Analysis of the Republic of Kenya 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

Submitted by the

Commonwealth Human Rights Initiative

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Analysis of the Republic of Kenya draft *Freedom of Information Bill 2005*

1. The Kenya Human Rights Commission has forwarded a copy of the draft *Freedom of Information Bill 2005* to the Commonwealth Human Rights Initiative (CHRI) for review and comment. CHRI understands that the Bill has been drafted by the Government of Kenya, although it is not clear either what the status of the Bill is – that is, whether it is due to be tabled in Parliament in its current form or whether it is a working draft which is now open to the public to comment on. CHRI has assumed the latter.

2. CHRI welcomes the opportunity to comment on the Bill and encouraged the Government to consult widely with the public and other key stakeholders before the Bill is finalised and tabled in Parliament. Experience has shown that a participatory law-making process can be a major factor in laying a strong foundation for an effective right to information regime. Implementation is strengthened if right to information laws are 'owned' by both the government and the public. Best practice requires that officials proactively encourage the involvement of civil society groups and the public in the legislative process. This can still be done in a variety of ways, for example, by: setting up a committee of stakeholders (including officials and public representatives) to consider and provide recommendations on the draft Bill; inviting submissions from the public before Parliament votes on the Bill; convening public meetings to discuss the proposed law; and strategically and consistently using the media to raise awareness and keep the public up to date on progress.

BACKGROUND

3. Article 79 of the current Constitution of Kenya guarantees the freedom of expression, which includes: "freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons)". The Republic of Kenya has also acceded to the International Covenant on Civil and Political Rights (ICCPR). Section 19(2) of the *ICCPR* protects the right to information in the similar terms to the Kenyan Constitution. By ratifying the ICCPR and including a similar provision in the Constitution, the Republic of Kenya has agreed to take on the responsibility for the protection and promotion of the right to information. Kenya has also acceded to the African Charter on Human and People's Rights which, by article 9, specifically enshrines the right to receive information by all individuals.

4. In 1999, the International Commission of Jurists in Kenya[1] developed a draft *Access to Information Bill*. The draft was initially prepared with a view to presenting it to Parliament for consideration. However, it was overtaken by the establishment of the Constitution of Kenya Review Commission; recognising the importance of securing domestic legal recognition of the right to information, attention shifted to ensuring the right was included in the new draft Constitution. Even if constitutional protection *is* specifically extended to the right under the new Constitution however, legislation is still needed to effectively operationalise the right. CHRI supports the Government decision therefore to draft a comprehensive right to information law for Kenya.

ANALYSIS OF DRAFT BILL AND SUGGESTIONS FOR IMPROVEMENT

5. While it is necessary to ensure that the public participates in the drafting process to ensure that the final legislation developed is appropriate for the national context, it is generally well-accepted that there are basic minimum standards which all RTI legislation should meet. Chapter 2 of CHRI's Report, *Open Sesame: Looking for the Right to*

[1] Vitalis Omondi, *New Law Against Secrecy Proposed In Kenya*, The East African, 13-19 October 1999. http://www.nationaudio.com/News/EastAfrican/111099/Regional/Regional6.html, (Accessed on 21 March 2004).

Information in the Commonwealth[2], provides more detailed discussion of these standards. The critique below draws on this work.[3]

General comments

6. Overall, CHRI's assessment is that, while the draft Bill in its current form contains some useful provisions, it still requires considerable further work if it is to set up a well-functioning access to information regime. Most notably, the draft Bill is overly legalistic, such that 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 right to information laws are 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.

7. In this context, it appears that large tracts in the Bill have been modelled on the Australian *Freedom of Information Act 1982* and the UK *Freedom of Information Act 2000*. Both of those Acts are notorious for being very technically drafted. Both Acts also operate in contexts which are highly conservative legal jurisdictions. They do NOT provide good FOI models for countries which are genuinely committed to enabling the right to information to become more than just an administrative right exercised by Opposition MPs and journalists, and instead to be used by ordinary people to simply and cheaply access valuable information. The supreme value of the right to information is that it can be a tool for the empowerment of the public, but the more complicated a law is drafted, the harder it becomes for people to use it to easily and effectively engagement with the Government. The new Indian *Right to Information Bill 2004*, the South African *Access to Information Act 2000* and the Mexican *Federal Transparency and Access to Public Government Information Law 2002* provide better models.

8. The unnecessary legalism evidenced in the two model Acts has been compounded by the fact that the Acts have not been replicated in their entirety. Most notably, the definitions clauses in the Australian and UK Acts have not been replicated, as a result of which the meaning of many clauses are problematically ambiguous. The copying of random individual clauses has also now caused certain internal consistencies between various provisions in the Bill which need to be sorted out as a priority.

CHRI recommends that the Bill 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. It also should be checked for internal consistency to make sure that all provisions interact appropriately.

Part 1 – Preliminary

Explicitly extend the RIGHT to information

9. It is positive that the introduction to the draft Bill specifically states that it seeks to enable access to information to the greatest extent possible, consistent with the public interest and the right to privacy. However, while this sums up the underpinnings of any good access law, it does not clearly extend a *right* to information. To assure a liberal interpretation of the right to information and to promote the presumption in favour of access, it is important that the intent of the Bill establishes clearly the principle of maximum disclosure, transparency and accountability.

CHRI recommends that the draft Bill be reviewed to ensure that its provisions are drafted in language which makes it clear that the public have the (immediate) right to access information and the government a duty to ensure they can obtain such access.

Set a specific date for the Act to come into force

10. Section 1 requires the date of enactment of the Act to be specifically notified and permits different dates to be notified for different sections of the law. It is problematic that no specific date is mentioned, as experience in other countries, such as India, has shown

[2] http://www.humanrightsinitiative.org/publications/chogm/chogm_2003/default.htm

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

that such a vague formulation can allow a law to sit on the books for years without ever coming into force. Although it is understandable that the Government may wish to allow for time to prepare for implementation, best practice shows that the law 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).

CHRI recommends that s.1 be amended 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.

Do not restrict the Act to "citizens"

11. Section 2(1) and s.6(1) clearly restrict the right to access information to "citizens" only. This could have major implications, as many poor and disadvantaged people may not have the necessary documentation to PROVE their citizenship. This clause could therefore be abused by resistant bureaucrats to refuse to accept applications. Additionally, in a country which has often taken in large numbers of long-term refugees and which has a sizeable population of permanent residents – none of whom have citizenship papers – this requirement will work to deny the right to information to key sections of the community. Bureaucrats may also use this requirement to reject applications from NGOs – a practice which has been witnessed in other jurisdictions.

12. Good international practice supports the extension of the Act to allow *all persons* access to information under the law, whether citizens, residents or non-citizens (such as asylum seekers) and to bodies, rather than only individuals. This approach has been followed in a number of jurisdictions, including the United States and Sweden, the two countries with the oldest access laws. This change may require the inclusion in s.3 of a definition of "person".

13. Alternatively, if the Government considers this formulation too broad, consideration could be given to following the example of Canada which allows access to information to citizens AND "permanent residents" (see s.4(1), *Access to Information Act 1982*) or New Zealand which allows requests to be made by citizens, permanent residents or any "person who is in New Zealand" (see s.12(1)(c) *Official Information Act 1982*). This latter formulation is particularly useful because it removes the need for proof of residence documents from applicants, while still limiting access only to people in Kenya.

CHRI recommends that ss.2(1) and 6 be amended to give "all persons" the right to access information rather than just "citizens". At the very least, a formulation should be devised to let residents of Kenya who are not citizens to access information.

Use consistent terminology – "right to access information" and "information"

14. The draft Bill sometimes refers to access to *information*, but in a number of key clauses it then goes on to refer to "access to records" or "access to information in documentary form" or "access to official information". The interchangeable use of these phrases is confusing. More problematically, they all serve to restrict the general "right to access information", because "information" covers a much broader range of items than "record" or "document". Notably, "official document" is an even more restrictive phrase and could be abused by officials to exempt many relevant government records on the basis that they are not "official", howsoever that term is supposed to be defined. It is not clear why so many different definitions phrases have been used, but they could cause confusion at implementation, and may also simply operate to undermine and restrict the general right to information which the Bill attempts to enshrine.

15. Additionally, the definitions of "information" and "document" which have been included in the Bill are restrictively phrased. They exclude access to information such as materials used to construct buildings/roads/etc or samples. In developing country contexts in particular, access to such information has been extremely useful in ensuring that public

works have been properly undertaken (see the *Right to Information Act 2001* in the State of Delhi where people have used the inspection power to scrutinise public works and expose corruption).

CHRI recommends that the entire Bill be reviewed to make reference to "access to information", rather than documents, records or official records. A number of provisions throughout the Bill use these latter terms interchangeably and this could become very confusing for officials to implement. A single standard of "access to information" should be adopted throughout the Bill, most notably in s.6 which actually sets out the parameters of the right to information.

In support of this recommendation, all of the various definitions in s.3 should be combined and a single definition of "information" should be included, reworded to ensure the broadest coverage, for example:

> *"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, works, models, data, material held in any electronic form and information relating to any private body which can be accessed by a public authority under any other law for the time being in force"*

Use consistent terminology – "public authorities", not "agencies" or "the Minister"

16. In s.2, the Bill is stated to apply to "Government" and "government departments, agencies and local authorities". In s.3 however, the term "agency" has been chosen to capture the range of bodies covered by the law. In s.15(3) and s.19 and elsewhere, the Bill instead focuses on the "Minister". In fact, throughout the Bill, a variety of formulations are used to refer to the bodies and people from whom information can be accessed. This could cause serious confusion at the time of implementation. It is important that precise terms are used and that all defined terms are consistently utilised. Drawing on international best practice, consideration should be given to using the term "public authorities" to refer to all the bodies covered by the Act. The definition of said "public authorities" should then be more broadly defined than the current definition of "agency".

17. In particular, all references to accessing information from "the Minister" should be removed. Although this is the approach favoured in the Australia *Freedom of Information Act 1982*, it is unnecessarily complicated and adds nothing. Ministers are not in practice responsible for providing information, their ministries are – and these Ministries will be covered under the general phrase "public authority". This is a very important distinction to recognise though, because many clauses in the Act currently confuse minister with ministries and the result is a restriction on the right to information. For example, s.15(3) and s.19 permit the "Minister" not to process applications if it would impair "his/her work". This is much too narrow – all Ministers are unlikely to have time to process almost all but the most sensitive of FOI applications!

CHRI recommends that the Bill remove all reference to access to information being requested from "agencies", "Ministries", "departments" or "the Minister", and that instead, all of these terms be replaced throughout the Bill with the phrase "public authority" which will be defined as follows:

> *"public authority" means Parliament and its committees, the courts, Cabinet, a Ministry, Department, Executive agency, statutory body, municipal corporation, government corporation, any government commission or any other agency of Government, whether part of the executive, legislature or judiciary and includes any authority or body established or constituted: (i) by or under the Constitution; (ii) by any other law, bodies which appear to exercise functions of a public nature, or are providing under a contract made with a public authority any service whose provision is a function of that authority, a publicly owned company and any other body owned, controlled or substantially financed by funds provided directly or indirectly by the appropriate Government"*

Extend the right to information to "private bodies"

18. Section 2 makes it clear that the Bill allows access only to information held by government departments, agencies and bodies. 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.

19. 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, but a number of other formulations could also be considered:
    - *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, determined according to turnover or employee numbers]
    - *India (FOI Act 2002) s.2(f): Any other body owned, controlled or substantially financed by funds provided directly or indirectly 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.*
    - *Maharashtra, India s.2(6): Any body which receives any aid directly or indirectly by the Government and shall include the bodies whose composition and administration are predominantly controlled by the Government or the functions of such body are of public nature or interest or on which office bearers are appointed by the Government.*
    - *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*

CHRI recommends that the Bill be amended to include specific provisions to bring private bodies within the scope of the law.

Part II – Publication Of Documents And Information

Broaden the proactive disclosure provisions

20. It is positive that ss.4 and 5 require proactive publication of certain information by all bodies covered by the Bill. However, the provisions are currently quite complicated. Additionally, the list of topics which public bodies are required to proactively publish is extremely limited. The Bill currently focuses only on providing very basic information about public authorities. The Bill has not exploited the opportunity to use proactive disclosure as a means of increasing transparency in public bodies and thereby reducing corruption and increasing accountability of officials. Proactive disclosure also works to increase confidence in government, while at the same time reducing the number of request made under access legislation.

21. Article 7 of the Mexican *Federal Transparency and Access to Public Government Information Law 2002 and s.4 of the Indian Right to Information Bill 2004* provide excellent models for consideration. They require 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.

22. The current provisions in the Bill only require publication of the required information in the Official Gazette. This is inadequate. As experience has shown in South Africa, publication in the Gazette has been incredibly expensive, for very little benefit because so few members of the public actually read the Gazette, or even know how to access it. It is much more important that the required information be disseminated on Government websites and additionally be kept at all offices of the public authority for inspection.

CHRI recommends that ss.4(1) of the Bill be replaced with more comprehensive proactive disclosure provisions, and the remaining provisions in ss.4 and 5 be simplified to facilitate easier implementation by public officials. The following list of provisions is drawn from the Mexican and Indian Acts and could be insert at s.4(1):

"(1) Every public body shall

(a) publish before the commencement of this Act:
- *(i) the particulars of its organisation, functions and duties;*
- *(ii) the powers and duties of its officers and employees;*
- *(iii) the procedure followed in the decision making process, including channels of supervision and accountability;*
- *(iv) the norms set by it for the discharge of its functions;*
- *(v) the rules, regulations, instructions, manuals and records, held by it or under its control or used by its employees for discharging its functions;*
- *(vi) a statement of the categories of documents that are held by it or under its control;*
- *(vii) the particulars of any arrangement that exists for consultation with, or representation by, the members of the public in relation to the formulation of its policy or implementation thereof;*
- *(viii) a statement of the boards, councils, committees and other bodies consisting of two or more persons constituted as its part or for the purpose of its advise, and as to whether meetings of those boards, councils, committees and other bodies are open to the public, or the minutes 'of such meetings are accessible for public;*
- *(ix) a directory of its officers and employees;*
- *(x) the monthly remuneration received by each of its officers and employees, including the system of compensation as provided in its regulations*
- *(xi) the budget allocated to each of its agency, indicating the particulars of all plans, proposed expenditures and reports on disbursements made;*
- *(xii) the manner of execution of subsidy programmes, including the amounts allocated and the details of beneficiaries of such programmes;*
- *(xiii) particulars of concessions, permits or authorisations granted by it;*
- *(xiv) details in respect of the information, available to or held by it, reduced in an electronic form;*
- *(xv) the particulars of facilities available to citizens for obtaining information, including the working hours of a library or reading room, if maintained for public use;*
- *(xvi) the names, designations and other particulars of the Public Information Officers;*
- *(xvii) such other information as may be prescribed;*

and thereafter update there 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.*

(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"

Require proper records management

23. The huge volume of information in governments' hands requires that information be carefully managed so that authorities can locate and provide requested information in a timely and efficient way. In recognition of this fact, a new provision should be inserted in the Bill specifically requiring that *"Every public body is under an obligation to maintain its records in a manner which facilitates the right to information as provided for in this Act*. Section 6 of the Pakistan *Freedom of Information Ordinance 2002* provides useful guidance in this context, specifically requiring computerisation of records and networking of information systems. Consideration should also be given to empowering an appropriate body - perhaps the Public Information Directorate? – to develop guidelines or a Code on records management to this end. This has been done in the UK where, under s.46 of the *Freedom of Information Act*, the Lord Chancellor is responsible for developing a Code of Practice on records management.

CHRI recommends that a new provision be inserted into the Bill incorporating appropriate record keeping and management systems to be implemented to ensure the effective implementation of the law.

Part III – Access to Documents

Strengthen the fundamental provision setting out the "right to information"

24. Section 6(1) is the most important provision in the entire Bill as it sets the parameters for the right to access information under the law. Currently, the provisions is confusingly worded and unnecessarily restrictive. It is not at all clear why the provision differentiates between "official information of government departments" (noting that "government departments" are not specifically defined within the Bill but are probably covered by the definition of "agency" in any case) and "documents of an agency". There is no justification for such a distinction – and in all likelihood it will only serve to confuse bureaucrats and the public when it comes to implementation.

Permit access to all information created, collected or held by a public authority before passage of the Bill

25. Section 7(2) appears to severely restrict the right to information because it seems to operates to ensure that the public can only request information that became a document of a public authority AFTER the passage of the Bill. Even considering the special provisos contained in the sub-sections, this approach is completely inappropriate. It will operate to keep an incredible amount of information held by the Government away from public scrutiny. The public have a right to access historical documents, particularly when one considers the corruption that has plagued previous governments. It goes completely against international best practice to impose such a severe limit on the right to access government information.

CHRI recommends that s.7(2) be deleted.

Clarify who is responsible for handling applications

26. Section 10 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 considerable reworking to make it capable of implementation in practice. In particular, it is a problem that s.10(1) does not properly identify who will be responsible within each public authority for receiving

and processing applications. The current formulation appears to envisage that "a responsible officer of an agency" (a term which is not explained) or the Minster will be responsible for accepting and responding to applications. This could be difficult to implement – is a Minister really expected to accept applications? Some effort is made to clarify this approach in s.18 (query why this clause has been included separately from s.10(1)?), but it is still not clear exactly how s.18 interacts with s.10(1).

27. In accordance with common practice in other countries, consideration should be given to requiring that a specific officer or officers be designated within public bodies to be responsible for receiving requests and ensuring access to information. This can 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!

28. Taking this into account, consideration should be given to revising s.10(1) and s.18 either 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 who 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.

CHRI recommends that s.10(1) and 18 be merged/deleted/amended with a view to identifying 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 Bill 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*"*

Remove unnecessary bureaucratic requirements from the application process

29. The process for submitting applications set out in s.10 needs to be reworked to take into account the following:

    - Identifying documents: Section 10(2)(b) places too heavy a burden on requesters to identify the information needed. What is required to "provide such information concerning the document as is reasonably necessary to enable a responsible officer of the agency, or the minister, to identify it"? This seems to assume that requesters will always know exactly what document(s) they want – whereas often they may know the general subject matter they are interested in, but not what actual documents are held by the agency in relation to that subject. For example, a requester could ask for all documents related to the tender process for Project X related to Company Y's successful bid. Is this specific enough to meet the requirements of s.10(2)(b)?

In keeping with best practice, the requester should only be required to provide as much information as possible to assist the PIO to find all relevant documents, and s.10(2) should be made explicitly subject to s.10(3) which requires assistance from PIOs to fix non-conforming applications. Notably, s.10(3) should also make it clear that applications cannot be rejected UNLESS AND UNTIL such assistance has been offered and rejected.

- Time limits: The time limits in s.10(5) are 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 *Freedom of Information Act 2002*.

- Written notice of decisions: Section 10(5) only requires that "all reasonable steps" are taken to notify requesters of decisions. This is unacceptable considering that one of the requirements for all applications is that an address for notices is supplied (s.10(2)(c)). If this has been done, then what possible excuse can there be for notices to not be received by applicants? The current drafting of the provision could be abused by officials to excuse non-compliance with the time limits in the law by claiming that a notice was sent to an applicant but not received by them. This requirement should be deleted and replaced with a strict requirement that all applicants receive a decision notice with the prescribed time limits. The content of such notices should also be prescribed in the Bill.

CHRI recommends that:

- *s.10(2) should make it explicit that it is subject to the provisions in s.10(3);*
- *s.10(2)(b) should require only that applicants provide as much information as possible to assist the PIO to find all relevant information;*
- *s. 10(5) should include an additional sub-clause providing that "information will be provided within 48 hours where it relates to the life and liberty of a person"*
- *s. 10(5) should require that all applicants must receive a notice of a decision on their request within the prescribed time limits.*

CHRI recommends that a new clause be inserted specifying the content of 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 [see paragraphs 30 and 31 below re 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
- *Non-disclosure notice: Where access is refused or partially refused, the PIO shall give a notice to the applicant informing:*
  (a) that access has been refused or partially refused;
  (b) the reasons for the decision, including the section of the Act which is relied upon to reject the application and any findings on any material question of fact, referring to the material on which those findings were based;
  (c) the name and designation of the person giving the decision;
  (d) the amount of any fee which the applicant is required to deposit, including how the fee was calculated;
  (e) the applicant's rights with respect to review of the decision regarding non-disclosure of the information, the amount of fee charged or the form of access provided, including the particulars of the appellate authority, time limit, process and any other forms.

Fees should not be imposed, or at least should be limited to cost recovery

30. Sections 10(2)(e) and 14(1)(b) appear to indicate that a fee will be imposed both for making an application and for accessing information. Best practice requires that no fees should be imposed for accessing information, particularly government information, as costs should already be covered by public taxes. At the very least, no application fee should be levied because the initial work required to locate information and determine its sensitivity to disclosure is a routine and expected task of government. This is the case in Trinidad & Tobago where s.17(1) of the *Freedom of Information Act 1999* specifically states that no fees shall be imposed for applications. Notably, s.17(3) of the Trinidad & Tobago Act and s.7(6) of the Indian *Right to Information Bill 2004* go further and state that even where fees are imposed, if a body subject to the Act fails to comply with the time limits for disclosure of information, access to which the applicant is entitled shall be provided free of charge.

31. If any fees *are* imposed, the rates should be set with a view to ensuring that the costs imposed for access are not so high as to deter potential applicants. At the most, 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. Furthermore, a provision should be included in the Bill allowing for fees to be waived in certain circumstances. Section 29(5) of the Australian *Freedom of Information Act* actually provides a good model.

CHRI recommends that the approach to fees be reconsidered such that:

- *No fees shall be imposed for applications, both because the public already pay for information via their taxes and because in practice it will be difficult to collect fees if applications can be emailed or posted;*
- *No fees are imposed for access, but that if fees are imposed:*
  - *It should be explicitly stated that "any fees imposed should not be prohibitively high, so as to defeat the intention of the law and the fee regime for all public authorities will be prescribed in rules by the Minister"*
  - *"Notwithstanding the imposition of fees, applicants shall be provided the information free of charge where a public authority fails to comply with the time limits specified in sub-section 10(5)";*
  - *Fees can be waived "where*
    (i) the payment of a fee would cause financial hardship to the applicant or the person on whose behalf the application was made or
    (ii) the giving of access is in the general public interest or in the interest of a substantial section of the public"

Consolidate and tighten the transfer provisions

32. Section 10(4) and s.12 both cover transfers of applications but adopt different requirements. The key principle which should underpin all transfer provisions is the fact that applications should be processed quickly and at minimum cost to the applicant. In this context then, it should be recognised that it is difficult for members of the public to ascertain which body, or bodies, hold the information they require and, if they are initially mistaken, to then submit multiple applications until they find the right body. It is simpler, cheaper and timelier to *require* public bodies to simply transfer applications which would be better handled by another body. As such, s.10(4) which anticipates that public authorities should assist applicants to redirect their applications should be deleted – the responsibility should not be on the applicant.

33. Public officials have access to the internal workings of government and can much more easily ensure effective transfers of requests. Section 12 seems to recognise this to some extent but it is poorly drafted:

- It requires transfers in cases where the public authority is not in the possession of the information but it is "to the knowledge of that agency" with another agency. But what constitutes "knowledge"? Is this issue only considered on the basis of the state of the knowledge of the particular person processing the application, or is it to be expected that the public authority, even if it does not hold the information, will at least actively try to find out who does? CHRI considers that the latter should be the minimum test. Public authorities should make "every endeavour" to find out who holds the information, and only if they certify that they cannot locate the information within the entirety of the bureaucracy should they have the right to reject an application.
- It requires the "agreement of the other agency" before a transfer can be made. This is an unnecessary legal requirement – all public authorities have a duty to process requests for information and therefore, if the subject matter correctly falls within the public authority's mandate, that authority has a duty in law to process it. It should not have a discretionary right to "agree" to accept an application.

CHRI recommends that s.10(4) be deleted.

CHRI recommends that s.12 be replaced with the following:

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

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

(b) the subject matter of which is more closely connected with the functions of another public authority,

the first mentioned public authority shall transfer the application or such part of it as may be appropriate to that other public authority and shall inform the applicant immediately of the transfer.

(2) A transfer of an application pursuant to subsection (1) shall be made as soon as practicable but not later than 5 days after the date of receipt of the application."

Permit translation of requested documents, if in the public interest

34. The Bill does not currently address the issue of translation of requested information. 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.

Considering that Kenya's official languages are both English and Swahili, CHRI recommends that an additional provision be included which enables citizens to access information in the second official language. Section 12 of the Canadian Access to Information Act 1983 *provides a useful example:*

"(1) A person who is given access to a record or a part thereof under this Act shall, subject to the regulations, be given an opportunity to examine the record or part thereof or be given a copy thereof.

(2) 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

(a) forthwith, if the record or part thereof already exists under the control of a government institution in that language; or

(b) 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."

Do not permit rejection of requests because of lack of Ministerial time

35. Sections 15(3) and s.19 both permit information to be withheld and/or information to be withheld in a particular form because giving of access would "interfere unreasonably with…the performance by the minister of his or her functions". This is an astonishing caveat. Almost every request could be rejected on this basis. Ministers are incredibly busy such that it is unreasonable to imagine that they could be expected to deal with any but the most sensitive and important of information requests. Although these provisions are

modelled on the Australian *Freedom of Information Act 1982*, they are not best practice and should not be replicated.

36. As discussed in paragraphs 16 and 17, these provisions reflect the confusion throughout the Bill in relation to who exactly is responsible for providing information under the law. CHRI continues to recommend that the Bill should be stated to apply to "public authorities", not Ministers and agencies. Although Ministers may often legally be the head of these public authorities, for the purpose of the law it should be understood that it is the public authority that has responsibility as an organisation for processing requests, not the Minister as an individual.

37. In relation to s.19 specifically, it is concerning that s.19(2)(a) allows applications to be rejected because processing would take too much time in instances where this occurs because of difficulties locating documents. This provisions is ripe for abuse and appears to penalise applicants because of a failure in a public authority's record keeping. Similarly, s.19(5) gives an unjustifiably broad discretion to public authorities to reject applications. The provisions allows officials to simply assume a whole batch of documents will be exempt – without even looking at them! This is an unfair provision and could very easily be abused.

38. While it is understandable that there may be cases where a request is genuinely too large to process without unreasonably interfering with the public authority's workload, the bottom line should be that in such cases the public authority should be required to consult the applicant and assist them to try to narrow their search. Applications should not be summarily rejected simply because of the anticipated time it will take to process them.

CHRI recommends that s.15(3)(a) be reworded to read: "would interfere substantially and unreasonably with the operations of the public authority".

CHRI recommends that s.19 be replaced with the following:

"(1) Where a public authority is of the opinion that processing the request would substantially and unreasonably divert the resources of the public authority from its other operations, the public authority shall assist the applicant to modify his/her request accordingly.

(2) Only once an offer of assistance has been made and refused can the public authority reject the application on the ground that processing the request would substantially and unreasonably divert the resources of the public authority from its other operations"

Tighten the deferral provisions

39. Although 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, the provisions in s16(1) are unnecessarily complicated in guarding against this possibility. Sections 16(1)(a) 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. Otherwise, publication could be delayed *ad infinitem* with no recourse for the applicant. It is not clear what purpose section 16(1)(d) serves – other than to allow the Minster to publicise a key piece of news before it is published anywhere else? But this smacks of "spin"; if the information is in the public interest, then it should be released – whether in parliament or not. Likewise, s.16(1)(b) could be abused because there is no time limit for presenting the information in parliament or to the person it was prepared for.

CHRI recommends that

- *s.16(1)(b) be subject to a requirement that the information must be conveyed to Parliament or the person for whom it was prepared within 1 month, after which time, it will be released nonetheless;*
- *s.16(1)(d) be deleted.*

Simplify the severance provisions

40. It is very positive that the Bill includes provisions which allow for partial disclosure of information where records may contain some exempt information only. However, the model which has been chosen in s.17 is unnecessarily complicated and will likely simply impose an additional and unnecessary burden on public officials. Commonly, severance provisions simply state that where a record contains exempt information and the information can reasonably be severed from the record, it shall be and the remainder of the document will be released.

41. However, s.17 goes one step further and states that even "irrelevant" information should be severed. This provision could easily be abused – resistant officials may well deem information "irrelevant" arbitrarily. This may also require officials to undertake a huge amount of extra work for little gain because they will have to sift through every record to consider what is and is not relevant. This is unnecessary – officials should simply provide access to records which contain some relevant information. Applicants then have the option of inspecting them to decide what is and is not relevant themselves and choosing to copy what they want. In this way, they can keep costs down, but still ensure that they are definitely getting all the information they require.

CHRI recommends that s.17 be replaced with the following:

"Where a request for access to information is rejected on the ground that it contains information which is exempt from disclosure, then, notwithstanding anything contained in this Act, access may be provided to that part of the record which does not contain any information which is exempt from disclosure under this Act and which can reasonably be severed from any part that contains exempt information."

[NB: A decision notice should be sent in the same terms as recommended under paragraph 29 above]

Part IV – Exempt Documents

Make all exemptions subject to a public interest override

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

43. 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. 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. The Act currently already makes some exemptions specifically subject to a public interest test – for example, in ss. 22, 24, 27 and 33. However, this is not enough – all exemptions should be considered through the lens of the public interest. Section 8(3) of the Indian *Right to Information Bill 2004* and s.32 of the Ugandan *Access to Information 2004* provide examples of such clauses.

44. Every test for exemptions (articulated by Article 19) 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?

CHRI recommends that a public interest override provision be included before section 21, in the following terms:

> *"A public authority may, notwithstanding the exemptions specified in section [X], allow access to information if public interest in disclosure of the information outweighs the harm to the public authority"*

CHRI recommends the inclusion of a blanket declassification provision.

Delete all references to Ministerial certificates

45. The use of Ministerial certificates in ss.21, 22, 24 and 25 is entirely contrary to international best practice, such that it is disappointing that this device has been replicated from the Australian *Freedom of Information Act 2002*. Even in Australia, 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".

46. More recently, in 1994 two officials from the Attorney General's department concluded that:

    > "The provisions for conclusive certificates are now anachronisms with little if any relevance to the contemporary world of FOI decisions. Time has proven that the substantive exemption provisions, without the added strength of certificates, are in fact more than adequate to the task of the exemption of genuinely sensitive documents."[4]

47. In a law which is specifically designed to make Government more transparency and accountable, the use of Ministerial 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 (see ss.44(3) and (4) of the Bill which put Ministerial certificates beyond the scrutiny of the Information Tribunal). This completely undermines the principles upon which the Westminster separation powers is based – oversight bodies are supposed to provide the "checks and balances" on the executive and legislature. But in this instance, the Minister is able to be his/her own judge and jury.

48. CHRI strongly recommends that all of the exemptions in the Bill which permit a Minister to issue a conclusive Ministerial certificate are deleted. If this recommendation is not implemented, at the very minimum, all of the provisions permitting the use of Ministerial certificates should:

    - Require the same criteria to justify the use of a certificate in all the provisions, namely that "the disclosure of the document would be contrary to the public interest" (see s.24(3)). The tests in s.21 and 22(4A) are more general and could be more easily abused.
    - Amend the sub-clause which permits the use of a Ministerial certificate where "information as to the existence or non-existence of a document…would, if contained in a document of an agency, cause the last-mentioned document to be an exempt document" to require that in such cases, the relevant exempt information can be severed and that portion made the subject of the Ministerial certificate, while the remainder of the document can still be released.

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[4] Campaign for Freedom of Information UK (2001) *The Ministerial Veto Overseas: Further evidence to the Justice 1 Committee on the Freedom of Information (Scotland) Bill*, http://www.cfoi.org.uk/pdf/vetopaper.pdf.

- Delete the sub-clause which permits the delegation of the power to issue Ministerial certificates. Ministerial certificates are very significant documents and should ONLY be issued by a Minister if at all. If this power is delegated, it could easily be abused by officials who have less to lose politically if it is later found out that the Ministerial certificate was incorrectly issued. Under the UK *Freedom of Information Act 2000*, Ministerial certificates can only be issued by a "Minister who is a member of the Cabinet or by the Attorney General" (eg. s.25(3)).
- Add an additional clause requiring any Ministerial Certificate issued must be tabled in Parliament along with an explanation. This is the practice in the UK, 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".

CHRI recommends that ss.21, 22, 24 and 25 be amended to remove the power for Ministers to issue conclusive Ministerial certificates and the remainder of the Bill amended accordingly. In the event that this recommendation is not adopted, CHRI recommends that the recommendations detailed in paragraph 48 above are implemented.

Tighten the international relations exemption

49. Sections 21(1)(a)(iii) and (b) overlap with s.22(1)(a) and (b) because both protect international relations/ relations with foreign governments. As such, one set of provisions should be deleted to prevent duplication. In any case, ss.21.(1)(b) and 22(1)(b) should both be deleted because the key issue for any exemption should be whether harm will be caused by disclosure, whereas, ss.21.(1)(b) and 22(1)(b) focus instead on the confidential nature of the information. Just because information was given to the Kenyan Government in confidence does *not* mean that it should necessarily *remain* confidential. At the time it was communicated it may have been sensitive, but at the time it is requested it may be harmless. Why should disclosure be prevented in such cases? As long as the more general protections in ss.21(1)(a) and 22(1)(a) 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?

CHRI recommends that ss.21(1)(a)(iii), s,21(1)(b) and ss.22(1)(b) be deleted. Section 22(1)(a) provides adequate protection against disclosures that would harm international relations.

Remove the exemptions for Cabinet documents

50. Although it has historically been very common to include 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.

51. In this context, it is 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. For example, s.23(1)(a) protects documents "submitted to the Cabinet for its consideration". However, it is notable that in some other jurisdictions, this type of provision has been abused because Cabinet members simply take documents into

Cabinet and then out again and claim an exemption. While it is positive that the exemption requires that the document must have only come into existence for the purpose of submission to Cabinet, in this day and age of "cut and paste" report writing, it would not be very hard for an official to "create" a new document for Cabinet out of old information that he/she wishes to make exempt.

52. It is also not clear why s.23(1)(b) 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.23(1)(c) – which protects documents containing extracts from official Cabinet records. Section 23(1)(d) 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. However, if s.23(1)(b) is deleted and official records of Cabinet are at least released, this may go some way to mending the harm done by s.23(1)(d)

CHRI recommends that s.23 should be deleted entirely. At the very least, ss.23(1)(a), (b) and (c) should be deleted.

Tighten the exemptions internal working documents

53. Section 24(1) which protects internal working documents is also far too broad. It is positive that the provision is made subject to a public interest test. Although as discussed in paragraph 52 above in relation to the Cabinet exemption, the fact remains that the advice and decision documents being exempted under this provision are exactly the kind of documents that most need to be exposed to public scrutiny, in the interests of good governance and accountability. It is not enough in this context to argue that disclosure of this kind of information would inhibit internal discussions. Officials should be able – and be required – to ensure that their advice can withstand public scrutiny. To fear such transparency raises questions about the soundness of the entire decision-making process. Of course, where the discussions relate to sensitive information, it must be remembered that such information will be protected under other exemptions clauses.

54. The exemption is currently too focused on the types of internal working documents, not their purpose. The exemption though, should be drafted more tightly to ensure that it is not so broad that it can be used to remove all the most interesting documents from public view. It should only protect internal documents 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!

CHRI recommends that s.24(1) be replaced 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;
(b) seriously frustrate the success of a policy, by premature disclosure of that policy; and disclosure would be contrary to the public interest"

Delete the exemption for documents concerning agency operations

55. The protections contained in s.28 are all much too broad, apart from s.28(1)(a). Section 28(1)(d) is the worst of the sub-clauses. Allowing an exemption for information the release of which would "have a substantial adverse effect on the proper and efficient conduct of the operations of an agency" is the equivalent to giving officials a carte blanche to withhold any document they do not wish to make public. What is intended to be legitimately covered by this provision? Ideally, this provision should be deleted, but at the very least the drafters should include criteria to guide the application of this exemption. It can too easily be abused – or even just genuinely misunderstood.

56. Section 28(1)(c) which protects information related to "the management or assessment of personnel" is also a provision which is ripe for abuse. Could this clause be used to cover up cases of nepotism or favouritism in promotions, or instances of transfers being used as punishment? Could this clause be used to hide bad staff management practices? Section 28(1)(b) is simply redundant – the relevant interests are already protected by s.28(1)(a).

CHRI recommends that ss.28(1)(b), (c) and (d) are deleted.

Release business information in the public interest

57. It is legitimate to include exemptions to protect sensitive commercial information, but to make absolutely sure that the exemption is not abused, it is absolutely imperative that s.31 is made subject to a public interest override (even if the general recommendation in paragraphs 42-44 above are not implemented). Private bodies have a huge impact on public life such that the public increasingly feels the need to exercise their right to know in respect of private business information as well as Government information. It is an indisputable fact that most of the corruption that occurs in Government happens at the public/private interface – most commonly a private body contracting with a public authority makes an agreement for both sides to divert public money. It is in recognition of this fact that the strong push for greater "corporate responsibility" is occurring international. Allowing access to key business information from private bodies is one way of supporting this agenda.

58. In this context, s.31(1)(c) provides an unjustifiably broad protection for private business information because it does not contain a harm test but merely tries to protect the "business, commercial or financial affairs of an organization or undertaking where disclosure could unreasonably affect that person adversely in respect of his or her lawful business". This is much too broad – what does "unreasonably affect" and "adversely" cover? These are very low standard of harms. What if the disclosure relates to environmental or social hazards – these could affect the private body adversely but should still be disclosed to the public!

CHRI recommends that s.31 be expressly made subject to a public interest override whereby information will still be released even if covered by an exemption, if the public interest in disclosure outweighs the public interest in withholding the information.

CHRI recommends that s.31(1)(c) be reviewed to ensure that the level of harm required to justify non-disclosure is sufficiently high to warrant protection, taking note of the need to promote greater corporate social responsibility and accountability of the private sector. At the very least, information should still be disclosed where the disclosure of the record would reveal evidence of:

(i) a substantial contravention of, or failure to comply with the law; or
(ii) an imminent or serious public safety, public health or environmental risk; and

Do not exempt research

59. The exemption in s.32 for research information is much too broad. If the research has any commercial value it will be protected by s.31(1)(b). In all other circumstances there is little justification for protecting against premature publication of research. Conversely, there is ample scope for abuse via such a provision – key government statistics (on health care, education, crime) could be withheld on the basis that they constitute part of a bigger research activity. At the very least, the harm test is too low – "substantial damage" or "serious prejudice" should be required to justify non-disclosure.

CHRI recommends that s.32 be deleted in its entirety.

Do not exempt electoral rolls

60. The exemption in s.34 against disclosure of electoral rolls is entirely unjustified. There is little harm that can be envisaged from the release of such rolls, but huge benefits in terms of electoral transparency. In India for example, it is very common practice for NGOs to

access copies of electoral roll and then undertake research to check that the people listed on the electoral roll actually exist. At the last election, NGOs uncovered thousands of false names on the electoral rolls. Their work has contributed to cleaning up voter fraud. This kind of work should be encouraged rather than stifled.

CHRI recommends that s.34 be deleted in its entirety.

Part V – Amendment And Annotation Of Personal Records

61. CHRI has not commented on this Part as CHRI does not specialize in privacy rights issues.

Part VI – Review of Decisions

62. The appeals process is currently very confusingly drafted. Section 38 currently appears to set out a process for internal appeal of decisions, while ss.41-44 set out a process for appealing to a newly established Information Tribunal. In both instances it is not clear from whose decisions applicants will be appealing.

Taking into account the more general recommendations in paragraphs 28 above, it is vital that the Bill be reviewed with a view to clarifying exactly what the process for applications and appeals is – from the Public Information Officer under s.10 to the appellate authority under s.38 to the Information Tribunal under ss.41-44. All of these provisions should be reviewed to ensure that the Bill is internally consistent and clarifies exactly who has authority to do what at what stage.

Clarify the internal appeals process

63. Section 38 is very confusingly drafted and requires further elaboration to enable proper implementation. Currently it is not actually clear to whom an aggrieved applicant will be appealing. Section 38(1) only mentions an appeal being sent "to the agency". This is very unclear – not only for the public but for the public officials who will be required to implement the provisions. The provision also specifically states that an appeal may only be made if the decision was NOT made by "the responsible minister or principal officer", but then does not explain what happens if the decision WAS made by those parties. Will an applicant in such cases be able to apply directly to the Information Tribunal?

64. It is very worrying that s.38 is written in such general terms, leaving the details of the internal appeals process to be set out in regulations. This is not appropriate. An effective and internally consistent appeals framework is essential to a proper functioning of the entire access regime. The primary legislation should set out such important details. To ensure clarity and ease of implementation, the entire procedure for applying for information, determining applications and submitting and handling appeals should be developed holistically and captured in a single legislative instrument.

CHRI recommends that s.38 be entirely reworked to make it clear:

- *Who exactly within each public authority will be responsible for receiving complaints under the Act (referred to as the Appellate Authority)*
- *What investigation and decision-making powers the Appellate Authority has;*
- *The time limits for making decisions;*
- *The process for notifying applicants of decisions; and*
- *Any appeal rights following the internal appeal.*

Ensure the Information Tribunal is independent, autonomous and properly-resourced

65. It appears that ss.41-44 are designed to establish an Information Tribunal which will act as an appeal body for applicants who are dissatisfied with the response they receive from a public authority and/or the appellate authority under s.38. This is a positive step in theory because best practice international standards require that access regimes include an appeals mechanism which is independent of government, as well as cheap, quick and

procedurally simple. 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, the availability of another independent body as the first point of appeal is a positive step. Experience from a number of Commonwealth jurisdictions, including Canada, England, Scotland and Australia, has shown that such independent bodies have been very effective in raising the profile of the right to information and balancing against bureaucratic resistance to openness.

66. It should be recognised at the outset, that the creation of a new Information Tribunal will require the allocation of financial resources from the Government if it is to be effective. It is important that the Government is genuinely committed to ensuring the new Information Tribunal can discharge their mandate effectively and does not indirectly exert influence via the (non) allocation of funding.

67. The procedure for appointing members of the Information Tribunal must be impartial and independent of government interference, to ensure that the Information Tribunal is seen as non-partisan and can act as an independent body. The current provisions for appointment in s.41 of the Bill do not fulfil this criteria. Appointment of members by the Minister in consultation with the Attorney General means that Tribunal members will effectively be government appointees. This severely undermines the notion of the Tribunal comprising an *independent* appeal body. It is additionally problematic that the Minister can amend the schedule setting out membership, procedures and sittings of the Tribunal at will and without oversight by simply putting a notice in the Gazette. This power is too broad and far-reaching to be vested in a single Government officer, particularly considering the centrality of an independent oversight body to an access regime.

68. It is worth referring to the ICJ draft *Freedom of Information Bill 1999* and the provisions proposed in relation to the appointment of an independent Information Commission. The ICJ's recommendations regarding appointment of Commissioners should be applied to the appointment of Tribunal members to ensure that the Tribunal is – and is seen to be – impartial and independent. More generally, it is worth noting that the appointment process for most Information Commissioners and/or administrative tribunals responsible for handling freedom of information appeals throughout the world are designed to maximise independence of appointees – usually by requiring a committee comprising representatives of Government, the Opposition and the Chief Justice to nominate candidates, and often requiring those candidates to subsequently be endorsed by Parliament.

CHRI recommends that ss.41-44 be moved to sit in Part VI: Appeals.

CHRI recommends that s.41 is replaced by the following provisions:

(1) The President shall nominate a candidate or candidates to the Information Tribunal from persons qualified under the provisions of this Act and parliament by a special majority vote, shall confirm the said nomination.

(2) The persons appointed to the Information Tribunal shall –
- *(a) be a person qualified to be appointed as a judge of the High Court of Kenya;*
- *(b) be publicly regarded as a person who can make impartial judgments*
- *(c) have sufficient knowledge of the workings of Government;*
- *(d) not have had any criminal conviction and not have been a bankrupt;*
- *(e) be otherwise competent and capable of performing the duties of his or her office;*
- *(f) not be the President, Vice President, a Minister or Deputy Minister, a serving public officer or a Member of Parliament; and*
- *(g) not hold any other public office unless otherwise provided for in this Act.*

(3) Members of the Information Tribunal shall have budgetary, operational and decision-making autonomy and should be completely independent of the interference or direction of any other person or authority, other than the Courts.

(4) (a) A person who is a member of the Information Tribunal may be removed from office before expiry of his or her term only for inability to exercise the functions of the office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour.

(b) A person who is a member of the Information Tribunal shall be removed from the office by the President if the question of his removal has been referred to a Tribunal appointed under this section and the Tribunal has so recommended.
(c) The President shall appoint the Tribunal consisting of a chairman and four other members from among persons:-
(i) who hold or have held the office of judge of the High Court or Court of Appeal;
(ii) who are qualified to be appointed as judges of the High Court under section 61 (3) of the Constitution.

Clarify the scope of the Information Tribunal's oversight remit

69. Sections 42 and 43, which explain what cases the Tribunal can adjudicate on, are unnecessarily complicated and could easily be conflated to set out a core set of areas over which the Information Tribunal has jurisdiction. Notably, an additional catch-all provision should also be included which allows the Information Tribunal to hear an appeal on "any issue related to disclosure". This will ensure that the Information Tribunal's jurisdiction is not inadvertently limited, while at the same time simplifying 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* provide good models.

CHRI recommends that ss.42 and 43 be replaced with the following:
"Subject to this Act, the Information Tribunal shall receive and investigate complaints from persons:
(a) who have been unable to submit a request to a Public Information Officer, either because none has been appointed as required under the Act or because the Public Information Officer has refused to accept their application;
(b) who have been refused access to information requested under this Act;
(c) who have not been given access to information within the time limits required under this Act;
(d) who have been required to pay an amount under the fees provisions that they consider unreasonable, including a person whose wishes to appeal a decision in relation to their application for a fee reduction or waiver;
(e) who believe that they have been given incomplete, misleading or false information under this act;
(f) in respect of any other matter relating to requesting or obtaining access to records under this Act."

Clarify the investigative powers of the Information Tribunal and other process issues

70. In order to ensure that the Information Tribunal can perform its appeal functions effectively, it is imperative that the Tribunal is explicitly granted the powers necessary to undertake a complete investigation and ensure enforcement of their orders. Section 8 of the Schedule does this to some extent but it is not comprehensive. The powers granted to the Canadian Information Commissioner under s.36 of the Canadian *Access to Information Act 1982* provides a better model.

71. An additional provision replicating s.30(3) of the Canadian *Access to Information Act 1982*, which gives the Canadian Information Commission the power to initiate its own investigations, should also be included. In practice, this will be useful in allowing the Information Tribunal to investigate delays in providing information, because these cases will often not reach the Tribunal as a complaint if the information is finally handed over, but may still be worthy of review and the imposition of a penalty, particularly if the Tribunal uncovers a pattern of non-compliant behaviour.

CHRI recommends that the following provision is inserted before s.44:

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

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

(b) to administer oaths;

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

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

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

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

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

(3) *Where the Information Tribunal is satisfied that there are reasonable grounds to investigate a matter relating to requesting or obtaining access to records under this Act, the Tribunal may initiate its own complaint in respect thereof.*

Clarify who carries the burden of proof in appeals

72. 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.

CHRI recommends that an additional provision be inserted into s.44 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 or that the Tribunal should give a decision adverse to the applicant."

Clarify the decision-making powers of the Information Tribunal

73. In addition to the Tribunal's investigative powers, it is necessary to clearly set out the Tribunal's decision-making powers, to ensure that bureaucrats cannot sideline the Tribunal as only a mediator or arbitrator. In this context, the mention of "arbitration" in s.41(1) should be amended to clarify that the Tribunal is an appeals body with powers to make binding decisions. Section 44(1) does attempt to clarify the Tribunal's decisions-making powers to some extent, but the section is relatively brief and could usefully be elaborated upon. The Tribunal is a new body, it is useful to specify the extent of the Tribunal's powers in more detail to ensure that all parties – the public, public authorities and Tribunal members themselves – clearly understand what the Tribunal can do. This elaboration of the Tribunal's decision-making powers should be included in the body of the Act rather than the Schedule, as the current draft of the Bill allows the Schedule to be modified by the Minister alone.

74. In accordance with best practice evidenced in a number of jurisdictions (eg. the State of Queensland in Australia, Mexico), the Commission should have the power to make binding determinations, compel parties to take action, enforce compliance with orders and impose sanctions as appropriate. Without strong powers, the Commission could easily be ignored and sidelined by a bureaucratic establishment which is determined to remain closed. Section 88 of the Queensland *Freedom of Information Act 1992* (which is

replicated in paragraph 55 above), as well as s.82 of the South African *Promotion of Access to Information Act* and ss.42-43 of the Article 19 Model FOI Law provide very useful examples.

75. In this context, it is particularly worth noting that s.44(3) unnecessarily restricts the Tribunal's powers by disabling the Tribunal from releasing documents if they are found to be exempt. In keeping with the recommendations at paragraph 28 above, even if an exemption is found to apply to certain information the Tribunal as an independent arbiter should have the power to look at whether the public interest in disclosing the information outweighs the public interest in withholding the information. This will ensure that an impartial judge is responsible for deciding what is in the public interest – which is preferable when one considers that officials can sometimes confuse the general national public interest with the Government's interests.

CHRI recommends that s.41(1) be amended to clarify that the Information Tribunal is not only an arbitrator of disputes, but operates as an appeals body with the power to make binding decisions on all parties

CHRI recommends that s.44(1) be extended to clarify exactly what powers the Information Tribunal, specifically:

(1) The Information Tribunal has the power to:
- *(a) require the public authority to take any such steps as may be necessary to bring it into compliance with the Act, including by;*
  - *(i) providing access to information, including in a particular form;*
  - *(ii) appointing an information officer;*
  - *(iii) publishing certain information and/or categories of information;*
  - *(iv) making certain changes to its practices in relation to the keeping, management and destruction of records;*
  - *(v) enhancing the provision of training on the right to information for its officials;*
  - *(vi) providing him or her with an annual report, in compliance with section X;*
- *(b) require the public body to compensate the complainant for any loss or other detriment suffered;*
- *(c) impose any of the penalties available under this Act;*
- *(d) reject the application.*

(2) The Information Tribunal shall serve notice of his/her decision, including any rights of appeal, on both the complainant and the public authority.

(3) Decisions of the Information Tribunal shall be notified within 30 days of the receipt of the appeal notice.

CHRI recommends that s.44(2) be amended to permit the Information Tribunal to "disclose document even where they are exempt, where the public interest in disclosure outweighs the public interest in withholding the information".

In accordance with the recommendations in paragraphs 45-48 above, s.44(3) and (4) should be deleted – Ministerial certificates have no place in an effective right to information regime.

Consideration should be given to including a provision making it explicit that the Court of Appeal has the power to consider appeals de novo, and will not be restricted to considering only points of law.

Impose penalties for non-compliance with the law

76. The Act is seriously weakened by the absence of comprehensive offences and penalties provisions, a shortcoming which should be rectified as a priority. Sanctions for non-compliance are particularly important incentives for timely disclosure in jurisdictions where the bureaucracy is unused to hurrying at the request of public. Most Acts contain combined offences and penalty provisions. Section 12 of the Maharashtra *Right to Information Act 2002*; s.49 of the Article 19 Model Law; s.54 of the UK *Freedom of Information Act 2000*; s.34 of the Jamaican Ac*cess to Information Act 2002*; and s42 of the Trinidad & Tobago *Freedom of Information Act 1999* all provide useful models.

77. In the first instance, it is important to clearly detail what activities will be considered offences under the Act. It is important that these provisions are comprehensive and identify all possible offences committed at all stages of the request process – for example, unreasonable delay or withholding of information, knowingly providing incorrect information, concealment or falsification of records, wilful destruction of records without lawful authority, obstruction of the work of any public body under the Act and/or non-compliance with the Information Commissioner's orders.

78. Once the offences are detailed, sanctions need to be available to punish the commission of offences. International best practice demonstrates that punishment for serious offences can include imprisonment, as well as substantial fines. Notably, fines need to be sufficiently large to act as a serious disincentive to bad behaviour. Corruption – the scourge that access laws assist to tackle – can result in huge windfalls for bureaucrats. The threat of fines and imprisonment can be an important deterrent, but must be large enough to balance out the gains from corrupt practices.

79. When developing penalties provisions, lessons learned from the Indian states with right to information laws are illuminating. In some Indian states for example, penalties are able to impose on individual officers, rather than just their department. 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. It is therefore important in combating entrenched cultures of secrecy that individual officers are faced with the threat of personal sanctions if they are non-compliant. The relevant provisions need to be carefully drafted though, to ensure that defaulting officers, at whatever level of seniority, are penalised. It is not appropriate for penalty provisions to assume that penalties will always be imposed on PIOs. 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.

CHRI recommends the inclusion of the following offences and penalties provisions to sanction non-compliance with the law:

Subject to sub-section (3), where any Public Information Officer has, without any reasonable cause, failed to supply the information sought, within the period specified under section 7(1), the appellate authority, Information Tribunal or the Courts shall, on appeal, impose a penalty of [Sh XXXX], which amount must be increased by regulation at least once every five years, for each day's delay in furnishing the information, after giving such Public Information Officer a reasonable opportunity of being heard.

Subject to sub-section (3), where it is found in appeal that any Public Information Officer has –

- *Refused to receive an application for information*
- *Mala fide denied a request for information;*
- *Knowingly given incorrect or misleading information,*
- *Knowingly given wrong or incomplete information, or*
- *Destroyed information subject to a request;*
- *Obstructed the activities of a Public Information Officer, any appellate authority, the Information Tribunal or the Courts;*

commits an offence and the appellate authority, Information Tribunal or the Courts shall impose a fine of not less than [Sh XXXX] and the courts can also impose a penalty of imprisonment of up to two years or both.

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

(4) Any fines imposed under sub-sections (1), (2) and (3) shall be recoverable from the salary of the concerned officer, including the Public Information Officer, or if no salary is drawn, as an arrears of land revenue.

(5) *The Public Information Officer or any other officer on whom the penalty under sub-sections (1), (2) and (3) is imposed shall also be liable to appropriate disciplinary action under the service rules applicable to him.*

Part VII – Miscellaneous

Making the Public Information Directorate responsible for monitoring and promotion of the law

80. The establishment of a Public Information Directorate is a very progressive idea. However, as the Bill is presently drafted, the responsibilities of the PID are both ambiguous and minimal. If the Government is committed to setting up a PID, then this body should be clearly tasked with promoting proper implementation and use of the law. In fact, it is increasingly common to include provisions in access laws mandating a body to promote the new law and the concept of open governance. Such provisions often specifically require that the Government ensure that programmes are undertaken to educate the public and the officials responsible for administering the Act. Section 40 of the Trinidad & Tobago *Freedom of Information Act 1999* and *Section 83 of the* South Africa Promotion of Access to Information Act provide good models.

81. It is also very common to include provisions in access laws mandating a body to monitor and promote implementation of the Act, as well as raise public awareness about using the law. Monitoring is important - to evaluate how effectively public bodies are discharging their obligations and to gather information which can be used to support recommendations for reform. Different monitoring models are found in various jurisdictions. Some countries require every single public body to prepare an annual implementation report for submission to parliament, others give a single body responsibility for monitoring – a particularly effective approach because it ensures implementation is monitored across the whole of government and allows for useful comparative analysis – and still others prefer a combination of both. Section 40 of the Trinidad & Tobago *Freedom of Information Act 1999* and s.48 and 49 of the United Kingdom *Freedom of Information Act 2000* provide useful models of potential monitoring approaches

CHRI recommends that s.39 be extended to give the Public Information Directorate a much clearer role in monitoring implementation of the law and promoting the law's proper use and application through training and public education. Section 39 should include the following provisions:

(1) The Public Information Directorate must as soon as practicable after the end of each year, prepare a report on the implementation of this Act during that year and cause a copy of the report to be laid before each House of the Parliament.

(2) Each responsible department/ministry shall, in relation to the public authorities within their jurisdiction, collect and provide such information to the Public Information Directorate as is required to prepare the report under this section, and shall comply with any prescribed requirements concerning the furnishing of that information and the keeping of records for the purposes of this section.

(3) Each report shall, at a minimum, state in respect of the year to which the report relates:

- *(i) the number of requests made to each public authority;*
- *(ii) the number of decisions that an applicant was not entitled to access to a document pursuant to a request, the provisions of this Act under which these decisions were made and the number of times each provision was invoked;*
- *(iii) the number of appeals sent to the Information Commissioners for review, the nature of the complaints and the outcome of the appeals;.*
- *(iv) particulars of any disciplinary action taken against any officer in respect of the administration of this Act;*
- *(v) the amount of charges collected by each public authority under this Act;*
- *(vi) any facts which indicate an effort by public authorities to administer and implement the spirit and intention of this Act;*
- *(vii) recommendations for reform, including recommendations in respect of particular*

public authorities, for the development, improvement, modernisation, reform or amendment of this Act or other legislation or common law or any other matter relevant to operationalising the right to access information, as appropriate.

(4) The Public Information Directorate must:

(a) develop and conduct educational programmes to advance the understanding of the public, in particular of disadvantaged communities, of this Notification and of how to exercise the rights contemplated in this Act;

(b) encourage public authorities 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 authorities about their activities.

(d) train information officers of public authorities and/or produce relevant training materials for use by authorities themselves.

(5) *The Public Information Directorate 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.* [see s.10 of the South Africa Promotion of Access to Information Act for guidance on what should be included in such a guide]

Publication schemes

82. The requirement in s.40 for all public authorities to develop publications schemes appears to be based on a similar requirement in ss.19-20 of the United Kingdom's *Freedom of Information Act 2000*. However, the provisions in this Bill suffer from the fact that the Bill does not completely replicate the UK model – which in practice may result in a lesser outcome than hoped for. In particular, it is notable that the Director of Public Information has been made responsible for approving schemes. In the UK model, this responsibility is given to the independent Information Commission, which loosely equates to the Information Tribunal in the Bill. This is a potentially key difference because it is more appropriate for an independent and impartial body to check publication schemes as they are most likely to promote maximum openness and disclosure. A smaller point to note is that this requirement to produce publication schemes more appropriately sits in Part II: Publication Of Documents And Information.

CHRI recommends that s.40 be reviewed against ss.19-20 of the United Kingdom's Freedom of Information Act 2000 *and amended accordingly and that the entire section be removed to sit in Part II of the Bill.*

Ensure that the law overrides all other secrecy laws

83. It is very positive that s.45 repeals the Official Secrets Act. However, to ensure that the full intention of provision is realised and the FOI Act does indeed establish the framework for all information disclosure, consideration should be given to extending this provision to make it clear that that FOI Act overrides all other statutory or common law prohibitions on access to information.

CHRI recommends that s.45 be extended to make it clear that the FOI Act "overrides all other statutory or common law prohibitions on access to information".

Protect officials for liability cause by bona fide release of information

84. Officials responsible for making decisions regarding disclosure of information may legitimately be concerned that wrong decisions on their parts, that is, decisions which result in the disclosure of information that their superiors believe should not have been released, could result in action being taken against them. Similar concerns could be harboured at an institutional level. Officials need to be reassured that they will not be penalised for releasing information. This can be done by specifically including a provision in the Act protecting officials from "*being criminally or civilly liable for anything done in good faith in the exercise or performance or purported exercise or performance of any power or duty in terms of this Act"*. Section 89 of the South African *Promotion of Access to*

Information Act 2000 and Section 38 of the *Trinidad and Tobago Freedom of Information Act 1999* provide good models.

In order to encourage openness and guard against this possibility, CHRI recommends that a new provision be included to protect officials/bodies acting in good faith to discharge their duties under the law.

Protect whistleblowers

85. 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 pubic 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.

CHRI recommends that an additional article be included dealing with whistleblower protection. Section 47 of the Article 19 Model FOI Law[5] 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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[5] http://www.article19.by/publications/freedominfolaw/