Consolidated Civil Society critique of the draft Right to Information Act 2005 (Ghana)

Compiled by the Commonwealth Human Rights Initiative for the Freedom of Information Bill Coalition

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The value of the right to information

INTRODUCTION

There is growing evidence that access to information leads to more effective, environmentally-sound, and ultimately sustainable development of a country. Democracy depends on an open, accountable government and the opportunity for citizens to actively participate. The right to information is fundamental to this process. Article 19 of the International Covenant on Civil and Political Rights states that: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and *to seek, receive and impart information and ideas through any media regardless of frontiers."*

> ***"Freedom of information is a fundamental human right and is the touchstone for all freedoms to which the United Nations is consecrated"***
>
> ***- United Nations General Assembly, 1946***

The proposed Ghanaian Right to Information Bill (hereafter referred to as 'the Bill') recognises this, yet it falls short of the nine principles set out by the United Nations relating to Freedom of Information (2000), which are necessary in order to address the fundamental issues that guarantee the right to information. These are as follows:

Maximum disclosure - Access to information laws must be based on the principle of maximum disclosure. An exemplary model of this may be found within the Commonwealth in the legislation of South Africa, where there are strong inputs from civil society, and administrative reforms have focussed upon comprehensively entrenching open governance.

There should be limited exceptions to disclosure of information. Denial of the right to access any given information should be justified by the public authority.

Obligation to publish - Freedom of Information places a duty upon public bodies to not only provide information upon request, but to actively publish information provided that this does not violate public interest.

Promotion of open government - It is crucial to make steps to overcome the closed environment between governments and donors and encourage public participation. The right to information promotes democracy and is therefore a stepping stone towards the elimination of corruption. Furthermore the right to information will support economic development as it will encourage a political and economic environment more conducive to the development of a free market. This will increase confidence in investors, resulting in stronger economic growth.

Limited scope of exceptions – In order to avoid undermining the purpose of the right there is a need for narrow, well-defined parameters which should be adhered to when requests for information are declined. In order to ensure this, numerous other jurisdictions follow a three-part test:

a. The information must relate to a legitimate aim listed in the law;
b. Disclosure must threaten substantial harm to that aim; and
c. The harm must be greater than the public interest in disclosure.

Declining requests in order to protect the government from embarrassment or to conceal wrongdoing can never be justified.

Process to facilitate access - Access to information legislation must include clear and uncomplicated procedures that include quick responses. In the case of denial there should be an appeal system in place.

Costs - Fees should not be prohibitive as this may limit people's right to obtain information.

Open meetings - The legislation must establish that meetings of governing bodies should be open to the public in order to increase public awareness of government activities. This would encourage public involvement in decision-making processes, thereby upholding democracy.

Disclosure takes precedence - It is crucial that the legislation overrides inconsistent and restrictive provisions in existing laws.

Protection for whistleblowers - there is a need to implement effective whistleblower protection in the legislation. This would follow South Africa's lead.

PROCEDURES FOR ACCESS

1. The provision in Part 1 of the Bill to the effect that government should provide information on grounds of good governance voluntarily is not strong enough. It leaves too much to the discretion of government agencies. Disclosure should be made mandatory and more exhaustive.

> ***A key test of an access law's effectiveness is the ease, inexpensiveness and promptness with which people seeking information are able to obtain it. The law should include clear uncomplicated procedures that ensure quick responses and affordable fees.***
>
> ***-Open Sesame, 41***

2. Procedures for access need to be user-friendly. The procedure for access is cumbersome and places an undue burden upon the applicant, with processes including the writing of letters and completion of forms. This could have the effect of discouraging requests. In addition, the structure and legal language of the legislation should be user-friendly and easily accessible.

3. It is clear that sections 3 and 4 of the Bill deal in a large measure with deliberative issues. The idea here is that there should be confidentiality when the decisions of Cabinet impinge directly on public matters. There should be a legislative reason why the public should not be given information, because it undermines probity and accountability.

4. Ideally rights to information should be classified into two types and access should be readily available depending on the type. There should be a distinction between "active" and "passive" rights to information. Active information should be provided to the public at the initiative and expense of the authorities. This information should be publicly and readily available, with no restrictions. Passive information refers to the right of the public to obtain information upon request. This type of information should be subject to a reasonable time restriction. It is suggested that the Bill show the distinction

between these two types of information. For example, Part 2 of the Bill reflects a bias towards accessing information rather than making it available.

5. Ideally information should be recorded both in English and in Ghanaian languages where appropriate in order to reflect the practical realities of the Ghanaian population. Without such a provision, whole groups would otherwise be excluded from accessing information.

6. There is a need to clarify what happens when information can not be found or does not exist and how an agency can refuse access.

FEES

7. The fee regime should be contained in one provision, as it is currently scattered across section 20(f) and section 27.

8. It is crucial that the cost for accessing information should be as minimal as possible. In developing countries fees may be a serious practical obstacle. Fees should only cover that actual cost of reproducing the information requested; they should not be charged on application, or for the time taken to process request. The Bill should provide for the creation of a central binding fee schedule, based solely on the costs of copying, and perhaps retrieval costs. This would prevent authorities from imposing prohibitively large fees and increase uncertainty amongst the public. There is currently tension between section 26, which states that fees may be estimated by individual agencies and section 76, which states that there will be a fee schedule set by the Attorney General.

9. There should be no requirement for advance payment fees.

10. There should be no fees for Ministerial review of negative decisions by government agency information offices.

11. Consideration should be given to providing financial assistance, where appropriate, to those appealing negative decisions to the courts.

TIMEFRAMES

12. Section 24 avoids stating the time within which the information should be provided. There is also a need to define access here.

13. The proposed 30-day limit for processing applications has been criticised and it has been suggested that this be reduced by approximately ten days.

14. There should be a provision which allows the government to furnish applicants with oral information about the contents of any document. For example, section 16(1)(f) of the New Zealand Act includes such a provision. This affords the opportunity to obtain information without waiting for a written copy.

15. "Active" information should be made available in less than twenty-four hours, whereas "passive" information should be subject to reasonable time restrictions.

16. The time limits suggested for the processing of applications should be adjusted to be "working days", as public holidays may increase the current time period to an unreasonably lengthy time.

17. There should be time bound limitations that would require information to be reviewed for declassification after a certain period and made available to the public.

SCOPE OF EXCEPTIONS

18. The Bill falls short of the international standards for a Freedom of Information legislation that seeks to promote open government. The numerous exemptions under the Bill do not promote the principle of open government. The Bill should include a complete list of the legitimate grounds which may justify non-disclosure. These exceptions should be narrowly drawn to avoid including material which does not harm the legitimate

'The limits on disclosure need to be tightly and narrowly defined. Any denial of information must be based on proving that disclosure would cause serious harm and that denial is in the overall public interest.'

- Open Sesame, 37

interest. Article 21 of the Constitution should be the general yardstick in accessing information.

19. The exemptions within the Bill are too numerous, couched in technical terms and are too broad. This undermines the very purpose of a right to information bill. It is crucial that the exceptions are necessary, clearly and narrowly formulated. There should be a standard to test the necessity of the exemptions; at present the Bill provides no tools for this.

20. Exemptions should be subject to the harms test, whereby only information which would cause harm should be exempt. Exemptions should also be subject to an overriding public interest principle, whereby when public interest in disclosure outweighs the harm to be caused then the information should be disclosed, even where it is subject to exemptions.

21. There is a problem with how section 5 is drafted. Section 5(1)(a) leaves a wide opening to deny information, which leaves room for abuse of the system. The phrases 'likely to be used' and 'to reveal' are imprecise and open to misinterpretation. Section 5(1)(c) seems to be hanging and does not state the specific harm that it would cause and does not underscore the principles of the right to information. In section 5(2) information is restricted to the successes of particular activities and does not include the failures. This could be an omission or a restriction but it is suggested that it be amended so as to read 'status' of a programme or activity.

22. Section 5(3) is a blanket provision that is not subjected to any harm's test. The Armed Forces for example, has information which is important and the public must be able to access it provided that this is subject to the harms and public interest tests.

23. The phrasing of section 11(1) – 'if the disclosure could frustrate and inhibit…' – should be reworded as it is currently too broad and should be clearly and narrowly defined. Who determines whether the disclosure frustrates or inhibits?

It is suggested that this sub-section be removed altogether because there is no real danger of this occurring.

CONSUMER PROTECTION AND ENVIRONMENTAL PROTECTION

24. The Bill can have a very positive impact on consumer protection with the provision of product information to consumers.

25. The Bill is altogether silent on environmental justice. At least it should enhance access to environmental information as a basis for protecting the environment.

26. Consumer protection and environmental protection should be elaborated and fixed in the Bill. Government and private bodies should provide routine information on their products.

QUALITY OF RECORDS

27. Access to information legislation should require governments to create and maintain record management systems that meet public needs. If this does not occur, it will undermine the right to access to information. Any Freedom of Information legislation is only as good as the quality of the records to which it provides access.

28. Record-keeping and information dissemination are basic and essential functions of effective government and are already funded by public money.

29. Section 28 and section 29 make it easy to deny information because if an agency does not have a good system of records it may cost the a lot more time and divert their attention and this would not be due to the requested information but to the authority's own lack of efficiency. Section 29 should be removed as there should not be any reason for refusal under this ground.

PENALTIES

30. Penalties for unreasonably delaying or withholding information are crucial if an action law is to have any real meaning. Lack of penalties weakens the whole foundations of an action regime. Penalties are incentives for timely disclosures.

In the proposed Bill there are no penalty provisions where a public official unreasonably refuses to provide information.

APPEALS AND COMPLAINTS

31. Section 39(2) states that appeals should be addressed to the Minister; negative decisions issued by the offices of the President, Vice President or Cabinet should be able to be appealed to an independent administrative body. It is suggested that the Minister is not the appropriate person to handle the reviews as this will result in him/her being over-burdened.

32. The Bill should promote a collaborative approach to making information available. Where there is refusal, there should be an internal procedure for review.

33. Section 72 is useful because it shows that the refusal is lawful. This is one positive aspect of the Bill.

ENFORCEMENT MECHANISM

34. The Bill should explicitly override any secrecy or other laws that could be construed as providing for the withholding of information properly disclosed pursuant to the provisions of the Bill.

35. The Bill seems appropriate at the national level but it does not take district and regional institutions and structures into consideration. Operationalising the Bill at the local levels would therefore create more difficulty.

Effective enforcement provisions ensure the success of access legislation. Any body denying access must provide reasons. Powerful independent and impartial bodies must be given mandate to review refusals to disclose information and compel release. The law should impose penalties and sanctions on those who wilfully obstruct access to information.

-Open Sesame, 43

36. It is not practical to expect reviews to take place outside Accra. Access to the review procedure would thus seem to be restricted only to those in Accra. The Bill therefore does not favour those outside Accra and the largely rural population.

37. District Assemblies have a critical role to play in

providing information at the grassroots level. The Bill is silent about this possible but critical role. This role should be viewed within the context of the large illiterate factor and oral tradition of the Ghanaian public.

38. There is the need to provide an agreed definition of 'information' which should be wide and inclusive. It is notable that the Bill is silent on the role of Information Communication Technology (ICT) and the Internet. It is important that section 20 indicate the type of access required. The fundamental errors need to be looked at. The type of access may be on a written form, tape recorded, digital, soft copy, and so on.

39. Independent monitoring of implementation ensures that the purposes of the Bill are met and that the Bill is not subverted or watered down in the course of time. Presently there is no monitoring body to supervise the operation of the Bill.

40. Section 79, which appoints roles to the Attorney General as being in charge of the Bill, may continue to promote the culture of secrecy as the Bill makes certain demands on the government. The Minister for Information faces similar problems. There is a need to employ an independent body.

41. Where there is a refusal there should be an internal procedure for review. The Commission on Human Rights and Administrative Justice (CHRAJ) is an autonomous body which can play the role of the information commissioner and its services are free. This has not been considered in the proposed Bill.

42. The responsibility is placed on every Minister to produce manuals and the Attorney General is to provide the guidelines for the manual. Therefore there should be a supervisory mechanism to oversee the compilation of the manual.

FORMAT OF THE BILL

This part of the critique should be read in conjunction with the text of the Bill.

<u>Preamble</u>

43. The Preamble should explicitly espouse the principle of “maximum disclosure” and state that the objective of the Act is to “foster a culture of transparency and accountability”. Such objectives clauses set the tone for the rest of the Act and provide a good guide to officers interpreting the Act’s provisions.

New Part I: Introductory Sections

44. Part I should be a general introductory section. The proposed changes in the attached marked up Bill have moved the definitions to the front of the Bill as well as a number of other section which provide the framework within which the rest of the provisions of the legislation will be interpreted.

Current Part I: Access to Information from Government Agencies (New Part II)

45. The current Part I is a very good foundation for the rest of the Act. The right is broadly defined – a “right is recognised; access is given to “information”, not records or documents, which can be more restrictive; requesters are not required to provide reasons for the request; and the principle of severability is included.

46. Section 2 in current Part I should be grouped together with the provisions in current Part III. These sections all relate to proactive disclosure by government. Current section 2 is a good clause in terms of entrenching the principle of open governance. Suggest including the requirement that information be made available to the people “in a timely fashion”.

Current Part II: Exempt Information (New Part IV)

47. The exemptions need to be very tightly and narrowly drawn. Currently, many are too loosely worded. Further, the public interest test – which is inconsistently mentioned specifically in some provisions but then also included at section 17 as a provision overriding the entire Part – explicitly puts the onus on the requester to show that public interest would be served by disclosure, whereas it should be the responsibility of the public body to provide that non-disclosure is in the public interest. The Exemptions need to be considered again in detail.

The South African *Promotion of Access to Information Act* 2000 and the Commonwealth Model FOI Law provide good references in this respect.

48. Section 3 is an anachronism and should be deleted. Many Acts permit the exemption of the Head of State from access laws, but there is no justifiable reason for such exemption. The deliberations and decisions of the Head of State are *exactly* the kind of information that the public is entitled to know. On the same grounds, section 4 is not necessary and can be deleted. If sections 3 and 4 are not deleted:

    The words "or decision" should be deleted from section 3(3) and the words "any decision" should be deleted from section 4(1)(c). Decisions must be relayed to the public unless they are otherwise exempt under the Act, e.g. for reasons of national security, and so on.

49. Section 4(2) should be replicated in section 3.

50. Both Section 3 and 4 can be replaced with a general section protecting information on the deliberative process. Current section 11 already attempts to do this, although its ambit is still too wide. It is true that government officials need to be encouraged to provide candid advice, but the knowledge that the advice proffered might be scruintised by the public should not be considered an inhibitor of candour. This argument cannot be accepted by a government committed to transparency, accountability and good governance. Section 11 should be reviewed with this in mind. Suggested alternate wording is that based on section 32 of Article 19's Model FOI Law is:

    > *XX. (1) A body may refuse to indicate whether or not it holds a record, or refuse to communicate information, where to do so would, or would be likely to: -*
    >
    > *cause serious prejudice to the effective formulation or development of government policy;*

seriously frustrate the success of a policy, by premature disclosure of that policy;

significantly undermine the deliberative process in a public body by inhibiting the free and frank provision of advice or exchange of views.

(2) Sub-section (1) does not apply to facts, analyses of facts, technical data or statistical information.

51. Section 5(1)(a) should read "with the *lawful* prevention".

52. Section 5(1)(c) should read "reveal *lawful* investigation techniques".

53. Section 5(1)(h) should read "has been *lawfully* confiscated".

54. Section 5(2)(a) is badly worded. The subsection needs to make clear that everything else that has to do with law enforcement and security is open and should be disclosed, for example, structure, issues related to the internal functioning of the police and its hierarchy. The only exception is a narrow category of information connected to ensuring public safety. The last sentence of the sub-section should constitute a general public interest override and therefore should read "or disclosure..." not "and disclosure".

55. Section 5(3) is potentially too broad as information only has to "relate" to the security of the state. See the attached marked up Act for suggested wording based on section 41(1) of the South African *Promotion of Access to Information Act 2000*. This section can then be grouped with Section 7, which relates to national security and defence.

56. Query why section 6(2) gives the President override power. On what basis is the President's override power to be exercised?

57. Section 7(a) should be deleted as it is very broad, extremely subjective and highly political.

58. Section 8(c) is too broad - what does "undue disturbance" mean? – and could be misused It should be deleted. Section 8(e) is much too broad. Information

on “criteria, procedures, positions or instructions” relating to government negotiations would cover contractual negotiations over the awarding of government tenders as easily as it covers international trade negotiations. A better formulation of such provisions is found in section 42 of the South African *Promotion of Access to Information Act 2000*.

59. Section 8(f) is too specific. A better formulation is found in section 44(2) of the South African *Promotion of Access to Information Act 2000*.

60. Section 12(b) virtually duplicates (5)(g) and should be deleted.

61. Section 15(1) is very broad – what does “personal affairs” mean? This section should be tightened.

62. See paragraph 47 above for a general critique of the section 17 override clause. It should be reconsidered entirely, but if not, the current proposal in the marked up attachment reflects other jurisdictions’ models of “public interest override” clauses. Notable, in the revised formulation the balancing of the public interest in disclosure now constitutes a separate ground.

63. Inserted new section after section 17, based on section 36 of the Commonwealth *Model FOI Law*, requiring public bodies to act in good faith when applying the exemptions provisions.

Current Part III: Compilation of Manual (New Part III)

64. The entire Part has been moved to sit with section 2 as all of the section relate to proactive disclosure.

Current Part IV: Procedures for Access (New Part V)

65. Section 20(1)(b) has been amended to reflect best practice standards. What is meant by “type of access” in ssection 20(1)(c)? What is meant by “to the satisfaction of the officer” in section 20(1)(d)?

66. Section 20(3) should read: “inform the applicant of this *as soon as practicable and no later than 14 days after the application is made*”.

67. No application fee should be levied. It costs an agency virtually nothing to receive an application such that charging a fee appears to be just a revenue-raising exercise.

68. Sections 22(1)(a) and (2) appear to duplicate each other.

69. Section 23(a) should be deleted because it is too vague and anyway duplicates section 23(b).

70. Section 24(1) should read: "be given to the applicant *as soon as possible and no later than* 30 working days".

71. Section 24(6) should not include an exemption from the time limit provisions for transferred applications, as section 22(4) allows that the date of receipt of transfers is the date of transfer: the 30 day time limit can legitimately be imposed on the recipient agency from that time.

72. Current section 29 should be inserted after section 24 as it directly relates to the preceding provisions.

73. Section 25(3) recognises that the application of the preceding sections constitutes a deemed refusal. As such, the notice in section 25(1) should include information on the requester's right to seek redress under Part VI.

74. If imposed at all, fees should only cover the actual cost of reproducing the information requested; they should not be charged on application, nor for the time taken to process a request (the limit in the current draft of only 2 free search hours is extremely small). There is otherwise a definite risk that poorer sections of the community will not, in practice, be able to access information.

75. In section 26(4) what does "necessary to cover the costs of dealing with the application" mean? Any access to information regimes should not be operated as a user-pays system; the public has a right to information and that right should not be conditional on their ability to pay.

76. It is proposed that a new provision be inserted after section 27 stating that fees will be forgone where public bodies fail to comply with time limits.

77. Sections 28(1) and (2) replicate section 26(5) and should therefore be deleted. Accordingly, sections 28(3) and (4) should be moved to sit with section 26(5).

78. Sections 30(d) and (f) appear to duplicate each other. An additional clause has been inserted into section 30 allowing for translations of documents where appropriate.

Current Part VI: Internal Appeals (New Part VIII)

79. It is positive that there is provision for independent appeals, but in providing only independent judicial remedies, and not cheaper, quicker, simpler administrative remedies, in practice it is likely that the right of appeal may not be exercised by any but the wealthiest of applicants, such as media houses and political parties. It is unlikely that ordinary people will have the resources to appeal to the courts.

80. As such, it is suggested that consideration be given to empowering an Ombudsman with power of review, as is the case in Australia, Belize, New Zealand and Trinidad and Tobago for example. Alternatively, a special post of Information Commissioner may be created, as has been done in Canada and the United Kingdom, and this officer may be given review powers. Appeal to the courts may then be made once these channels are exhausted.

81. It is proposed that section 39(3) be amended to allow for assistance to be provided to applicants who cannot reduce their applications to writing because of illiteracy or disability.

82. Query why section 40(3) requires the review to be conducted in private, when openness is the fundamental principle underlying the entire Act. In reality, it is very likely that ordinary people will be intimidated by a review were it to be conducted by a Minster or senior official, a problem which will be reinforced if secrecy is required under the guise of privacy. If the concern for privacy is

motivated by a desire to ensure no disclosures are made contrary to the Act, that problem is dealt with by section 40(4).

83. Section 41(1) which allows for extension of time for decision if there is "delay or other default" by the applicant is too broadly worded. Query what these two phrases comprise of and who will judge them.

84. Query the need to specify in section 44(3) that information refused by the President or Cabinet is able to be reviewed. However, if this provision is included to ensure that there is no ambiguity about people's right to review in those cases, then they should remain.

85. Query why section 44(2) requires that court proceedings are to be held in private. While the documents at issue cannot be made public, there is no reason why the arguments for and against disclosure should be kept secret. International practice does not support such a restriction.

86. It is proposed to amend section 45 to include some specific examples of orders that can be made by the court. In particular, it is explicitly stated that the Court can impose fines on bodies for non-compliance with their obligations under the Act. NB: If administrative remedies are also provided (i.e. application to an Ombudsman), a similar power to impose penalties should be conferred. Without remedies, the practical enforcement of rights becomes a nullity.

<u>Former Part VII: Private Bodies</u>

87. The deletion of all reference to private bodies from the 2005 draft bill has considerably weakened the potential impact of the legislation. It has become increasingly common for governments to contract out public functions either to the private or voluntary sector; it is crucial that such bodies are subject to the same disclosure regime as purely public bodies. Non-state actors have the potential to influence the lives of many people and it is for this reason that the ambit of the right to information must be extended beyond just the government. The right to information should be resolved by reference to its role in protecting

the fundamental interests of citizens, and not by reference to the provenance or structural characteristics of the institutions holding the contested information.

Deleted: I

Part VII: Miscellaneous

88. It is proposed that section 55, relating to public and government education about the Act, be strengthened drawing on the provisions of Section 83 of the South African *Promotion of Access to Information Act 2000*.

89. It is proposed that a new provision be included to impose a duty on public (and private) bodies to maintain proper records. The provision is based on section 43 of the Commonwealth Model FOI Law, section 46 of the UK *Freedom of Information Act 2000* and section 19 of Article 19's Model FOI Law.

90. Section 60 should be deleted as it is not clear why the National Archives in its entirety should be exempted in its entirety from the operation of the Act.

91. It is proposed that a new provision be included before section 62 to protect whistleblowers. This is one of the key UN principles on freedom of information. A properly functioning open governance regime is aided by legislation that makes it safe and acceptable for people to raise concerns about illegality and corruption. Whistleblowing is a means to promote organisational accountability, maintain public confidence and encourage responsible management. The Bill should contain protection for whistleblowers along the lines of section 47 of the ARTICLE 19 Model Law. The South African legislation provides a good model for this

92. It is proposed that a new provision be included after section 67 to give the responsible Minister the power to amend or repeal Acts which are contrary to the primary Act.

93. The Bill lacks a clear spirit as it reflects a mere constitutional injunction, not one of enhancing our democracy and promoting sustainable development. A formulation on the rights of individuals could strengthen the spirit and make it more obvious.

MISCELLANEOUS

94. The Chieftaincy Institution should be brought under the purview of the bill subject to certain exemptions.

95. The very title of the Bill is ambiguous. This ambiguity is reflected in the confusion between the 'freedom of information' as a substantive right and 'the right to access' as a procedural right. The Bill needs to make clear distinction between the two to make it more effective while maintaining both aspects.

96. There is a need to include a provision on wilfully destroying or mutilating information or data and the sanction that goes with such wilful mutilation.

"While a law alone can not always ensure an open regime, a well-crafted law, which strengthens citizens' democratic participation, is half the battle won."[1]

[1] Open Sesame, 46.