

Detailed Analysis of Guyana Draft Freedom of Information Bill 2005 & 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



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Analysis of the Guyana draft Freedom of Information Bill 2005

1. The Commonwealth Human Rights Initiative (CHRI) was informed that The Hon'ble Raphael Trotman, a Member of Parliament from Guyana, has compiled a draft Freedom of Information Bill which he intends to table in the Guyana Parliament as a private members' bill. MP Trotman has forwarded a copy of the draft Bill to CHRI for review. CHRI welcomes this opportunity to comment on the Bill. CHRI's analysis draws on international best practice standards, in particular, good legislative models from the Commonwealth countries. This paper suggests areas which could be reconsidered and reworked, as well as providing examples of legislative provisions which could be incorporated into a revised version of the Bill.
2. In the context of the current law-making exercise, CHRI would note that although the Bill will be tabled as a private members Bill, MP Trotman, the Government of Guyana and the Parliament of Guyana are encouraged to continue to develop the law participatorily because for any right to information legislation to be effective, it needs to be respected and 'owned' by both the government and the public. Participation in the legislative development process requires that policy-makers proactively encourage the involvement of civil society groups and the public broadly. This can be done in a variety of ways, for example, by: convening public meetings to discuss the law; strategically and consistently using the media to raise awareness and keep the public up to date on progress; setting up a committee of stakeholders (including officials and public representatives) to consider and provide recommendations on the development of legislation; and inviting submissions from the public at all stages of legislative drafting.

THE VALUE OF THE RIGHT TO INFORMATION

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

- *It helps to reduce conflict.* Democracy and national stability are enhanced by policies of openness, which engender greater public trust in their representatives. Importantly, enhancing people's trust in their government goes some way to minimising the likelihood of conflict. Openness and information sharing contribute to national stability by establishing a two-way dialogue between citizens and the state, reducing distance between government and people and thereby combating feelings of alienation. Systems that enable people to be part of, and personally scrutinise, decision-making processes reduce citizens' feelings of powerlessness and weakens perceptions of exclusion or unfair advantage of one group over another.

ANALYSIS OF DRAFT BILL AND SUGGESTIONS FOR IMPROVEMENT

4. While it is necessary to ensure that the public participates in the drafting process to ensure that the final legislation developed is appropriate for the national context, it is generally well-accepted that there are basic minimum standards which all RTI legislation should meet. Chapter 2 of CHRI's Report, *Open Sesame: Looking for the Right to Information in the Commonwealth*¹, provides more detailed discussion of these standards. The critique below draws on this work.²
5. Overall, CHRI's assessment is that the Bill in its current form contains some useful provisions. Notably however, it appears that the draft Bill is modeled heavily on the Trinidad and Tobago Freedom of Information Act 1999. While CHRI commends MP Trotman for drawing on previous good practice, nonetheless CHRI would note that in the last five years there have been a number of important developments in the area of access to information legislation, which have extended and broadened the right to information. The Trinidad & Tobago Act, due to the time of its enactment, does not incorporate these more recent best practice developments. As a result, this analysis suggests a number of amendments, modeled on more recent legislation. At all times, the recommendations proposed attempt to 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.

General

6. At the outset, it is generally problematic that the language of the draft Bill is very complicated and contains long and confusing sentences. The Bill is overly legalistic and it may be very difficult not only for the public to understand the law, but also for public officials to know how to implement it. The right to information is primarily about trying to open up government to the participation of the common person. As such, it is crucial that any right to information law is drafted in a user-friendly way. The terms of the law need to be clear and precise, but plain English should be used as much as possible. The new Indian *Right to Information Act 2005*, the South African *Access to Information Act 2000* and the Mexican *Federal Transparency and Access to Public Government Information Law 2002* provide better models.

Recommendation:

The Bill should be reviewed with a view to simplifying all of its provisions and ensuring that it can be easily understood by the public and bureaucrats alike. User-friendly language should be used and complicated cross-referencing and legalistic language should be avoided.

Part I: Preliminary

Section 2 - Commencement

7. Section 1 currently wrongly titles the Bill, probably a simple drafting mistake.

Recommendation:

- *Amend s.1 to correctly title the law as the Freedom of Information Act 2005*

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

Section 2 - Commencement

8. The commencement provision at section 2 has been left blank. It may be that the drafter felt that this section was unimportant enough to simply be dropped in at the point the Bill was to be enacted. However, international experience has shown that the commencement clause can be crucial. In India for example, no implementation date was included in the *Freedom of Information Act 2002* (now repealed and replaced by the *Right to Information Act 2005*), and this omission allowed the law to sit on the books without being implemented for 18 months, despite receiving Presidential assent. Although it is understandable that a government may wish to allow for time to prepare for implementation, best practice has shown that the Act itself should specify a maximum time limit for implementation, to ensure there is no room for the provision to be abused and implementation to be stalled indefinitely. Experience suggests a maximum limit of 1 year between passage of the law and implementation is sufficient (see Mexico for example). Alternatively, in Jamaica a phased approach has been adopted, whereby the most important Ministries implemented the national access law first, and then a year later the remaining agencies implemented the law.

Recommendation:

- *Amend s.2 to include a maximum time limit for the Act coming into force in, ideally immediately but not later than 1 year from the date the Act receives Presidential assent.*

Section 3 - Object of the Bill

9. It is positive that the introduction to the draft Bill specifically states that it seeks to enable access to information to members of the public held by public authorities and that sub-section 3(2) makes it explicit that access should be given “promptly and at the lowest reasonable costs”. However, to assure the most liberal interpretation of the right to information in accordance with democratic principles, and to promote a presumption in favour of access, the objects clause should be extended to establish clearly the principle of maximum disclosure, and to specifically recognise that the purpose of the Act is to promote transparency, accountability and participation. Section 2 of the *Jamaican Access to Information Act 2002* provides a good model. This is an important amendment, because courts will often look to the objects clause in legislation when interpreting provisions of an Act.
10. Sub-section 3(b) of the Objects clause should also be amended because it currently narrows the right by permitting access only to “information in documentary form”. This is a very limiting formulation of the right to information, unlike India and New Zealand for example, which allow a broad right to access “information” or “official information”. The clause should be amended to provide that all information shall be accessible, whatever its form, unless an exemption applies.

Recommendations:

- *Amend the current Objects clause to more clearly set out the broader democratic objectives of the Bill, for example:*
WHEREAS there exists a need to:
 - (i) *give effect to the fundamental Right to Information, which will contribute to strengthening democracy, improving governance, increasing public participation, promoting transparency and accountability and reducing corruption*
 - (ii) *foster a culture of transparency and accountability in public authorities by giving effect to the right of freedom of information and thereby actively promote a society in which the people of Guyana have effective access to information to enable them to more fully exercise and protect all their rights;*
 - (iii) *establish 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 where the information is needed for the exercise and/or protection of a right, in a swift, effective, inexpensive and user-friendly manner.*
 - (iv) *promote transparency, accountability and effective governance of all public authorities and private bodies by including but not limited to empowering and educating all persons to:*
 - *Understand their rights in terms of this Act in order to exercise their rights in relation to public authorities and private bodies.*
 - *Understand the functions and operation of public authorities; and*
 - *Effectively participating in decision making by public authorities that affects their rights.*

Section 4 - Interpretation

11. The Bill currently defines and uses the term “document” and “official document” throughout, rather than the broader term “information”. In accordance with the discussion at paragraph 10 above, it is recommended that the term “information” be included in the definitions section and then used in the Bill instead of “official document”. Allowing access to “information” will mean that applicants will not be restricted to accessing only information, which is already in the form of a document or hard copy record at the time of the application. Otherwise, the current formulation excludes access to things like scale models, samples of materials used in public works and information not yet recorded by an official but which should have been. In any case, the definition of “official document” should be deleted because it adds nothing and only serves to possibly limit access further. The definition could easily be abused by resistant officials to restrict access.
12. The definition of personal information should be reconsidered as it is currently extremely broad, and when coupled with the exemption clause at section 30 could result in the non-disclosure of important information, most notably, information related to the discharge of official functions by public officials. For example, would sub-section (b) of the definition block access to employment information about an official even where there is an allegation of financial malfeasance, unjustified transfer, unwarranted promotion or the like in relation to the official’s employment?
13. The Bill defines the term “responsible minister” and then makes him/her the responsible person for providing information. This is not practicable and may be confusing for the public and officials to understand. Instead, all references to accessing information from “the Minister” should be removed and a Public Information Officer (PIO) appointed in all public authorities who shall be made responsible for handling all information requests. (PIOs should be persons of a senior rank who can take the decisions of whether or not to disclose information in the context of exemptions.) Notably, the current approach is favoured by the Australian *Freedom of Information Act 1982* - but it is unnecessarily complicated and adds nothing. Ministers are not in practice responsible for providing information, their ministries are – and this should be clearly recognised by the law to avoid confusion.
14. Section 4 should be amended to insert a definition of the term “access” to clarify the content of the right to “access” information. This will promote maximum accessibility by the public. In this context, the law should be drafted to permit access not only to documents and other materials via copying or inspection. It should also permit the inspection of public works and taking of samples from public works. Such an approach has been incorporated into the India *Right to Information Act 2005* in recognition of the fact that corruption in public works is a major problem in many countries, which could be tackled by facilitating greater public oversight through openness legislation.

Recommendation:

- *Amend s.4 to include a definition of the term ‘information’, which should subsume the current definition of document. A model definition could be:
“information” means any material in any form, including records, documents, file notings, memos, emails, opinions, advices, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models, data, material held in any electronic form and any information relating to a private body which can be accessed by a public authority under any law.*
- *Review the definition of “personal information” to ensure that it does not operate in conjunction with other provisions in the Bill to exclude information which should be accessible;*
- *Remove the reference to the term “responsible minister” and replace it with a new requirement for Public Information Officers (PIO) to be appointed to handle requests;*
- *Amend s.4 to include a definition of the term “access”. A model definition could be:
“access” to information means the inspection of works and information, taking notes and extracts and obtaining certified copies of information, or taking samples of material.*

Section 5 – Non-application of the Act

15. Section 5 currently operates as a de facto exemption clause, excluding the office of the President, inquiry commission set up by the President, or any other public authority as may be ordered by the President from the purview of the Act. This is contrary to best practice and the promotion of open government via the entrenchment of the principle of maximum disclosure. While it is understandable that the Government should wish to protect against the disclosure of sensitive/and or private information, this has been adequately provided for under Part IV of the Bill which contains the Act's exemptions regime. It is unnecessary and unjustifiable to go beyond this and simply assume that the abovementioned bodies shall be placed beyond the scope of the Act. For example, in India the Office of the President is covered by the Act, in Jamaica executive agencies are specifically covered, and in Australia the Governor-General (Head of State) is covered at least in respect of his/her administrative functions.
16. Section 5(2) also provides too broad a power for the President to exempt bodies or function of bodies from the coverage of the Act. This is not appropriate; once the regime is agreed by Parliament it should not be able to be undercut by regulation. At a minimum, any such power to exempt certain bodies or their functions should only be permitted to be used in accordance with certain agreed criteria so that the President's discretion is limited to what is reasonable.

Recommendation:

- *Delete section 5(1), in keeping with the spirit of promotion of open government, and rely on the exemptions in the Act to properly protect sensitive information;*
- *Delete section 5(2), or at least include a set of criteria which limit when the President may use his power to exempt certain bodies or their functions.*

PART II – PUBLICATION OF CERTAIN DOCUMENTS AND INFORMATION

Sections 7 – Proactive disclosure requirements

17. It is very positive that the current provisions require the proactive disclosure of a considerable amount of information. Nevertheless, consideration should be given to extending the categories of information which need to be automatically disclosed in line with the most recent best practice. Section 4 of the new Indian *Right to Information Act 2005* and Article 7 of the Mexican *Federal Transparency and Access to Public Government Information Law 2002* provide excellent models for consideration. They require the disclosure of information such as the recipients of government subsidies, concessions and licenses, publication of all government contracts and information about proposed development works. Such provisions operate to assist the public to keep better track of what the government is doing as well as ensuring key activities of public bodies are always and automatically kept open to public scrutiny. Notably, although the initial effort of collecting, collating and disseminating the information may be a large undertaking, over time it will be worth the investment as it will reduce requests in the long run because people will be able to easily access routine information without having to apply to public bodies.
18. Section 7(4) rightly requires a Minister to provide a public explanation where an agency for which he/she is responsible fails to meet its proactive disclosure requirements. However, the section currently only requires that the explanation is published in the Official Gazette. In practice, this is not a very useful method of publication because ordinary members of the public are extremely unlikely to ever read the Gazette. To facilitate a more informed public, it would be more effective if the explanation was published in the newspaper or broadcast on the radio.

Recommendation:

- *Amend s.7 to include additional proactive disclosure obligations based on Indian & Mexican laws:*
 - “(1) Every public body shall*
 - (a) publish [before X date? within 3 months of? the commencement of this Act]:*
 - (i) the powers and duties of its officers and employees;*
 - (ii) the procedure followed in the decision making process, including channels of supervision and accountability;*
 - (iii) the norms set by it for the discharge of its functions;*

- (iv) *the rules, regulations, instructions, manuals and records, held by it or under its control or used by its employees for discharging its functions;*
 - (v) *a directory of its officers and employees;*
 - (vi) *the monthly remuneration received by each of its officers and employees, including the system of compensation as provided in its regulations*
 - (vii) *the budget allocated to each of its agency, indicating the particulars of all plans, proposed expenditures and reports on disbursements made;*
 - (viii) *the manner of execution of subsidy programmes, including the amounts allocated and the details of beneficiaries of such programmes;*
 - (ix) *particulars of concessions, permits or authorisations granted by it;*
 - (x) *details in respect of the information, available to or held by it, reduced in an electronic form;*
 - (xi) *the names, designations and other particulars of the Public Information Officers, and appeals bodies under the Act;*
 - (xii) *such other information as may be prescribed;*
and thereafter update these publications within such intervals in each year as may be prescribed;
 - (b) *publish all relevant facts while formulating important policies or announcing the decisions which affect public;*
 - (c) *provide reasons for its administrative or quasi judicial decisions to affected persons;*
 - (d) *before initiating any project, or formulating any policy, scheme, programme or law, publish or communicate to the public in general or to the persons likely to be affected thereby in particular, the facts available to it or to which it has reasonable access which in its opinion should be known to them in the best interest of natural justice and promotion of democratic principles.*
 - (e) *Upon signing, public authorities must publish all contracts entered into, detailing at a minimum for each contract:*
 - (i) *The public works, goods acquired or rented, and the contracted service, including any sketches, scopes of service and/or terms of reference;*
 - (ii) *The amount;*
 - (iii) *The name of the provider, contractor or individual to whom the contract has been granted,*
 - (iv) *The periods within which the contract must be completed.*
- *Amend s.7(4) to require the explanation from the Minister to be published in all daily national newspapers, in addition to the Official Gazette;*

Sections 7-9 – Method of dissemination of information

19. Sections 7, 8 and 9 currently updating of the information is done at least once a year. Notably however, some of the information, which is being collected and published, may change very often, such that it could be terribly out of date if it is not updated more regularly. Accordingly, a maximum time limit of 6 months should be allowed for updating and the rules should prescribe shorter time limits for specific categories of information, as appropriate.
20. Further, the sections should be reviewed and more consideration given to the method of dissemination. Currently, the Official Gazette appears to be the preferred dissemination method, but as noted in paragraph 18 above, very few members of the public actually read the Gazette! It would be more effective to utilise the internet more and to consider using existing media outlets and local dissemination channels. The law should explicitly provide for wider dissemination of information and as such consideration should be given to effective methods for ensuring the information reaches smaller towns – for example, by posting it on notice boards, broadcasting it on the radio or television or including it in telephone directories.

Recommendation:

- *Amend the provisions in sections 7, 8 and 9 regarding how often information should be updated and how it should be disseminated:*
 - (1) *Information shall be updated at least every 6 months, while regulations may specify shorter timeframes for different types of information, taking into account how often the information changes to ensure the information is as current as possible.*
 - (2) *It shall be a constant endeavour of every public authority to take steps in accordance with the requirements of clause (b) of sub-section (1) to provide as much information suo moto to the*

public at regular intervals through various means of communications so that the public have minimum resort to the use of this Act to obtain information.

(3) All materials shall be disseminated taking into consideration the cost. Effectiveness, local language and the most effective method of communication in that local area and the information should be easily accessible, to the extent possible in electronic format with the Public Information Officer, available fee or at such cost of the medium or in print cost price may be prescribed

PART III – RIGHT OF ACCESS TO INFORMATION

Section 11

17. Section 11 is one of the most important provisions in the Bill because it sets out the parameters of the right to access information. In this context, as noted in paragraph 11 above, the right provided by the Bill should be to access “information” not just to access “official documents”. The latter is much too narrow a right. This change should be reflected throughout the remaining provisions of the law.

21. The Bill currently only allows access only to information held by public authorities. In accordance with international best practice however, disclosure of information should be the duty of all private bodies, at least where it is necessary to exercise or protect one’s rights. Private bodies are increasingly exerting significant influence on public policy. Many private bodies – in the same way as public bodies – are institutions of social and political power, which have a huge influence on people’s rights, security and health. This is only increased by the rise in outsourcing of important government functions and the country is likely to see further outsourcing/privatisation of important services as part of its economic development strategy. It is unacceptable that private bodies, which have such a huge effect on the rights of the public, should be exempt from public scrutiny simply because of their private status

22. Notably, a number of countries around the world have already brought private bodies within the ambit of their right to information regimes. South Africa’s law is the most progressive:

- *South Africa s.50: Information held by or under the control of a private body where access to that information is necessary for the exercise or protection of any right. [NB: if this formulation is too broad, consideration could be given to limiting the application of the law to private bodies over a certain size (determine according to turnover or employee numbers)]*
- *India s.2(h)... Any body owned, controlled or substantially financed.... by funds directly or indirectly provided by the appropriate Government.*
- *Jamaica s.5(3): Bodies which provide services of a public nature which are essential to the welfare of society can be covered by the Act by Order.*
- *United Kingdom s.5(1): Bodies which appear to exercise functions of a public nature, or are providing any service whose provision is a function of an authority under a contract made with that public authority can be covered, by Order of the Secretary of State*

Recommendation:

- *Reword section 11 to provide “access to information” not just official documents;*
- *Rework section 11 and the remaining provisions in the Bill as appropriate, to allow access to information held by private bodies.*

Section 13 - Clarify who is responsible for handling applications

23. Section 13 is a crucial provision because it sets out the actual process for the public to request access to a document. The provision currently still needs reworking to make it capable of implementation in practice. In particular, it is a problem that s.13 does not properly identify who will be responsible within each public authority for receiving and processing applications. The current formulation simply requires that the application is made to the “public authority” but this could be difficult to implement in practice. Within an organisation, who will be responsible for handling applications? How will officials – particularly low ranking officials in rural outposts – know how to

handle applications and who to forward them to? What about applicants – who should they address their application to and who should they follow up with if they receive no response?

24. Later on in the Bill, section 22 appears to assume that different officers will be designated to make decisions in relation to different types of documents. While this approach may be useful, in that certain sensitive documents need to be approved for release by more senior officers, nonetheless, at a general level, the Bill should still identify officers who are generally responsible for receiving and processing applications, even if part of their job is to forward sensitive applications to more senior officials.
25. In accordance with common practice in other countries, consideration could therefore be given to requiring that a “Public Information Officer(s)” be designated within public bodies to be responsible for receiving requests and ensuring access to information. Notably, this can also be a useful way of raising awareness of a new access law within a public body and ensuring that the law is effectively implemented and properly monitored. It is also important in terms of decentralising implementation – sub-offices of a public authority should also be required to identify an officer who is responsible for receiving applications. This is because it cannot be expected that people from all over the country wanting to submit their application in person have to travel to the head office of the authority!
26. Taking this into account, consideration should be given to revising s.13 and s.22 to:
 - Make it clear that all applications shall be sent to the “head of the public authority” in all cases. If this approach is adopted, the Bill should make it clear that applications will be accepted at all sub-offices of the public authority and officials in those sub-offices will be required to forward them to the relevant officer(s) responsible within the public authority for processing requests. This process is simpler for the public who will know that all applications to all public authorities simply need to be addressed to the “department head”. They will not have to worry about who within the organisation has had responsibility for FOI delegated to them. However, it could still be confusing for officials, because it may not be clear who within the organisation is responsible in practice for processing requests. As such, consideration should be given in addition to:
AND/OR
 - Establish new positions within each public authority known as “Public Information Officers” (PIO). All applications for information can be sent to PIOs who will then be responsible for handling them. This formulation is preferable because it means that the public can very easily identify who they need to address their application to – the PIO in all cases – and all officers within a department will automatically know to whom applications need to be referred to if they happen to receive an information request. The PIO can then also be targeted for special training on the law and can take the lead in ensuring proper implementation.
27. Whatever option is chosen, consideration should also be given to including specific wording in the law which makes it clear that the *“internal processes for receiving and processing applications should be designed to promote easy, simple, quick and cheap access to information for the public”*.
28. This section also provides for a specific form in which a request for information has to be made. Section 13(1) should be amended to make it clear that although the prescribed form may be used for applications, requesters will not be *required* to use the form, as long as they provide sufficient information for the application to be processed. In countries with entrenched bureaucratic cultures of secrecy, it needs to be made explicit that applications cannot be refused under the law simply because they were not on the right form. The Bill should also provide for information requests be sent to public authorities electronically. The Indian and Jamaican access laws provides for this.
29. An additional clause should be inserted to clarify that applications can be made in Guyana’s local language(s). It should be the duty of the relevant PIO of the public authority to translate the request into the official language. To require all requestors to submit an application in only an official language could in practice exclude people from utilising the law.

Recommendation:

- *Identify a single generic position(s) within each public authority, which will be responsible for receiving and processing applications. Section 5 of the new Indian Right to Information Act 2005 provides a good model, making it clear that every public authority must “designate as many officers as Public Information Officers in all administrative units or offices under it as may be necessary to provide information to persons requesting for the information under this Act”.*
- *Revise s.22 accordingly, to require that the officer responsible for receiving applications will forward sensitive applications to more senior officers in accordance with regulations*
- *Include a clause specifying that “internal processes for receiving and processing applications should be designed to promote easy, simple, quick and cheap access to information for the public”.*
- *Clarify that requests can be made electronically as well as in writing (either in the prescribed form or as a plain paper application) or in person.*
- *Clarify that request cannot be rejected if not made on specified form*
- *Permit applications to be made either in the official language or in the Guyana local language(s)*
- *Review s.13(5) because the cross-referencing does not make sense*

Section 15 - Time Limit and written notice of decisions

30. Section 15 only requires that “all reasonable steps” are taken to notify requesters of decisions of approval or rejection of request within the set time limit. This is not enough. The Bill should require that written notice be given to all requesters of the outcome of their application. The content of such notices should also be prescribed in the Bill. Section 22 of the Bill provides for decision notice to be given to a requester only in case of a negative decision, that is, when the decision is against disclosure. Decision notices must also be given when an application is approved, in particular because any fees need to be specified and requesters need to know the exact process for them to access the information.

31. The time limit in s.15 is appropriate, although consideration should be given to including an additional provision requiring information to be provided with 48 hours where it relates to the life and liberty of a person. This is consistent with s.7(1) of the *Indian Right to Information Act 2005*.

Recommendations:

- *Include a 48 hour time limit where an application relates to the life and liberty of a person.*
- *Specify that all applicants must receive a notice in writing of a decision on their request within the prescribed time limits.*
- *Insert a new clause specifying the content of approval decision notices:*
Disclosure notice: Where access is approved, the PIO shall give a notice to the applicant informing:
 - (a) *that access has been approved;*
 - (b) *the details of further fees 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*
- *Cross reference the notice provisions in s.23(1) which deal with refusal or deferment of applications so that officials can more easily identify their notice obligations.*

Section 16 – Partial disclosure

32. It is positive that section 16(2) allows for severability of exempt information and partial disclosure of non-exempt information. However, consideration should be given to amending s.16 to require the relevant notice to the requestor advising of partial disclosure to also include advice regarding the

opportunity and process for appealing that decision. This should be worded along the lines of rejection notices in section 22.

Recommendations:

- *Separate s.16(2) into a separate section on partial disclosure.*
- *Insert a new clause or amend s.22 to specify that a similar notice must be sent to the requester where partial disclosure is permitted.*

Section 17 - Fees

33. Best practice requires that no fees should be imposed for accessing information, particularly government information, as costs should already be covered by public taxes. The Bill follows this best practice to the extent that it does not provide for payment of fees at the application stage. The Bill further provides for fee waiver in case public authority is unable to maintain the time limits. Further, sub-section 17(4) the Bill provides for refund of fees in certain cases. These provisions are very positive and in keeping with international best practice.

34. Section 17(5) still imposes fees for accessing information. It is encouraging that the provision specifies that fees shall be commensurate only with the cost incurred in making the documents available. However, the Bill should make it explicit that rates should be set with a view to ensuring that the costs imposed for access are not so high as to deter potential applicants. Fees should be limited only to cost recovery, with no additional margin for profit, and a maximum limit should be imposed. Charges should only cover reproduction costs, not search or collation/compilation time. Imposing fees in respect of the latter could easily result in prohibitive costs, particularly if bureaucrats deliberately drag their heels when collating information in order to increase fees. Also, where the costs of collecting the fees outweigh the actual fee (for example, where only a few pages of information are requested), fees should be waived.

35. Furthermore, a provision should be included in the Bill allowing for fees to be waived where that 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. Section 29(5) of the Australian *Freedom of Information Act* actually provides a good model.

Without limiting the matters the agency or Minister may take into account in determining whether or not to reduce or not to impose the charge, the agency or Minister must take into account:

- (a) *whether the payment of the charge, or part of it, would cause financial hardship to the applicant, or to a person on whose behalf the application was made; and*
- (b) *whether the giving of access to the document in question is in the general public interest or in the interest of a substantial section of the public.*

Recommendations:

- *Sub section 17(5) should be re-worded clarifying that any fees charged for provision of information "shall be reasonable, shall in no case exceed the actual cost of providing the information such as making photocopies or taking print outs and shall be set via regulations at a maximum limit taking account of the general principle that fees should not be set so high that they undermine the objectives of the Act in practice and deter applications".*
- *A new clause should be inserted which allows for the waiver or remission of any fees where their imposition would cause financial hardship or where disclosure is in the general public interest.*

Section 18 - Forms of Access

36. As discussed in paragraphs 11 and 14 above, the right to information provided by the Bill should be broadened to allow, not only access to documents, but access to information more broadly, which

will include the right to inspect public works and the right to take samples of public works. This approach has been incorporated into the Indian *Right to Information Act 2005*, one of the newest access laws in the world and one of those which enshrines the latest standards in openness. The forms of access permitted under s.18(1) and (2) should be amended to take into account this broader right of access.

37. Section 18(4)(a) deals with the issue of processing an application, which requests information in a form which could legitimately be considered to be “unreasonably interfering with the operations of the body”. It is good that the Bill requires that in such circumstances the form in which the information is requested shall be refused but access in any other form shall be provided. However, what constitutes ‘unreasonable interference with the operation of the body’ needs to be more clearly explained, as this provision could otherwise be misused by public authorities. This section can be amended slightly to cross-reference back to s.14 which requires public authorities to be assisted to reformulate non-compliant requests.

38. The Bill does not currently address the issue of accessing information in the form of a translated copy of a document. A society, which promotes democratic participation and aims to facilitate the involvement of all of the public in its endeavours should ensure that people are able to impart and receive information in their own language and cultural context. Section 12 of the Canadian *Access to Information Act 1983* provides a useful example:

Where access to a record or a part thereof is to be given under this Act and the person to whom access is to be given requests that access be given in a particular official language, a copy of the record or part thereof shall be given to the person in that language

- (e) forthwith, if the record or part thereof already exists under the control of a government institution in that language; or*
- (f) within a reasonable period of time, if the head of the government institution that has control of the record considers it to be in the public interest to cause a translation to be prepared.*

Recommendations

- *Section 18 should be amended to permit access via inspection of public works and taking samples from public works*
- *Section 18(4)(a) amended to narrow the ambit of what could be considered “unreasonably interference with the operations of a body”. Even in such cases, the public authority should be required to assist the applicant to modify his/her request.*
- *A new section should be inserted to permit translations of requested information, at least where it is in the public interest.*

New provision - Transfer

34. The Bill does not envisage provisions with regard to transfer of applications within public authorities. This arises in cases where the requester may lodge a request for information with a public authority and the information is actually available with another public authority. What procedure is to be followed in such cases? Is an application going to be rejected merely on the ground that it was lodged with a wrong public authority? This is not appropriate.

35. The key principle that should underpin all internal processing provisions is the fact that applications should be disposed of quickly and at minimum cost to the applicant. It is simpler, cheaper and timelier to *require* public bodies to simply transfer applications, which would be better handled by another body because public bodies are better equipped to know which of their fellow agencies is most likely to hold the information. The responsibility to identify the proper body should not be put on the applicant – who might otherwise be forced to submit multiple applications until they stumble across the right body, wasting a lot of their time unnecessarily. To ensure application requiring transfer are not delayed, a clear time limit for transferring a request should be included and the applicant should be notified of the transfer immediately so that they know who to follow up with.

Recommendations:

- *Insert a new clause requiring that:*
 - (i) *An application will be transferred where the information is not held by the body to which the application is submitted;*
 - (ii) *Requiring that the transfer shall be made “as soon as practicable but not later than 5 days after the date of receipt of the application, and the applicant shall be given detailed written notice of the transfer immediately”.*

Section 19 – Deferred access

36. It is understandable that in some cases a public authority may genuinely need to defer access because premature disclosure of the information could cause harm to legitimate interests. Sections 19(1)(a), (b) and (c) appear largely legitimate, but there should be some maximum time limit for deferral on these grounds, after which the public authority should be required to reconsider release or some external body should be required to approve continued deferral. Otherwise, publication could be delayed *ad infinitum* with no recourse for the applicant.

37. It is not clear what purpose section 19(1)(b) serves – other than to allow the Minister to publicise a key piece of news before it is published anywhere else? However, if the information is in the public interest, then it should be released – whether in Parliament or not. Likewise, s.19(1)(a) could be abused because there is no time limit for presenting the information in Parliament.

Recommendations:

- *Amend s.19 to include a specific maximum deferral time limit – eg. 28 days – after which time the requested information will be released nonetheless.*
- *Consider requiring the Ombudsman to approve any additional deferrals after the first one.*
- *Delete s.19(1)(b) or at the very least, require disclosure where it is in the public interest.*

Section 20 – Repeated requests

38. Section 20 needs to be re-worded as in its present form it is very confusing. In particular, s.20(1)(a) needs to be reconsidered altogether because if an application for correction of personal information is made for a second time, it should not be able to be rejected arbitrarily without at least first cross-checking that such correction of personal information has been carried out! Further, it is important to note here that even if a request has been rejected and that decision has been upheld by the High Court, with the passage of time, disclosure of the information may no longer be sensitive such that it *could* be reasonable for the application to be reconsidered. In this context, the broad discretion allowed in s.20(1)(c) for rejection where there are ‘no reasonable grounds for making the request’ could easily be misused by public authorities. This provision should be deleted, or at the very least, some guidance provided as to what this clause means in practice.

Recommendations:

- *Amend s.20 to permit rejection of repeated requests only in cases where the High Court has reviewed the application and upheld its rejection, within the previous 12 months.*
- *Alternatively, simplify the wording of the provision to ensure clarity and amend s.20(2) to require the refusal notice to include the decision-makers name and position and a detailed explanation of the grounds for rejection, including the basis for the decision that there are no reasonable grounds for making the request again.*

Section 21 – Rejection on procedural grounds

39. Best practice requires that no application shall be rejected unless the information requested falls under a legitimate and specifically defined exemption. Information that does not fall within an exempt category cannot be denied. Accordingly, s. 21 which permits rejection simply where the task

of locating information is considered onerous, should be deleted. Many public body's will consider more than a couple of hours spent on processing a request an unreasonable interference with their activities, simply because they do not accept that providing access to information should be part of their core business. Consider in contrast that in some countries, dedicated public information officers are employed in Freedom of Information Units whose sole task is to process requests. Moreover, this is a particularly unfair clause when one considers that it may be the public body's own poor record-keeping practices that are the reason for the difficulty in locating information. Should the requester be penalised because the public body has not kept its record properly?

40. Section 21(5) is particularly problematic because it provides that a public authority may refuse to grant a request if it is apparent from the nature of the documents that they are exempt documents. This clause could be very easily abused by lazy or resistant officials and should be deleted. Decisions under the law should always be reasoned and should not be made arbitrarily without proper, defensible grounds. If appealed, how would an official defend such a decision? What if another applicant separately applied for smaller sections of the rejected information, and when the information was reviewed disclosure was required? How could the government defend such inconsistent decisions?

Recommendations:

- *Delete section 21. If the provision is retained, at the very least, delete s.21(5).*
- *Separate out s.21(4) into its own section, which is applicable to the processing of ALL requests (ie. the applicant's reasons can never be taken into account by the decision-making official)*

Section 22

41. As noted in paragraphs 23 to 26 above, s.22 reflects the confusion throughout the Bill in relation to who exactly is responsible for providing information under the law. This section should be amended and a specific officer (Public Information Officer?) designated to handle all applications. Although Ministers are legally the head of most public authorities, for the purposes of practical implementation of the law it is important that the law identify an actual officer who a requester can interact with in relation to their application.

42. Sub-section 22(2) appears to be a "deeming" provision, designed to make it clear that where no decision is made by a public authority within time, no-response will be taken as a rejection for the purposes of appeal. Such a clause is crucial to ensure that requesters can proceed to make an appeal even where they have no order which to complain against. However, the provision is currently very confusing worded and could be redrafted for clarity and simplicity.

Recommendations:

- *In accordance with the recommendations at paragraphs 23-26, consider designating Public Information Officers to be responsible for processing applications.*
- *Replace s.22(2) to insert a clearer deeming provision, for example:
If an information officer fails to give the decision on a request for access to the requestor concerned within the period contemplated in [section XXX], the information officer is, for the purposes of this Act, regarded as having refused the request.*

PART IV – EXEMPT DOCUMENTS

43. One of the key principle of access to information is minimum exemptions. 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, as has been provided in the Bill, because at that point they should be deemed to be no longer sensitive and thus declassified.

44. All exemptions should be subject to a blanket “public interest override”, whereby a document which falls within the terms of a *general* exemption provision should still be disclosed if the public interest in the *specific* case requires it (see paragraph 61 below for more). This ensures that every case is considered on its individual merits and public officials do not 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.
45. Every test for exemptions (articulated by the Article 19 Model FOI Law) should therefore 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?

General - Delete references to Secretarial/Ministerial certificates

46. The use of Secretarial/Ministerial certificates in ss.24(4) and 25(3) is entirely contrary to international best practice, such that it is disappointing that this device has been incorporated into the Bill. Even in Australia, one of the few jurisdictions to retain the use of such certificates, Ministerial certificates have often been attacked by parliamentarians and civil society alike, as being contrary to good governance because they allow the Minister to remain unaccountable. In 1978, the Parliamentary Committee which considered the Australian Bill concluded:

“There is no justification for such a system tailored to the convenience of ministers and senior officers in a Freedom of Information Bill that purports to be enacted for the benefit of, and to confer rights of access upon, members of the public. This can only confirm the opinion of some critics that the bill is dedicated to preserving the doctrine of executive autocracy”.

47. In a law which is specifically designed to make Government more transparency and accountable, the use of such certificates cannot be defended. Within access to information regimes, the only use that Ministerial certificates have is to give Ministers the power to make decisions about disclosure which cannot be questioned by any court or tribunal.
48. CHRI strongly recommends that all of the exemptions in the Bill which permit a Minister/Secretary to issue a conclusive certificates are deleted. If this recommendation is not implemented, at the very minimum, all of the provisions permitting the use of these certificates should justify the use of a certificate, namely that “the disclosure of the document would be contrary to the public interest”. Further, an additional clause should be added requiring any certificate issued by the Secretary/Minister to be tabled in Parliament along with an explanation. This is the practice in the United Kingdom, where the UK Information Commissioner noted in May 2004 that “issues relating to each and every use of the veto will be brought before Parliament”.

Recommendation:

Amend sections 24(4) and 25(3) to remove the power for the Secretary/Ministers to issue conclusive certificates and amend the remainder of the Bill accordingly. In the event that this recommendation is not adopted, require that where a certificate is issued it must specify how disclosure of the document would be contrary to the public interest and that it must be tabled in Parliament along with an explanation.

Section 24 – Cabinet documents exemption

49. Although it has historically been very common to include blanket exemptions for Cabinet documents in right to information laws, in a contemporary context where governments are committing themselves to more openness it is less clear why the status of a document as a Cabinet document should, in and of itself, be enough to warrant non-disclosure. Considering all of the exemptions already contained in the law, it is not clear in addition why such a broad Cabinet exemption needs

to be included. One of the primary objectives of a right to information law is to open up government so that the public can see how decisions are made and make sure that they are made right. The public has the right to know what advice and information the Government bases its decisions on and how the Government reaches its conclusions – particularly in the most important decision-making forum in the country, Cabinet.

50. It is therefore recommended that the Cabinet exemption be deleted and Cabinet documents protected under other exemptions clauses as necessary – for example, national security or management of the national economy. At the very least, all of the Cabinet exemptions need to be reviewed to ensure that they are very tightly drafted and cannot be abused. Currently, the provisions are extremely broadly drafted, with s.24(1)(b) protecting even documents simply “prepared...for submission to Cabinet” or a document “which is related to issues that are or have been before Cabinet”. This could capture a huge number of documents and could easily be abused by the bureaucracy, who could claim that a vast number of documents “relate” to Cabinet issues! It is notable in this respect that even some MPs in some other jurisdictions have complained that broad Cabinet exemptions have been abused because Cabinet members simply take documents into Cabinet and then out again and claim an exemption.
51. It is also not clear why s.24(1)(a) protects “official records of the Cabinet”. These records are presumably vetted by Cabinet before they are finalised – and if Cabinet members sign off on them as a legitimate record of discussions then why should they be worried about their release? So long as they capture Cabinet discussion accurately, they should be open to public scrutiny (unless some other exemption applies). The same argument applies to the exemption in s.24(1)(d) – which protects documents containing extracts from official Cabinet records. Section 24(1)(e) should also be deleted on the basis that Cabinet decision-making processes and debates should be able to stand up to public scrutiny – unless openness would harm another legitimate interest, such as international relations or law enforcement.
52. A provision should be added that all decisions of the Cabinet along with the reasons thereof, and the materials on which the decisions were taken shall be made public after the decisions have been taken and the matter is complete. Section 8(1)(i) of the Indian *Right to Information Act 2005* provides a good example of such a clause.

Recommendations:

- Deleted s.24 entirely or at the very least amend the entire section substantially to tighten the protection provided, with ss.24(1)(a), (b) and (d) being deleted narrowed considerable.
- Insert an additional provision requiring that once a decision of Cabinet is made, the decision along with reasons and materials upon which the decision was made shall be made public (unless an exemption applies) and all related materials shall be accessible upon request (unless an exemption applies).

Section 25 – Defence & intelligence and security information

53. It is legitimate that section 25(1) attempts to protect against disclosures, which could prejudice the defence of the Republic, although consideration could still be given to requiring a more stringent harm test to be met. However, the special protection in s.25(2) for information which could “prejudice the lawful activities of the security or intelligence services” appears to overlap with the protection for law enforcement activities in s.28, which is particularly concerning because s.25 permits the Minister to issue a conclusive Ministerial certificate to block disclosure and it is not subject to the narrower parameters in s.28(2).

Recommendation:

Delete s.25(2) and consider its incorporation into s.28(1).

Section 26 – Confidential international information

54. Sub-section 26(c) and (d) should be deleted because the focus of these exemptions is purely on the fact that the information was provided in confidence, whereas the key issue for any exemption should be whether harm will be caused by disclosure. Just because information was given to the Government of Guyana 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?
55. As long as the more general protections in ss.26(a) and (b) which guard against disclosures that would cause harm to international relations are 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?

Recommendation:

Delete ss.26(c) and (d). Section 22(1)(a) and (b) provides adequate protection against disclosures that would harm international relations.

Section 27 – Internal working documents exemption

56. Section 24(1) which protects internal working documents is much too broad. It is positive that the provision is made subject to a public interest test, but it is still not appropriate that the exemption goes to such lengths to prevent the disclosure of information about internal decision-making processes. Officials should be able – and be required – to ensure that their advice can withstand public scrutiny. This is exactly the kind of transparency – with a view to promoting more public sector accountability – that an access law attempts to promote. To fear such transparency raises questions about the soundness of the entire decision-making process. Of course, where the discussions relate to sensitive information, it must be remembered that such information will be protected under other exemptions clauses.
57. The exemption is currently too focused on the types of internal working documents, rather than their purpose and whether their disclosure would actually cause harm to important and legitimate public interests. Ideally, the provision should be deleted in its entirety and the remaining exemptions relied upon to protect genuinely sensitive information. Alternatively, the exemption should be substantially narrowed to avoid blanket exemption and protect internal documents only where disclosure would genuinely harm the decision-making process. The simple fact is that good governance requires not only that the public knows what the government does – but also WHY!

Recommendation:

Replace s.27 with the following provision:

“A public authority 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:

- (a) cause serious prejudice to the effective formulation or development of government policy; or*
- (b) seriously frustrate the success of a policy, by premature disclosure of that policy; and*
- (c) disclosure would be contrary to the public interest.*

Section 29 – Legal professional privilege

58. Section s.29(2) is very confusing because it appears that it refers to incorrect cross-references. More generally, the wording could be simplified.

Recommendation:

Amend s.29(2) to fix the incorrect cross-referencing:

Section 30 – Personal privacy

59. As noted in paragraph 12 above, the definition of personal information in s.4 is currently very broad, such that, when incorporated into the exemption at s.30 for personal information, it could result in important information about public officials being wrong withheld from disclosure, even though it could promote the law's objectives of public sector transparency and accountability.

Recommendation:

Review the exemption in s.29 taking into account the very broad definition of personal information currently included at s.4 to ensure that information about public officials regarding misconduct or malfeasance cannot be excluded on the basis that it is personal information about the official.

Section 34 - Act to have overriding effect

60. This provision of the Bill must be amended to incorporate the overriding effect of the Act. It should explicitly provide that the new access law overrides all other inconsistent legislation. A right to information law should be comprehensive, both in the right it extends and the restrictions it recognises. The list of exemptions included in the law should be exhaustive and other laws should not be permitted to extend them. Otherwise, public officials could be very confused when trying to apply the law, and the law could be inadvertently undercut by unrelated legislation which imposes contrary secrecy obligations. Consideration should be given to reworking s.34 to make it clear that that law overrides all other statutory or common law prohibitions on access to information. Section 22 of the Indian *Right to Information Act 2005* provides a good model:

Recommendation:

Amend s.34 to make it clear that the law overrides all other statutory or common law prohibitions on access to information:

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

Section 35 - Public interest override

61. As noted in paragraphs 44-45 above, the question of whether or not the public interest is served by disclosure of information should be the primary question guiding all decisions under the law. In this context, it is notable that the Bill currently subjects only a few of the exemptions to a general public interest override. Unfortunately, the overarching public interest override at s.35 is much narrower because it requires the conditions at s.35(a)-(d) to be met AND that the disclosure is then shown to be in the public interest. This is not appropriate. Instead, if EITHER the requirements in sections 35(a)-(d) are satisfied OR the public interest in disclosure outweighs the public interest in secrecy, then disclosure should be required. Notably, s.8(2) of the recently passed Indian *Right to Information Act 2005* now includes this type of broad public interest override and it is strongly recommended that the Guyana law draw on this best practice.

Recommendation:

Rework s.35 to require disclosure EITHER where the requirements in sections 35(a)-(d) are satisfied OR the public interest in disclosure outweighs the public interest in secrecy. Alternatively, reword the provision as follows:

“A public authority may, notwithstanding the exemptions specified in sections [XXX], allow access to information if public interest in disclosure of the information outweighs the harm to the public authority”

PART V – MISCELLANEOUS

Sections 38A and 39 - Appeals to the Ombudsman and High Court

62. Oversight via appeals to an umpire independent of government pressure is a major safeguard against administrative lethargy, indifference or intransigence and is particularly welcome where court-based remedies are slow, costly and uncertain. The fear of independent scrutiny ensures that exemption clauses are interpreted responsibly and citizens' requests are not unnecessarily obstructed. While the courts satisfy the first criteria of independence, they are notoriously slow and can be difficult to access for the common person. As such, in many jurisdictions, special independent oversight bodies have been set up to decide complaints of non-disclosure. They have been found to be a cheaper, more efficient alternative to courts and enjoy public confidence when they are robustly independent, well-funded and procedurally simple.
63. 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, including Canada, England, Scotland and Western Australia, 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. However, there are alternatives to an Information Commission. For example, in Australia, the Administrative Appeals Tribunal has appeal powers and in New Zealand and Belize the Ombudsman deals with complaints.
64. It is encouraging that the Guyana Bill makes the independent Ombudsman the first appeal point for aggrieved applicants and allows an additional appeal to the High Court. However, there are a number of deficiencies in the appeals mechanism as currently drafted. It is strongly recommended that the drafter look at Parts IV and V of the new Indian *Right to Information Act 2005* which drew on a range of international legislative best practice provisions in developing its appeals regime. Model clauses relating to most of the issues below can be found in that Act:
- The Bill is currently worded to only allow appeals in relation to a "refusal" of an application. However, appeals should be permitted where no response has been received, where it has not even been possible to submit an application, where the form of access provided or fee charged is considered unreasonable or, in fact, for any other act of non-compliance with the law. Section 88 of the Queensland (a State of Australia) *Freedom of Information Act 1992* and s.31 of the Canadian *Access to Information Act 1982* provides good models;
 - The Ombudsman can only make recommendations regarding disclosure, whereas for the law to really have teeth and make a dent in bureaucratic cultures of secrecy, the independent oversight body needs to have binding powers to require public bodies to take the necessary steps towards greater openness. If the Ombudsman is not given binding decision-making powers, at the very least the example of New Zealand should be replicated wherein a public body must justify their rejection of the Ombudsmen's recommendation by tabling their explanation in Parliament;
 - The law should make it explicit that the Ombudsman and High Court can see any document which is subject to an appeal, regardless of whether or not an exemption is claimed. This is a standard provision in any access law and recognises that the appeal body's powers will be very limited if they are not permitted to review all documents which are in dispute.
 - To ensure that the Ombudsman and High Court can properly discharge their appeals functions, the law should clarify their investigation powers. In fact, all of the procedures for conducting investigations and issuing decisions should be included in the law, including time limits within which the Ombudsman and High Court should make a decision, the minimum requirement of any decision notice, and whether the Ombudsman and Court have any power to impose penalties (paragraphs 68-70 below) or make more general recommendations (see paragraphs 66 and 67 below)

Recommendations:

- *Reconsider whether the Ombudsman's decisions are recommendatory only or are binding. If only recommendatory, insert a new provision requiring that where a public authority intends not to comply with the Ombudsman's recommendation, the authority must submit a written explanation to their Minister explaining the decision, which must be tabled in Parliament.*
- *Insert new provisions clarifying:*
 - *The appeals remit of the Ombudsman, ie. reviewing complaints where no decision has been made within the time limits; reviewing decisions to withhold information, the amount of fees imposed, the form of access; or non-compliance with any other provision in the law;*
 - *What investigation powers the Ombudsman has;*
 - *That the Ombudsman has the power to look at any piece of information being requested, whether or not an exemption is claimed;*
 - *The time limits for making decisions, ideally no more than 45 days;*
 - *The process for notifying applicants of decisions.*

New provision - Clarify who carries the burden of proof in appeals

65. Consideration should be given to including an additional provision in the Bill, which sets out the burden of proof in any appeal under the law. In accordance with best practice, the burden of proof should be placed on the body refusing disclosure and/or otherwise applying the law to justify their decision. This is justified because it will be unfair and extremely difficult for members of the public – who will never have seen the document they are requesting – to be forced to carry the burden of proof. Section 61 of the Australian *Freedom of Information Act 1982* provides a useful model.

Recommendation:

Insert a new provision specifying that:

“In any appeal proceedings, the public authority to whom the request was made has the onus of establishing that a decision given in respect of the request was justified.”

New provision – Investigations for persistent non-compliance

66. An additional provision should be included replicating s.30(3) of the Canadian *Access to Information Act 1982*, which gives the Information Commission the power to initiate its own investigations *even in the absence of a specific complaint by an aggrieved applicant*. In practice, this provision is used to allow an Ombudsman to investigate patterns of non-compliance, either across government or within a department and produce reports and recommendations for general improvements rather than in response to specific individual complaints. In the State of Victoria in Australia, the Ombudsman who performs a similar role to the one proposed in the Guyana Bill was recently given a similar power because it was recognised that, as a champion of openness within government, he needed to be able to investigate and take public authorities to task for persistent non-compliance with the law.

Recommendation:

Insert a new provision permitting the Ombudsman to initiate his/her own investigations in relation to any matter, whether or not he/she has received a specific complaint, eg. persistent cases of departmental non-compliance.

Section 40 - Reporting and Monitoring

67. Section 40 makes the Minister responsible for preparing and submitting to the National Assembly an annual report on the operation of the Act. However, the Minister is not an impartial body, such that it would be more appropriate for the Ombudsman to produce the report. Section 40 should then be amended to explicitly require the Ombudsman to include in the report recommendations for improving implementation. Such recommendations are commonly included in reports by Information Commissioners (see Canada for example), or Human Rights Commissions (see South Africa for example) where they are made responsible for annual reporting.

Recommendation:

- *Make the Ombudsman responsible for collating and submitting the Annual Report under s.40 because the Ombudsman is an independent body and will therefore in a better position to produce an impartial report assessing the satisfactoriness of the Government's implementation of the law.*
- *Insert an additional clause at s.40(3) requiring that the Annual Report include: "recommendations for the development, improvement, modernisation, reform or amendment of the Act or other legislation or common law having a bearing on access to information held by public and private bodies, respectively"*

Section 42 – Penalties

68. Sections 42(2) and (3) are the only clauses, which deal with penalties for certain acts of non-compliance (willful destruction or damage to records/documents). However, this section does not state who shall levy such a fine – the Ombudsman or the High Court or both. Further, this section does not envisage the levy of fine for offences for lesser instances of non-compliance with the provisions of the law. The Bill also fails to recognise that departmental disciplinary proceedings should also be instigated where an official is found to have breached the law.
69. It is a major shortcoming in the Bill that it does not contain a more fulsome range of offences, particularly for non-compliance with the provisions of the Bill. The Bill needs to sanction practical problems like a refusal to accept an application, unreasonable delay or withholding of information, and knowing provision of incorrect, incomplete or misleading information. These acts could all seriously undermine the implementation of the law in practice and should be sanctioned to discourage bad behaviour by resistant officials. Consideration should also be given to imposing departmental penalties for persistent non-compliance with the law. Poorly performing public authorities should be sanctioned and their bad behaviour even brought to the attention of their Minister who should have to table an explanation in Parliament.
70. When drafting more detailed penalty provisions, lessons learned from India can be illuminating, because in that jurisdiction penalties are leviable on individual officers, rather than just the 'person', a term which not been clearly defined in this context in the Bill. In reality, without personalised penalty provisions, many public officials may be content to shirk their duties, safe in the knowledge that it is their employer that will suffer the consequences. The relevant provisions need to be carefully drafted though, to ensure that defaulting officers, at whatever level of seniority, are penalised. If the PIO has genuinely attempted to discharge their duties but has been hindered by the actions of another official, the PIO should not be made a scapegoat. Instead, the official responsible for the non-compliance should be punished.

Recommendations:

- *Separate out sections 42(2) to (3) into a penalties provision.*
- *Insert a new provision to provide a more comprehensive list of offences which can attract a fine, for example, permitting sanctions for refusing to accept an application, unreasonable delay or withholding of information, knowing provision of incorrect information, concealment or falsification of records, and/or persistent non-compliance with the Act by a public authority.*
- *Insert a new provision to enable sanctions to be imposed personally on any individual PIO found guilty of an offence under the Act, including on any official who has been asked to assist a PIO to process and application*
- *Insert a new provision requiring that any official on whom a penalty is imposed shall also be liable to appropriate disciplinary action under the service rules applicable to him or her.*
- *Insert a new provision permitting the imposition of departmental penalties for persistent non-compliance.*
- *Clarify who can impose penalties, the Ombudsman, High Court or both.*

New provision – Promotion and Training

71. 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. The Ombudsman could do this job, or the Ombudsman, in his/her role as a champion of openness in administration. In other jurisdictions, 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 [Insert name of body] 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:*
 - (i) *the information officer of every public body; and*
 - (ii) *every deputy information officer of every public body...;*
- (d) *the manner and form of a request for...access to a record of a public body...[or] a private body...;*
- (e) *the assistance available from [and the duties of] the Information Officer of a public body in terms of this Act;*
- (f) *the assistance available from the [Insert name of body] in terms of this Act;*
- (g) *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 application with [the Ombudsman and] a court against a decision by the information officer of a public body, a decision on internal appeal or a decision of the head of a private body;...*
 - (i) *the provisions...providing for the voluntary disclosure of categories of records...;*
 - (j) *the notices...regarding fees to be paid in relation to requests for access; and*
 - (k) *the regulations made in terms of [under the Act].*

(3) *The [Insert name of body] must, if necessary, update and publish the guide at intervals of not more than two years.*

Recommendation:

Insert a new section placing specific responsibility on a body(s) – either a unit in the Ministry responsible for administering the Act or the Ombudsman - to promote public awareness, including through the publication of a Guide to RTI, and provide training to bodies responsible for implementing the Act, and requiring resources to be provided accordingly.

New provision - Protect whistleblowers

72. 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.

Recommendations:

- *An additional article be included dealing with whistleblower protection. Section 47 of the Article 19 Model FOI Law provides a good model:*

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

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

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