premature disclosure of that policy*” (and of course, if it otherwise contained sensitive information covered by another exemption). In recognition of the fact that Cabinet papers are largely time sensitive, it is worth noting that in Wales, Cabinet proactively discloses all minutes, papers and agendas of its meetings within 6 weeks unless there are overriding reasons not to. In Israel, Cabinet decisions are automatically made public on the Prime Minister's Office website.

Notably, while Cabinet papers may well be sensitive, it is completely inappropriate to extend the same level of protection to lower level decision-making such as that of Secretaries and other officers. This is an unjustifiably broad protection which could very easily be abused by officials of all ranks to keep documents secret. This clause in section 8(1)(i) should be deleted.

- (h) *Section 8(1)(j) – Personal privacy:* While it is common to exempt the disclosure of information that would constitute an unwarranted invasion of personal privacy, nonetheless this exemption is too broad. In particular, it is worrying that the section could be misused to permit non-disclosure of information about public officials. It is vital to government accountability that public officials can individually be held to account for their official actions. As such, a new provision should also be inserted in section 27 making it clear that in certain instances privacy rights must still give way to openness.

- (i) *Section 8(1)(k) – Jeopardizes similar information in the future:* This exemption is too broadly worded and could potentially apply all information as a result. How are officials supposed to decide what type of information the exemption should legitimately apply to? If the release of the information affects commercial confidence material or trade secrets etc then it would already be covered by s.8(1)(d). It is not clear why this additional exemption is justified.
- (j) *Section 8(1)(l) – Non-citizens:* As discussed in paragraph 14 above, ideally the law will apply to all people, whether they be citizens of Bangladesh or not. The right to information is an individual's human right, and attaching it to a notion of citizenry can introduce requirements that there be evidence of citizenship and discrimination in respect of visa holders, refugees and other marginalised groups in society who by virtue of their distance from the State do not have access to such identity cards.
- (k) *Subsection 8(2):* It is in line with best practice to provide a time frame in which certain exemptions are no longer valid such as done in this subsection. However, 25 years is a long time and consideration should be given to reducing the time frame. Best practice suggests that perhaps 10 years would be long enough to ensure that information is no longer sensitive. For example, in Ireland certain limited exemptions for Cabinet documents can be released under their *Freedom of Information Act 1997* after 10 years have passed.

Recommendations:

- Amend section 8(1)(a) to require that disclosure would “cause serious harm” not just “prejudicially affect” the relevant interests.
- Delete section 8(1)(c) that exempts information subject to Parliamentary privilege because there is no harm that would be caused by disclosure of such information.
- Amend the wording of section 8(1)(d) to minimize the possibility for abuse, for example by protecting: “*information including commercial confidence, trade secrets or intellectual property, the disclosure of which would cause unfair or serious detriment to the legitimate commercial or competitive interests of a Public Authority or a third party*”.
- Delete section 8(1)(e) or at the very least amend the section to clarify that the Information Officer – not the “competent authority” – must weigh up the public interest.
- Delete section 8(1)(f) that exempts information received from foreign Governments, as this is already protected under section 8(1)(a).
- Amend the wording in section 8(1)(h) to minimize the possibility of an overly broad interpretation, for example, by limiting the exemption to investigations undertaken by law enforcement authorities and to circumstances in which the release of information would actually cause (serious or substantial) prejudice to the investigation.
- Tighten the wording of section 8(1)(i) to protect only genuinely sensitive information by:
 - Rewording the first paragraph to protect only “*papers submitted to Cabinet, where disclosure would seriously frustrate the success of a policy, by premature disclosure of that policy*” and removing all references to deliberations of Secretaries and other officers;
 - Rewording the second paragraph to require that all papers submitted to Cabinet will be automatically disclosed after a decision has been made, unless they are covered by some other exemption.
- Delete section 8(1)(k) that exempts the release of information if it would jeopardize the receipt of similar information in the future.
- Insert an additional clause in section 8(1)(j) to permit disclosure where:
 - (a) *the individual has effectively consented to the disclosure of the information;*
 - (b) *the person making the request is the guardian of the individual, or the next of kin or the executor of the will of a deceased individual;*
 - (c) *the individual has been deceased for more than 20 years; or*
 - (d) *the individual is or was an official of a Public Authority or Private Body and the information relates to any of his or her functions as a public official or relates to an allegation of corruption or*

other wrongdoing.

- Delete section 8(1)(l) that exempts the release of information to non-citizens.
- Amend subsection 8(2) to limit the validity of exemptions to 10 years rather than 25.

Section 10 – Partial Access to Information:

27. International best practice requires that exemptions apply to protect only that information which is genuinely sensitive and whose disclosure would cause harm. While it is positive that section 10 permits the partial disclosure of information where an exemption applies to a record, the provision would be easier to apply in practice if the decision notice required in section 10(2) instead simply cross-referenced the decision-notice requirements in section 7(7)(a). This would mean that in practice, Public Authorities and Private Bodies could develop a template for rejection notices which could be used for complete and partial rejections. This would be easier for officials to use in practice.

Recommendations:

Amend subsection 10(2) to simply cross-reference section 7(7)(a) to ensure consistency and make it easier in practice for officials to handle (partial) rejections of applications.

Chapter IV – Information Commission

28. Best practice supports the establishment of a dedicated Information Commission with a mandate to review refusals to disclose information, compel release and impose sanctions for non-compliance. Experience from a number of Commonwealth jurisdictions, has shown that Information Commission(er)s have been very effective in raising the profile of the right to information and balancing against bureaucratic resistance to openness. It is positive that the draft Bill proposes the establishment of an Information Commission, but nonetheless, a number of changes are suggested to both the structure of the Information Commission and its powers and functions, which are designed to strengthen its practical operations.

Section 12 – Information Commission:

29. Subsection 12(3) refers to the appointment of the Information Commissioners by the President after recommendation by a committee. It is essential that the procedure for appointing members of the Information Commission is impartial and independent of government interference, to ensure that the Information Commission is seen as non-partisan and can act as an independent body. As such, it would be ideal if the committee's candidate was to be approved by Parliament, not just the President. At present, subsection 12(3) provides a list of committee members who will be responsible for the appointment of the Information Commission. It is essential that this committee is independent as possible. Whether this is the case will depend on whether their positions are vulnerable to political influence themselves.

30. To promote public confidence in the Information Commission and to ensure that the people chosen to be on the Information Commission are carefully selected, ideally, the selection process should include some element of public participation. For example, when a list is being drawn up by the bureaucracy of possible candidates for the positions, it should be required that the relevant department also call for nominations from the public. At the very least, any list which is put together by the bureaucracy should also be published at least one month prior to consideration by the selection committee mentioned in subsection 12(3) and the public should be permitted to make submissions to the selection committee on this list. Notably, at a minimum, the list prepared by the bureaucracy should also include a detailed explanation of the reasons for the candidate being nominated, in accordance with agreed criteria.

31. Ideally the Information Commission would consist of a total number of members that is an odd number. In that case, if the whole Commission sits on a case there can be no possibility of a split bench. Therefore section 12(2)(b) could require either four or six other Information Commissioners beside the Chief Information Commissioner.

32. Given the importance of the position of Information Commissioner and in order to ensure a person with the necessary skills and qualifications is nominated, perhaps the qualifications already stated in subsection 12(5) could be made more explicit to ensure that Commissioners are all committed to transparency and accountability in government and have proper expertise to fill the role.
33. Subsection 12(7) provides for headquarters in Dhaka and other offices as approved by Government. However, if the Commission is genuinely to operate independently and autonomously, the requirement for Government approval should be removed to prevent political interference in the Commission's activities. As long as the Information Commission has sufficient funds to set up and maintain an office, the Commission should have the power to choose when and where to open offices in order to more effectively perform their functions. This is an operational decision which should lie with the Information Commission.

Recommendation:

- Amend subsection 12(3) so that the committee's candidates for Information Commissioners must be approved by Parliament, not just the President.
 - Insert a requirement that the selection of the Information Commissioners be chosen via a process which involves public consultations, including by way of requesting nominations from the public and publishing the reasons forwarded by the bureaucracy in support of nominees.
 - Amend paragraph 12(2)(b) to require either four or six other Information Commissioners beside the Chief Information Commissioner.
 - Amend the list of qualifications necessary for an Information Commissioner in subsection 12(5) to ensure at a minimum that they are committed to transparency and accountability in Government, are not tainted in any way by allegations of corruption or criminality, are respected by civil society and have the expertise to do the job, for example:
 - The person appointed as the Information Commissioner or a Deputy Information Commissioner shall:*
 - (a) be publicly regarded as a person of integrity and good repute who can make impartial judgments;*
 - (b) have a demonstrated commitment to good governance, transparency and accountability;*
 - (c) not have any criminal conviction or criminal charge pending and not have been a bankrupt;*
 - (d) have knowledge of the workings of Government;*
 - (e) be otherwise competent and capable of performing the duties of his or her office..*
- In addition, the Information Commissioners should all be citizens.
- Remove the requirement in subsection 12(7) for other offices of the Information Commission to be approved by Government replacing the words "with the previous approval of the Government" with "if the Commission's budget permits".

Section 13 – Terms of Office of Chief Information Commissioner and other Commissioners:

34. Subsection 13(3) refers to an oath set out in a Schedule but this does not appear to have been drafted as yet. It is essential that any oath require the highest standards of public service and a commitment to transparency and accountability.

Recommendation:

Draft an oath for Information Commissioners which requires the highest ethical standards of behaviour.

Section 15 – Employees of Information Commission:

35. For the Information Commission to be truly independent, it is key that it is able to employ its own staff and define their job descriptions, etc. As some other Commissions in South Asia have shown, it can undermine the effectiveness of a Commission if staff are only engaged by seconding public servants. Many may not have the specific skills needed to do the relevant job and/or the necessary commitment. Additionally, in a position where it is of crucial importance that staff are impartial and not biased towards the bureaucracy, it is essential for the Information Commission to have the power to employ staff who are not members of the public service, if they have relevant skills. In

England, the Information Commissioner has the power to set his/her staff service conditions and in states/provinces in Canada and Australia, some Information Commissioners have the power to employ their staff outside the normal public service framework.

Recommendation:

Amend section 15 to require that the Information Commission will have the power to employ its own cadre of staff.

Section 16 – Removal of Information Commissioners:

36. Subsection 16(3) provides a number of circumstances in which the Chief Information Commissioner or the Information Commissioners can be removed from office. Section 16 (3)(d) is already provided for in the provisions that apply to the removal of a Judge of the Supreme Court as referred to in subsection 16(1) and can therefore be removed.

37. It is recommended that the removal of Information Commissioners should not rely on the President's subjective view, so as to remove all political discretion to remove the Information Commissioners from office. Removing references to "in the President's opinion" means that the view as to moral turpitude must be formed reasonably, not just formed by the President. Another option would be to replace references to the President with the appointment committee – that is, that the already formed appointment committee has to form the view the Commissioner is infirm etc.

Recommendations:

- Remove reference to the President in subsection 16(3).
- Remove paragraph 16(3)(d).

Chapter V – Powers and functions of the Information Commission and Appeal

Section 17 – Powers and functions of the Information Commission:

38. Subsections 17(1) to (3) deal with the ability of the Information Commission to receive complaints from individuals and to undertake inquiries (in response to a complaint or as own-motion inquiries). These provisions accord with international best practice, allowing the Information Commission to take action when they suspect a department is not complying with the law or is performing poorly. However, in order to clarify the provisions it might be a good idea to separate out the circumstances in which the Information Commission can undertake an inquiry on individual complaint as opposed to the circumstances in which the individual should appeal a decision through the mechanisms provided. Another aspect of this is that subsection 19(1) also allows an internal appellate authority to hear complaints (that is, internally review the original decision), but it would be best to clarify that this internal review must occur first before it can be appealed to the Information Commission.

39. Subsection 17(3) is a useful provision which allows the Information Commission to examine departmental non-compliance. However, the provisions weakened because it does not state what will happen once the Information Commission has completed its inquiry. A subsection should be added that empowers the Information Commission to submit its findings to Parliament and requiring Parliament or a relevant parliamentary committee to consider any such report.

Recommendations:

- Rename the section "Inquiry".
- Clarify in what circumstances the Information Commission can undertake an inquiry (that is, not in circumstances they will hear an appeal from a decision. The inquiry powers should be limited to circumstances of individual complaint when an internal review and then appeal is not available.
- Amend subsection 17(1) to clarify that complaints must first be submitted to the internal appellate authority and then to the Information Commission.
- Amend subsection 17(3) to require that reports arising out of subsection 17(3) inquiries shall be

submitted to Parliament, and Parliament or a relevant parliamentary committee will be required to consider any such report.

Subsection 17(4) and section 18 – Investigation powers:

40. Both subsection 17(4) and section 18 deal with the powers which the Information Commission has to investigate allegations of non-compliance with the law. Rather than embedding these provisions along with the clauses dealing with the Commission's appeal remit, they would benefit from being separated out into a separate provision.

Recommendation:

Combine subsection 17(4) and section 18 together into a single and separate provision clarifying the investigative powers of the Information Commission.

Subsection 17(5) – Role in developing Rules:

41. While it is positive that the draft Bill attempts to give the Information Commission powers to develop Rules, it is not clear whether the Constitution of Bangladesh permits a body such as the Commission to develop Rules on its own, without Government approval or input. If such an approach is not legally permissible, at a minimum, the draft Bill could still clarify that the Government must consult and collaborate with the Information Commission and the public before tabling any rules under the Act. If the Information Commission has legal standing to develop the rules, then they should also consult the public before the rules are tabled.

Recommendation:

- Separate out subsection 17(5) into its own section.
- Clarify whether the Information Commission can legally develop its own binding rules on issues such as fees or appeals, and if not require that, at a minimum, the Government must consult and collaborate with the Information Commission before tabling any rules under the Act.
- Include a provision requiring the public to be consulted before any such rules are tabled.

Section 19 – Appeal

42. Section 19 appears to largely replicate the appeals provisions in the Indian *Right to Information Act 2005*. Unfortunately, while many of the Indian Act's provisions are good, in practice there have been many problems with the drafting of the appeal provisions which have caused considerable confusion during implementation of the law over the last 12 months. While some of the problems with the drafting may appear minor, in the Indian context, small wording problems have resulted in major national debates. The analysis below attempts to address many of the problems which have occurred in India as a result of similar provisions.

43. Subsection 19(1) establishes a system of internal review by a senior officer in the Public Authority or Private Body. This provision is very basic and needs to be elaborated upon to ensure there is sufficient clarity to enable effective implementation. However, the section requires a number of amendments:

- Currently, it is not clear how the public will identify who the appellate authority is, because the hierarchy in Public Authorities often differs so that it will not always be easy to know who is superior to an Information Officer. It would be more appropriate therefore if the appellate authority were simply stated to be, in all cases, the Head of the Public Authority or Private Body and provisions were included to allow the Head to delegate this authority as necessary. Requesters could then simply address their appeal to the Head of the Public Authority or Private Body, and the Public Authority or Private Body upon receipt of the appeal could then forward it to the specific officer responsible for handling appeals. This would also ensure that a sufficiently senior person was responsible for dealing with appeals.

- It is not clear whether appeal to the Information Commission can only be made after an internal review has occurred or whether the person has the option to go straight to the Information Commission. In India, there has been confusion because the Information Commission can also hear such complaints and activists have argued that requesters can therefore bypass the internal Appellate Authority and go straight to the Information Commission with their complaints. Although administrative law traditionally requires people to exhaust internal review mechanisms before approaching higher tribunals, appeal straight to the Information Commission could be allowed, enabling those who feel they are dealing with hostile Public Authorities or Private Bodies to go straight to an independent arbiter and receive their decision faster. However, this largely defeats the purpose of the internal appeal mechanism. Accordingly, these issues need to be weighed up and section 19 must explicitly clarify whether or not all complaints must be made first to the internal Appellate Authority and then to the Information Commission or not. If so, subsection 17(1) should also be amended to make clear the 2-step process for complaints.
44. Subsection 19(5) replicates a flawed provision in the Indian Act and should be amended. The provision currently specifies a time frame for a decision in relation to appeals under subsections 19(1) and (3). However, the clause is supposed to refer to subsection 19(2) which deals with appeals to the Information Commission *not* subsection 19(3) which deals with third party rights. This was a drafting mistake in the Indian law but has caused major problems in practice.
 45. Subsection 19(5) requires the Information Commission to record its decision in writing, but does not clarify the minimum contents of such a decision notice nor what shall be provided to the requester. In accordance with the standard set for Information Officers in subsection 7(7), subsection 19(5) should be amended or a new section inserted which clarifies that the internal Appellate Authority referred to under subsection 19(1) and the Information Commission must give a written notice of its decision, including reference to relevant exemptions provisions and thorough reasoning, and details of any additional appeal rights.
 46. The Information Commission is empowered to develop its own appeal procedures under subsection 19(10). Experience in India has shown that this can lead to the developing of procedures which do not give the parties the opportunity of a fair hearing or other basic administrative law requirements. To avoid such problems, subsection 19(1) should specify that the Information Commission has the power to decide on appeal procedures, subject to the overriding principles of due process and fair administrative justice.
 47. The draft Bill does not clarify whether there is a further appeal to the courts from decisions of the Information Commission and section 26 explicitly bars such suits. However, the right to information is a fundamental right which underpins all of the other rights in the Bangladesh Constitution and should be justiciable by the Supreme Court. To make this clear an additional section should be included that states that decisions of the Information Commission can be appealed to the Supreme Court.

Recommendations:

- Amend subsection 19(1) to:
 - Require appeals to be sent to the Head of the Public Authority or Private Body, who can then delegate this power as appropriate. The person responsible for handling internal appeals should be called the Appellate Authority;
 - Clarify whether internal review mechanism must be exhausted before appeal to the Information Commission can be made.
- Amend subsection 19(5) to specify that:
 - An appeal under “sub-section (1) or sub-section **(2)**” must be decided within the specified time frames.
 - The subsection 19(1) internal Appellate Authority and the Information Commission must give a written notice of its decision, including reference to relevant exemptions provisions and thorough reasoning, and details of any additional appeal rights..

- Insert a new section which clarifies that decisions of the Information Commission can be appealed to the Supreme Courts.
- Amend subsection 19(10) to require that any appeals procedures developed by the Information Commission be “consistent with due process and fair administrative justice”.

Rename Chapter VI – Penalties and Protections

Section 20 – Penalty:

48. The penalty provisions, which appear to replicate the provisions in the Indian *Right to Information Act 2005*, are relatively strong. Notably however, the provisions which were finally included in the Indian Act were not those suggested by civil society. Unfortunately, the provisions do not capture all the possible different offences that could be committed under the law, and they are very confusingly drafted. It is confusing to combine all the offences into one section, because while offences like unreasonable delay can appropriately incur a daily penalty, offences such as unlawful destruction of records more appropriately warrant a single large fine and/or imprisonment. Section 20 would benefit from a redraft to ensure clarity.
49. While subsection 5(3) states that officers who are requested to help the Information Officer will be treated as Information Officers for the purposes of penalty provisions, nonetheless it would be useful to include a provision at section 20 clarifying that defaulting officers who were asked for assistance, whatever level of seniority they have, will be penalised if they are responsible for non-compliance. It is not appropriate for penalty provisions to assume that penalties will always be imposed on officers dealing with requests. If the Information Officer has genuinely attempted to discharge their duties but has been hindered by the actions of another official, the Information Officer should not be made a scapegoat. Instead, the official responsible for the non-compliance should be punished.
50. In order to ensure that Public Authorities and Private Bodies properly implement the law, they too should be liable for sanction for non-compliance. This would ensure that heads of department take a strong lead in bedding down the law and ensuring that staff across their authority undertake their duties properly. An additional provision should be included in the Bill to penalise Public Authorities and Private Bodies for persistent non-compliance with the law. A fine could be imposed for example, where a Public Authority or Private Body fails to implement the suo moto disclosure provisions in a timely manner, does not appoint Information Officers or appellate authorities, consistently fails to process applications promptly and/or is found on appeal to consistently misapply the provisions of the law to withhold information. The minimum fine should be sufficiently large to act as a deterrent.
51. To strengthen the powers of the Information Commissioner, it is important that an additional sanction is available to penalise officials who fail to comply with the orders of the Information Commissioner. Without such a provision the Information Commissioner may have difficulty implementing his/her mandate in practice because officials could simply attempt to ignore his/her rulings. In England, to deal with this issue, section 54 of the UK *Freedom of Information Act 2000* requires that where an official “*fails to comply with a notice of any appeals body, the appeals body may certify in writing to a court that the official has failed to comply with that notice, following which the court may inquire into the matter and deal with the authority as if it had committed a contempt of court*”. In Ireland, the *Freedom of Information Act 1997* makes it an offence to fail or refuse to comply with a requirement of the Commissioner concerning production of documents or attendance of a person before the Commissioner in connection with an appeal, punishable with a fine or imprisonment for up to 6 months or both.

Recommendations:

- Replace subsection 20(1) with more a more detailed set of provisions which clarify the different offences and how each of them can be punished:
 - (1) *Where any official has, without any reasonable cause, failed to supply the information sought, within the period specified under section X, the Information Commission and/or the courts shall*

have the power to impose a penalty of [X], which amount must be reviewed and, if appropriate, increased by regulation at least once every five years, for each day/s delay in furnishing the information.

(2) Where it is found in appeal that any official has .

(i) Mala fide denied or refused to accept a request for information;

(ii) Knowingly given incorrect or misleading information,

(iii) Knowingly given wrong or incomplete information,

(iv) Destroyed information subject to a request;

(v) Obstructed the activities in relation to any application or of a Public Information Officer, any appellate authority or the courts;

commits an offence and the Information Commission and/or the courts shall impose a fine of not less than rupees two thousand and refer the matter to a Magistrate for consideration as to whether a term of imprisonment of up to two years shall also be imposed.

(3) An officer whose assistance has been sought by the Information Officer for the performance of his/her duties under this Act shall be liable for penalty as prescribed in sub-sections (1) and (2) jointly with the Information Officer or severally as may be decided by the Information Commission or the Courts.

(4) The Information Officer or other officer shall be given a reasonable opportunity of being heard before any penalty is imposed on him/her.

(5) The burden of proving that he/she acted reasonably and diligently shall be on the Information Officer or other officer.

- Include departmental penalties of a minimum of Tk 10,000 per day and Tk 1 lakh for persistent non-compliance with the law.
- Require that where an official or authority fails to comply with a notice of the Information Commission, the Commission may certify in writing to a court that the official or authority has failed to comply with that notice, following which the court may inquire into the matter and deal with the officer or authority as if they had committed a contempt of court.

Section 21 – Right of legal representation:

52. Section 21 envisages that parties can invite lawyers to represent them at Information Commission proceedings. This is an unfortunate provision because, although it states otherwise, it has the definite potential to turn the Information Commission into another court-like forum which will be disempowering for ordinary people. In practical terms, the cost of a lawyer may be a major disincentive for many requesters in Bangladesh and may also result in a large power imbalance where the Public Authority or Private Body can afford legal representation. Consideration should be given to deleting the provision. At the very least, the Information Commission should offer free legal services to appellants where the Public Authority or Private Body has chosen to bring its own lawyers, ensuring a somewhat more balanced hearing.

Recommendations:

Delete section 21 or at the very least, amend section 21 so that if the Public Authority or Private Body chooses to use legal representation, the Information Commission is required to provide the other party access to competent and free legal representation.

Section 26 – Suit barred:

53. Section 26 of the Bill, which attempts to bar the jurisdiction of the Courts, needs to be deleted. The right to information is a fundamental right which underpins all of the other rights in the Bangladesh Constitution. It is also implied as part of the right to freedom of expression and the right to life and liberty. Accordingly, legal issues relating to the exercise or enjoyment of the right to information should be justiciable by the Supreme Court, which is the forum where the content of constitutional rights is finally considered.

Recommendations:

Delete section 26 and make it clear that decisions of the Information Commission can be appealed – at least by the requester – to the Supreme Court. Appeal and penalty provisions in earlier chapters will

accordingly need to be amended to recognise the role of the courts in the complaints process.

Insert new Chapter after section 26 – Monitoring and Promotion of the Act

Section 27 – Reporting:

54. To ensure that the Information Commissioners reports have proper weight and are given serious consideration by decision-makers, it is important that subsection 27(1) is amended to require that the Information Commission submits its reports to Parliament rather than to the Central Government. Otherwise, under the current formulation, the Government could simply sit on the report and parliamentarians would not have an opportunity to assess how effectively the law is being implemented. Section 49 of the UK *Freedom of Information Act 2000* and section 38 of the Canadian *Access to Information Act 1983* specifically require that their Information Commissioner submits his/her report to Parliament within 3 months from the end of the financial year. Section 40 of the Canadian Act clarifies that this requires the Information Commissioner to give the report to the Speaker of each House for tabling in Parliament.

55. Consideration should also be given to specifically requiring that the Report of the Information Commissioner be sent to a Parliamentary Committee for consideration and review. The Committee could then call on the Government to take action on key issues as necessary. This is the practice in Canada, where Information Commissioner reports are sent to a Parliamentary Committee designated or established to review the administration of the Act.

Recommendations:

- Renumber subsection 27(3)(i) to 27(4) and subsection 27(3)(j) to 27(5).
- Amend section 27(3)(i) to require that:
 - The Information Commission must table its report in both Houses of Parliament within 3 months of the end of the financial year.
 - The relevant Minister refers the report to the relevant Parliamentary Standing Committee for consideration and comment.

Insert new section – Education & Training:

56. It is increasingly common to include provisions in the law itself mandating a body not only to monitor implementation of the Act, but also to actively promote the concept of open governance and the right to information within the bureaucracy and amongst the public. 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. Sections 83 and 10 of the South African *Promotion of Access to Information Act 2000* together provide a very good model:

South Africa: 83(2) [Insert name], 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 by 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 [under] 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;
- 10(1) The [Information Commission] must, within 18 months...compile in each official language a guide containing such information, in an easily comprehensible form and manner, as may reasonably be required by a person who wishes to exercise any right contemplated in this Act.
- (2) The guide must, without limiting the generality of subsection (1), include a description of--
- (a) the objects of this Act;
 - (b) the postal and street address, phone and fax number and, if available, electronic mail address of the information officer of every Public Authority or Private Body; and
 - (c) the manner and form of a request for...access to a record of a Public Authority...[or] a Private Body...;
 - (d) the assistance available from [and the duties of] the Information Officer of a Public Authority or Private Body in terms of this Act;
 - (e) the assistance available from the [Information Commission] in terms of this Act;
 - (f) all remedies in law available regarding an act or failure to act in respect of a right or duty conferred or imposed by this Act, including the manner of lodging--
 - (i) an internal appeal; and
 - (ii) an application with [the Information Commission and] a court against a decision by the information officer of a Public Authority or Private Body, a decision on internal appeal or a decision of the head of a Private Body;...
 - (g) the provisions...providing for the voluntary disclosure of categories of records...;
 - (h) the notices...regarding fees to be paid in relation to requests for access; and
 - (i) the regulations made in terms of [under the Act].
- (3) The [Information Commission] must, if necessary, update and publish [see the discussion re the meaning of "publish" at paragraph 20 above] the guide at intervals of not more than two years.

Recommendation:

Insert a new section placing specific responsibility on the new Information Commission to promote public awareness, including through the publication of a Guide to the Act, provide training to bodies responsible for implementing the Act, and requiring resources to be provided accordingly.

Insert new section – Regular Parliamentary Review of the Act:

57. To ensure that the Act is being implemented effectively, it is strongly recommended that the law provides for a compulsory parliamentary review after the expiry of a period of two years from the date of the commencement of the Act, plus regular five year reviews after that. Internationally, such reviews of legislation have shown good results because they enable governments, public servants and citizens to identify stumbling blocks in the effective implementation of the law. Identified areas for reform may be legislative in nature or procedural. In either case, a two year review would go a long way in ensuring that the sustainability, efficacy and continued applicability of the law to the changing face of Bangladesh. It would enable legislators to take cognizance of some of the good and bad practice in how the law is being used and applied and enable them to better protect the people's right to information.

Recommendation:

Insert a new clause to provide for a parliamentary review of the Act after the expiry of two years from the date of the commencement of this Act and then every five years after that.

Insert new section – Whistleblower Protection:

58. 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:

Insert a new provision to protect whistleblowers:

(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 Authority or Private Body.

General:

59. There are a number of grammatical and drafting errors that detract from the reading of the draft Bill and its interpretation. These general issues have been addressed in the attached amended version of the draft Bill. For example, references to other provisions within the Act are not always accurate. Incorrect cross-referencing will confuse officials applying the law. Also, the layout of the draft Bill could be improved to enable ease of use, for example, some chapters of the draft Bill have titles, whereas others do not – it would be ideal for all to have titles. Consideration could be given to including an index after the Preamble but before the operative provisions so that users of the law can more easily understand it and find the section they are interested in.

Recommendations:

- Carefully review the Act to ensure that there are no minor drafting problems, including for example:
 - Ensure that cross-referencing to other provisions within the draft Bill is correct;
 - Name each and every Chapter in the draft Bill;
 - Include an index to the draft Bill.

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

Mrs Maja Daruwala, Director or Ms Cecelia Burgman, Programme Officer

Right to Information Programme

Commonwealth Human Rights Initiative (New Delhi)

Email: Cecelia@humanrightsinitiative.org

Phone: +91-11 2686 4678 / 2685 0523; Fax: +91-11 2686 4688