Analysis of the Saint Christopher and Nevis Freedom of Information Bill 2006

Recommendations for Amendment

"The great democratising power of information has given us all the chance to effect change and alleviate poverty in ways we cannot even imagine today. Our task, your task is to make that change real for those in need, wherever they may be. With information on our side, with knowledge a potential for all, the path to poverty can be reversed."
--- Kofi Annan

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ANALYSIS OF THE *FREEDOM OF INFORMATION BILL 2006*

1. The Government of Saint Christopher and Nevis (St. Kitts and Nevis) has published a draft *Freedom of Information Bill* 2006 (FOI Bill) on their Government website. It is understood that the FOI Bill has been released for public comment and that after the consultation period the Bill will be submitted to the National Assembly for enactment. CHRI welcomes the opportunity to comment on the Bill. CHRI has now analysed the Bill, drawing on international best practice standards, in particular, good legislative models from the Commonwealth. This paper suggests areas which could be reconsidered and reworked, as well as providing examples of legislative provisions which could be incorporated into a revised version of the Bill.

2. CHRI takes this opportunity to commend the St. Kitts and Nevis Government for undertaking public consultations on the Bill before it is tabled in the National Assembly. 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 and the benefits of a right to information law is strengthened if the law is owned by both the government and the public. However, best practice requires that policy-makers *proactively* engage civil society groups and the public during the legislative process. This can 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. A good example of such practice is the Cayman Islands Government, which has undertaken extensive public consultations on their national *Freedom of Information Bill 2006*, and is openly preparing for implementation even before the Bill has been introduced into Parliament. CHRI recommends the Government of St. Kitts and Nevis to consider undertaking similar initiatives, if it hasn't already done so.

THE VALUE OF RIGHT TO INFORMATION

3. At the outset, it is worth reiterating the benefits of an effective right to information regime:

   - *It strengthens democracy*: The right to access information gives practical meaning to the principles of participatory democracy. The underlying foundation of the democratic tradition rests on the premise of an informed constituency that is able to thoughtfully choose its representatives on the basis of the strength of their record and that is able to hold their government accountable for the policies and decisions it promulgates. The right to information has a crucial role in ensuring that citizens are better informed about the people they are electing and their activities while in government. Democracy is enhanced when people meaningfully engage with their institutions of governance and form their judgments on the basis of facts and evidence, rather than just empty promises and meaningless political slogans.

   - *It supports participatory development*: Much of the failure of development strategies to date is attributable to the fact that, for years, they were designed and implemented in a closed environment – with governments making decisions without the involvement of *people*. If governments are obligated to provide information, people can be empowered to more meaningfully determine their own development destinies. They can assess for themselves why policies have gone askew and press for the changes to make it work properly.

   - *It is a proven anti-corruption tool*: In 2006, of the ten countries performing the best in Transparency International's annual Corruption Perceptions Index, no fewer than nine had effective legislation enabling the public to see government files. In contrast, of the ten countries perceived to be the worst in terms of corruption, only one had a functioning access to information regime. The right to information

increases transparency by opening up public and private decision-making processes to scrutiny.

- *It supports economic development*: The right to information provides crucial support to the market-friendly, good governance principles of transparency and accountability. Markets, like governments, do not function well in secret. Openness encourages a political and economic environment more conducive to the free market tenets of 'perfect information' and 'perfect competition'. In turn, this results in stronger growth, not least because it encourages greater investor confidence. Economic equity is also conditional upon freely accessible information because a *right* to information ensures that information itself does not become just another commodity that is corralled and cornered by the few for their sole benefit.
- *It helps to reduce conflict*: Democracy and national stability are enhanced by policies of openness which engender greater public trust in their representatives. Importantly, enhancing people's trust in their government goes some way to minimising the likelihood of conflict. Openness and information-sharing contribute to national stability by establishing a two-way dialogue between citizens and the state, reducing distance between government and people and thereby combating feelings of alienation. Systems that enable people to be part of, and personally scrutinise, decision-making processes reduce citizens' feelings of powerlessness and weakens perceptions of exclusion from opportunity or unfair advantage of one group over another.

DETAILED ANALYSIS OF FREEDOM OF INFORMATION BILL

4. It is positive that St. Kitts and Nevis has recognised the many benefits of the right to information through explicit recognition in the Constitution. Article 12 of the St. Kitts and Nevis Constitution provides for the freedom to receive and communicate ideas and information without interference as part of the right to freedom of expression. Additionally, St. Kitts and Nevis committed itself to the right to information through its international and regional membership of the United Nations, the Commonwealth[1], and the Organization of American States. All of these bodies have endorsed international and regional FOI standards. These standards, as well as evolving State practice and the general principles of law recognised by the community of nations, have been distilled into key principles that underpin any effective right to information law which are at Annex 1.

5. CHRI has used the FOI principles at Annex 1 as the benchmark for its analysis of the St Kitts and Nevis FOI Bill. Overall, CHRI's assessment is that the FOI Bill is relatively comprehensive. It is very positive that the Bill draws heavily on the best practice contained in the Model Freedom of Information Law developed by Article 19. Although CHRI was a party to the drafting of the Model Law, since it was agreed in 1999 CHRI has witnessed a number of important developments in the area of access legislation across the world which have extended and broadened the right to information to ensure that the right is fully realised and implemented effectively. CHRI draws on these recent lessons learned and practical implementation experiences to suggest additions and amendments which CHRI considers would strengthen the Bill. Some are procedural or technical in nature but others are more substantive (for example, strengthening proactive publication provisions and penalty provisions). To bring the FOI Bill in line with international best practice, it is recommended that the Bill be reworked in accordance with the suggestions below.

[1] The Commonwealth recognised the right to information as early as 1980 and in 1999 through the adoption of the Commonwealth Freedom of Information Principles by the Commonwealth Law Ministers.

PART I - PRELIMINARY

Section 1 – Short Title and Commencement

6. As discussed above, the Constitution of St. Kitts and Nevis guarantees the 'protection of freedom of expression' to every person, which necessarily implies a *right* of individuals to freely receive and communicate ideas without interference. In recognition of the status of access to information as a *right,* consideration should be given to renaming the law the "Right to Information Act". Although some may argue that such a focus on terminology is pedantic, the status of access to information as a human right should be reflected in any legislation on the matter to ensure that implementing bodies are clear that access to information is not a discretionary gift granted to the people by a benevolent government. Rather it is a constitutionally mandated *obligation* on the Government.
7. It is recommended that section 1(2) clearly specify a date on which the Act will come into force. Failure to specify a commencement date in the legislation itself can otherwise undermine the use of the law in practice. In India for example, the *Freedom of Information Act 2002* was passed by Parliament and even assented to by the President but it never came into force because no date for commencement was ever notified in the Official Gazette. Although it is understandable that the Government may wish to allow for time to prepare for implementation, best practice has shown that the Act itself should specify a maximum time limit for implementation, to ensure there is no room for the provision to be abused and implementation to be stalled indefinitely. Even if a phased approach is adopted, which may require key Ministries to implement in the first year, and other agencies to implement 12 months later, this should be spelled out in the law itself. (For example, Mexico allowed one year for implementation while India's *Right to Information Act 2005* allowed 120 days.)

Recommendations:

- *Amend the name of the Bill to the "Right to Information Act 200_" to reflect the fact that the law implements a fundamental human right.*
- *Amend Article 1(2) to specify a maximum time limit for the Act coming into force, which is no later than twelve months from the date the Act receives Presidential assent.*

Section 2 - Interpretation

Insert a new definition of "access" to information

8. As the current Bill is drafted there is reference to the "right to information" but no where does it clarify what exactly that "right" entails. To help clarify the breadth of the right to access information, section 2 should insert a definition of the term "access" to information. Notably, the law should be drafted to permit access not only to documents and other materials via copying or inspection. It should also permit the inspection of public works and taking of samples of materials used in public works. It should allow for taking of samples of any materials that a public authority purchases with the use of tax payer's money. Such an approach has been incorporated into the India *Right to Information Act 2005* through section 2(j) in recognition of the fact that corruption in public works is a major problem in many countries, which could be tackled by facilitating greater public oversight through openness legislation.

Definition of "information"

9. Although section 4 gives every person the right to freedom of "information", section 2 fails to include a definition of "information" to help officials and the public understand the scope of the right of access. However, sections 2(1) and 8(1) include a definition of "record". Experience in other jurisdictions supports an approach whereby the law grants a specific right to access information held or controlled by public/private

bodies with the terms “access” and “information” then being defined. Notably, a definition of “information” is preferable to simply permitting access to “records” because the latter term is narrower. This approach has been followed in India and New Zealand which both grant access to information. This means that applicants will not be restricted to accessing only information which is already collated into a “record” at the time of application. In addition the use of term “record” can exclude access to items such as models or materials. This can be a serious oversight. It has been seen in many countries that the public ability to oversee government activities and hold authorities to account, in particular those bodies which deal with construction or road works, is enhanced by allowing them to access samples of materials and the like. It is recommended that the definition of “record” be replaced with a definition of “information”. At the very least, either definition should specifically include physical materials and models, such as those used in construction/infrastructure activities. Section 2(f) of India’s *Right to Information Act 2005* provides a good model.

Definition of “personal information”

10. The scope of the term “personal information” as it is currently defined in the Bill is very broad and ambiguous, requiring only that the information “relates” to a natural living individual who can be identified via that information. Such a vague definition, when read in conjunction with the section 26 exception, opens up considerable scope for misapplication and abuse by public officials. Therefore, consideration should be given to amending the definition of “personal information” to tighten the scope and to prevent misinterpretation. Section 3(II) of the Mexican *Federal Transparency and Access to Public Government Information Law* provides a good example:

    The information concerning a physical person, identified or identifiable, including that concerning his ethnic or racial origin, or referring to his physical, moral or emotional characteristics, his sentimental and family life, domicile, telephone number, patrimony, ideology and political opinions, religious or philosophical beliefs or convictions, his physical or mental state of health, his sexual preferences, or any similar information that might affect his privacy.

Definition of “publish”

11. It is extremely positive that the definition in section 2(1) of “publish” indicates that information to be published must be made available through a variety of mediums including print, broadcast and electronic. Nonetheless, routine access that facilitates the flow of information is so important that *every effort* must be made to ensure that it is “widely disseminated”, in as many ways as possible. Accordingly, it is recommended that the definition of “publish” be expanded to include “making information accessible through notice boards, newspapers, public announcements, media broadcasts, the internet etc”.

Recommendations:

- Add a definition of the term “access” to information:

“access” to information includes the right to-

(i) inspect work, documents, records;

(ii) take notes extracts or certified copies of documents or records;

(iii) take certified samples of materials

(iv) obtain information in the form of diskettes, floppies, tapes, video, cassettes or in any other electronic mode through printouts where such information is stored in a computer or in any other device.

- *Replace the definition of “record” in sections 2(1) and 8 with a definition of “information”:*

    “information” means any material in any form , including records , documents, memos, emails, opinions, advices, press releases, circulars, orders, logbooks, contracts, reports, papers , samples, 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 whether or not said data has been collated as requested.

- *Narrow the definition of "personal information" in section 2(1) to reduce the possibility of abuse of the related exemption in section 26.*
- *Broaden the definition of "publish" in section 2(1) to ensure that when read in conjunction with section 18 (Duty to Publish) public bodies are required to widely disseminate information including, but not limited to, by making information accessible through notice boards, newspapers, public announcements, media broadcasts, the internet or any other means, including inspection of offices of public authorities.*

PART II - RIGHT TO ACCESS INFORMATION HELD BY PUBLIC AND PRIVATE BODIES

Sections 4 and 5 - Freedom of Information and the General Right of Access

12. It is not entirely clear why sections 4 and 5 are separate as both deal directly with the breadth of the right to access information. For ease of application, consideration may be given to combining the two provisions. If necessary consideration could then be given to dealing with the rights of individuals in respect of public and private bodies in separate clauses. At minimum consideration could be given to making it explicit in section 4 that people can access information from private bodies, not just public bodies. For example, section 4 could state:

    "Every person has the right to access information held by or under the control of:
    (i) public bodies; and
    (ii) private bodies where the information is necessary for the exercise or protection of a right."

13. In respect of the "right to access information" held by private bodies in section 5(2) it is recommended the reference to "rights" be clarified. In South Africa, where this provision originated, there has been some confusion over its interpretation because of the lack of specification. To ensure that the provision is as broad as possible, it is suggested that the Bill refer to refer to *"information necessary for the exercise of protection of any right or liberty recognised under the Constitution of St. Christopher and Nevis, St. Christopher and Nevis common law or any international treaty to which St. Christopher and Nevis is a signatory."*

Recommendations:

- *Consider combining sections 4 and 5 to reduce confusion and ensure clarity about people's rights re public bodies and private bodies.*
- *At a minimum:*
    - *Amend section 4 to make it clear that the right to information relates to both public and private bodies.*
    - *Amend section 5(2) to specify that "information necessary for the exercise of protection of any right recognised under the Constitution of St. Christopher and Nevis, St. Christopher and Nevis common law or any international treaty to which St. Christopher and Nevis is a signatory".*

Section 6 - Legislation Prohibiting or Restricting Disclosure

14. Section 6(1) states that the Bill will apply to the exclusion of other legislation in force. While it is positive that the Bill appears to attempt to place itself above other inconsistent secrecy legislation, it would be useful if that were stated more explicitly.

Officials applying the law need to be clearly directed that the new openness law "overrides all other inconsistent legislation". At the very least, consideration should be given to amending the wording of section 6(1) to account for the possibility of another law, policy or practice developing in the future.

Recommendation:

Amend section 6(1) to make it explicit that the law overrides all other inconsistent legislation and to take account of the possibility of national access legislation and indicate how such legislation will interact with other law restricting access to information.

Section 7 – Public and Private Bodies

15. The definitions of public and private bodies are well drafted and in line with international best practice. It is very positive that the definition of "public body" refers to not only to official government agencies and those bodies the government 'owns, controls or substantially financed' but also those that carry out a statutory or public function. This reflects the fact that governments around the world are working through other organisations in a variety of forms, whether it be through contracts or other more informal arrangements.

16. However, the definition of "public body" could be clarified further by making it clear under section 7(1)(c) that the law covers all arms of government – executive, legislature and judiciary. In this context, it is particularly important to recognise that in any modern democracy, it is not appropriate to the give the executive (ie. The Head of State and/or Cabinet) broad immunities from disclosure. Such protection is a hangover from the days when the monarch was supreme, but this is no longer an appropriate approach to good governance.

17. In addition, more specific wording of section 7(2)(e) could be considered to ensure that the law covers *all* those bodies that can affect the public. Otherwise, as has happened in Canada at the federal level, other forms of entity may be set up by government departments to avoid the application of the law, for example, trusts or joint ventures. Consideration could be given to replicating section 5(1) of the United Kingdom *Freedom of Information Act 2000,* which is slightly more descriptive:

    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.

Recommendations:

- *Amend section 7(1)(c) to clarify that the law applies to all arms of government – the legislature, the executive and the judiciary.*
- *Amending section 7(1)(e) to clarify that it extends to bodies which appear to exercise functions of a public nature, or are providing any service whose provision is a function of an authority.*

Section 8 – Records

18. The current definition of "record" held by public and private body is confusing and circular. In accordance with the recommendation at paragraph 8 and 9 above, consideration should be given to deleting this definition and inserting new definitions of "information" and "access". At a minimum, section 8(1) should be amended to include a reference to correspondence, file notings and electronic/computer data whether or not said data has been collated as requested. It is also problematic that the definition potentially excludes access to information such as materials used to construct buildings/roads/etc or samples. Access to such information has been

extremely useful in other jurisdictions in ensuring that public works have been properly undertaken (see in India where people have used the inspection power in the *Right to Information Act 2005* to scrutinise public works and expose corruption). Consideration should be given to broadening the definition of information to include access to information in the form of samples and models.

Recommendation:

Delete section 8 and replace it with a definition of "information" as discussed in paragraph 9 above. At a minimum, specifically include correspondence, file notings and electronic/computer data whether or not said data has been collated and to refer to the collection and inspection of samples.

Section 9 – Request for Information

19. Section 9 is a crucial provision because it sets out the actual process for the public to request access to information. The procedures for requesting information outlined under section 9 are very strong. However, CHRI recommends a few minor amendments to further strengthen the provisions.

Electronic Requests

20. Sections 9(1) and (2) provide for applications to be received in writing. To increase accessibility of the law, these provisions should also explicitly allow for a person to make a written request via electronic means, such as fax or email.

Assistance from private bodies

21. It is positive that officials of public bodies are bound to provide assistance to the applicant to enable him or her to satisfy the requirements of section 9(1). However, it is not clear why sections 9(2) and (3) apply only to requests of information from *public* bodies. Consideration should be given to extending the provisions to private bodies as well so that officials dealing with applications in private bodies are also obliged to extend similar help to requestors.

Oral requests

22. While it is extremely positive that section 9 (3) allows for oral requests where a person is unable to make a written request due to disability or illiteracy, this provision attempts to ensure that officials provide reasonable assistance to the person free of charge which is commendable. Depending on the local circumstances, it may also be appropriate for oral requests to be permitted more generally, if for example, geography may make it difficult in practice for people to make applications in writing (for example due to the time and cost involved in travel).

Reasons for request

23. In line with the key principles of any good access to information law and the status of the right to information as a fundamental human right, applicants should never be required to give reasons for their request. Although this may be necessary for private bodies to apply the law by virtue of section 5(2), the principle of not giving reasons for a request from a public body should be specifically included in the law to make it clear that people can access information from public authorities for any reason whatsoever. There should be a corresponding obligation on the public body not to demand a justification or an explanation for seeking information from a requestor. This avoids the possibility for such a requirement being introduced by a public authority or any future Ministers. Section 11 of the Australian *Freedom of Information Act 1982* provides a useful model:

> *Subject to this Act, a person's right of access is not affected by:*
>
> *(a) any reasons the person gives for seeking access; or*
>
> *(b) the agency's or Minister's belief as to what are his or her reasons for seeking access.*

Handling the application

24. It is understandable that section 9(5) permits the transfer of applications from ordinary officials to Information Officers (appointed under section 17), as they will presumably be better trained on applying the law and assisting requesters. However, in order to make it clear who is responsible for what activities and who can be held accountable by the public when, it should be specified that the official who receives a request *must* transfer the application to the Information Officer who will deal with it forthwith. Additionally, the Bill should require that any such transfer be notified to the requester in writing with relevant contact details provided so that the requester can easily follow up if necessary. In practice, such information may be included in any receipt issued under section 9(7).

Forms

25. Section 9(6) permits bodies to develop application forms which must be used by requesters. While the provision requires that the forms do not "unreasonably delay requests or place an undue burden" on requesters, nonetheless, in practice this requirement will be hard to regulate. Are requesters expected to make an appeal to the Information Commissioner where they believe the form has placed an unfair burden on them or unreasonably delayed their application? International best practice tends against requiring an application form. So long as the requirements in section 9(1) are met, no form should be required. The key issue should only be whether there is sufficient information provided by requesters to enable the information to be located.

Receipt

26. For absolute clarity, section 9(7) could usefully specify that any receipt needs to be in proper written form – to ensure that officials provide a reliable form of receipt. More importantly, the provision should impose a time limit for receipts so that they are provided within no more than five days of the public body receiving the application. Otherwise, experience in other jurisdictions has shown that officials may delay issuing receipts, which then make it harder for requesters to demand timely access because they have no record of the date they made their application.

Recommendations:

- *Amend section 9(1) to permit applications to be received electronically.*
- *Amend sections 9(2) and (3) to apply similarly to public and private bodies.*
- *Amend section 9(3) to permit oral applications from any person.*
- *Insert an additional sub-section which explicitly states that no reason is required to justify a request for information from a public body and that an application will not be affected by the Minister's or public authority's belief as to what the applicant's reasons for seeking access are.*
- *Amend section 9(5) to require that the officer "must" transfer the application to the Information Officer under section 9(5). In addition, require that such a transfer be notified to the requester and contact details of the Information Officer provided to the requester accordingly.*
- *Delete section 9(6) because in practice, it may still place an undue burden on requesters. No form should be required so long as sufficient information is provided by requesters to enable the information to be located.*
- *Amend section 9(7) to impose a time limit of five days for the provision of receipts and specify that receipts must be in proper written form.*

Section 10 – Time Limits for Responding to Requests

27. The time limits in section 10 are generally appropriate however; it is recommended that the provision under section 10(3) for extending the time limit for dealing with voluminous requests be reconsidered. In cases where a request is genuinely too large to process without unreasonably interfering with the public authority's workload, it is preferable that public and private bodies first be required to consult applicants and assist them to narrow their search, if possible. This could be done either by contacting them over the telephone or inviting them to inspect the records and identify those that are specifically required. Thereafter, if the application still cannot be processed within the 20 day time limit, only then public or private bodies should consider extending the time limit, recording the reasons for doing so in writing.

28. Given the relatively small size of the St. Kitts and Nevis Government, consideration should be given to allowing time limits to be extended only by 20 working days, the original decision-making period. Forty days is a long extension period, compared to international practice. It should also be clear that only one extension is permitted. To minimise the possibility of abuse of the provision, consideration could also be given to requiring any extension of the time limits to be approved by the Information Commission.

Recommendations:

- *Amend section 10(3) to require that a public or private body may only extend the time limit for dealing with requests:*
  - *Subject to the public or private body making every effort to first assist the applicant to modify his/her request if possible.*
  - *Provided that the Information Commission has approved the extension.*
- *Amend section 10(3) to provide that the time period can be extended only once and only by 20 days.*

Section 11 – Notice of Response

29. Section 11 sets out in detail the content of notices to requesters on the outcome of their applications to either private or public bodies. However, it is confusing that section 11 has two separate sub-sections dealing with notices from public bodies and private bodies. Ideally the information to be given by both public and private bodies would be the same and could be condensed into one provision. Accordingly:
    - Sections 11(1) and (2) should be combined. At the same time, this will deal with the current deficiency in section 11(2) whereby private bodies are not required to provide information on any right of appeal. This is not appropriate and should be amended.
    - Sections 11(1)(b) and section 11(2)(b) – which are virtually identically – should be amended to require that any rejection notice specifies the provision of the law being relied upon and any material questions of fact being relied upon.
    - Section 11(1)(c) – which only applies to notices from public bodies– should be done away with.

30. Section 11(3) should clarify the time within which the communication of the information should take place, as the term 'forthwith' is uncertain – not only does the applicant not know when they will receive the information but the body concerned may consider that 'forthwith' is subject to their time and resources and thereby prolong giving access. Section 7(1) of the *Right to Information Act 2005* India provides that access to the information must be given 'as expeditiously as possible, and in any case within thirty days'. Given that the state of St Kitts and Nevis is

relatively small state, this could in fact be less – perhaps 20 days would be appropriate.

Recommendations:

- *Combine sections 11(1) and (2) into one subsection that deals with a notice of response that shall be given by both private and public bodies.*
- *Insert into section 11 a requirement that the reasons provided for a refusal to grant access to information specify which provisions of the Bill are relied on to deny access and applying any material questions of fact.*
- *Amend section 11(3) to provide that that communication of the information must take place as expeditiously as possible, but in any case, within 20 days of the response.*

Section 12 - Fees

Reasonable fees

31. Section 12(1) should make it explicit that *"any fees for providing information should be set with a view to ensuring that the costs imposed for access are not so high as to deter potential applicants"*. Section 12(1) currently permits costs to be charged for the time taken to "search" and "prepare" the information. However, best practice supports that charges should only cover reproduction costs, not searching or collation/compilation time. Imposing fees for this could easily result in prohibitive costs, particularly as it gives the power to bureaucrats to take their time when searching and collating information in order to increase fees. Therefore, at the most, fees should be *"limited only to cost recovery, with no additional margin for profit, and a maximum limit should be imposed".*

Fee Waiver

32. It is positive that section 12(2) allows fees to be waived where the information requested is personal information or in the public interest. However, in order to ensure fees do not act as a deterrent to using the law, other circumstances in which fees can be waived should be provided for in the law itself, not just in regulations in accordance with section 12(3)(b):

    - Firstly, fees should not be levied where it would cause financial hardship to an individual. Including such a provision will go a long way to ensuring that some of the underprivileged sections of society will have equal benefit of the use of the law. Two options are available in terms of who decides on the waiver: (1) the Head of the public body could be given the power to waive fees and could delegate that power as necessary; (2) the Information Officer could be given the power to waive fees and internal guidelines could then be developed to assist the Information Officer to make his/her decision. It is recommended that the latter option be chosen because this will likely be more efficient in terms of promoting timely decisions.
    - Secondly, fees should always be waived where the time limits in section 9 are not complied with. This approach has been adopted in India and Trinidad and Tobago.

Fee Regulations

33. Section 12(3) should be amended to make it clear that the Minister *must* (as opposed to the current 'may') make rules in respect of fees in collaboration with the Information Commission. At the very least, the Bill should specify that each public or private body is not permitted to set their own fees. This will undoubtedly lead to inconsistencies, and resistant bodies may use fees as one way of deterring requests or even to make a profit. In accordance with common practice, the relevant fee regulations should set out the amounts payable for copies (depending on the size of

the paper), the costs of floppies or CDs, the cost of inspection time and the cost for taking samples.

Recommendations:

- *Issue guidelines under section 12(1) to spell out what are 'reasonable' fees. In addition:*
  - *Make it explicit that "any fees imposed should not be prohibitively high, so as to defeat the intention of the law"; and*
  - *Exclude search and preparation time from the calculation of the fee payable for access.*
- *Specify in section 12(2) that the Information Officer will have the power to waive fees in more circumstances, for example, where imposing a fee would cause financial hardship to an individual.*
- *Insert a new provision requiring that fees are automatically waived where the time limits in section 10 are not complied with.*
- *Amend section 12(3) to make it explicit that only the Minister and the Information Commissioner together must prescribe fees under the law, and no public or private body may set their own fee schedule.*

Section 13 – Means of Communicating Information

Taking samples

34. If the definition of "records" in section 8 is amended to include the right to inspect works and to take samples of materials, then section 13 will need to be reworked to reflect that people may want to access information that is not in documentary or electronic form.

Providing information in the form requested

35. It is understandable that there may be cases where a request is genuinely too large to process without unreasonably interfering with a public/private bodies' workload. However, section 13(3)(a) needs to be reworded to make it clear what will be considered "unreasonable". However, before communication of the information can be considered "unreasonable", the public or private body should: (a) be required to consult the applicant and assist them to try to narrow their search and (b) should not be allowed to reject the request, but should only be allowed to provide the information in a form which is less burdensome (after giving the applicant a choice as to the less burdensome forms of communication). As the provision is currently worded, it does not make it clear that the body must still supply the information, but in a different form. A public or private body should not be able to reject applications simply because of the anticipated time it will take to process them. Proposed wording is suggested below:
    (1) Where a public or private body 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 or private body 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 or private body reject the application on the ground that processing the request would substantially and unreasonably divert the resources of the public or private body from its other operations":

Recommendations:

- *Amend section 13 to clarify that forms of access include taking a sample of materials and inspecting public works*
- *Amend section 13(3)(a) to provide that where a request for information is likely to unreasonably interfere with the operation of the body, the public or private body must make every effort to assist the applicant to modify his/her request accordingly, but if that is not possible, it may then provide the information in another more convenient form as chosen by the applicant..*

Section 14 – If a Record is Not Held

36. Section 14(1) provides for the transfer of information from an officer of the public body to the Information Officer when they do not believe they have the information. This provisions overlaps with section 9(5). If the recommendation in paragraph 24 in relation to section 9(5) is adopted, this provision will no longer be required.

37. Section 14(2) deals with transfers of requests, where the information requested is not held by the public body which received the request. There are a number of improvements that can be made to this sub-section to ensure it is administered effectively.

    - The Bill allows the public body to transfer the request *or* return the application to the applicant for them to follow up the request with the other public body. To ensure the application is dealt with expeditiously and to avoid confusion, one method should be provided only. Ideally the public body (as just one part of the broader body – the government) would be required to transfer the application and section 14(2)(b) would be deleted.
    - The current provision does not require the application to be transferred within a particular time-frame, leaving it open for the public body to transfer the application up to 20 days after receiving it (the deadline for responding to the application). This is particularly concerning when read in conjunction with section 14(3) which allows the 20 day period to start again on transfer. It is therefore essential to put a time-frame within which the application must be transferred. International best practice provides that this should occur as soon as practicable, but no longer than five working days.
    - While it is positive that section 14(2) requires officials to notify requestors where an application has been transferred, the clause should be amended to make it explicit that requestors be notified of the transfer as soon as practicable but no later than five days from the date of the transfer.
    - Consideration should be given to adding another section that deals with the case where no public body is believed to hold the information requested. Ideally, to prevent abuse of the provision, a statutory declaration should be signed by the Head of the public body or the Information Officer where it is claimed that no public body holds the information. This will ensure that officials take their responsibilities more seriously and make every effort to locate the information.

38. Section 14(3) states that where an application is transferred, the time limits for processing the request start again. This provision is ripe for abuse, and could easily result in Information Officers transferring sensitive applications from one body to the next in an attempt to deliberately delay an official response. This is not justifiable and should be removed.

39. Section 14(4) which deals with private bodies that have received an application but do not hold the information. This provision does not specify a time frame within which the private body must notify the applicant that they don't hold the information. Private

bodies should also be subject to a timeframe which requires them to respond as soon practicable, but within no longer than five days.

Recommendations:

- *Remove section 14(2)(b) and require that the public body must transfer the application to the other public body.*
- *Amend section 14(2) to require that such a transfer occur as soon as possible, but within no longer than five days.*
- *Amend section 14(2) to specify that:*
  Public bodies notify requestors in writing where a request for information is transferred "as soon as practicable as and no later than five days of the transfer".
- *Amend section 14 to require that where the Information Officer believes that no public body holds the information requested, the Head of the public body or the Information Officer shall sign a statutory declaration to that effect.*
- *Delete section 14(3).*
- *Amend section 14(4) to require the private body to specify that notice to the applicant must occur as soon as practicable but within no longer than five days.*

Section 15 – Vexatious, Repetitive or Unreasonable Requests

40. Best practice requires that no application shall be rejected unless the information requested falls under a legitimate and specifically defined exemption. Information that does not fall within an exempt category cannot be denied. Accordingly, section 15(1) which permits non-compliance with a request on the grounds that the "*request for information which is vexatious or where it has recently complied with a substantially similar request*" should be deleted. This provision could too easily be abused, particularly by resistant bureaucrats, who are used to a culture of secrecy and whom may be of the opinion that any request for information from the public is vexatious. If this clause is retained, at the very least the provision needs to be amended to clarify what constitutes the terms "vexatious" and "a substantially similar request".

41. Section 15(2) allows applications to be rejected by a public or private body because processing would "*unreasonable divert its resources*". While it is understandable that there may be cases where a request is genuinely too large to process without unreasonably interfering with the public or private body's workload in such cases the public or private body 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 or would unreasonably divert their resources. In any case, as section 13 allows for an extension of time in such cases, there is no need for this provision.

Recommendations:

- *Section 15(1) should be deleted.*
- *Section 15(2) should be deleted or at least amended so that where a public or private body is of the opinion that processing the request would substantially and unreasonably divert its resources from its other operations, the public authority shall assist the applicant to modify his/her request accordingly. Only once an offer of assistance has been made and refused and the public body does not believe section 13 is applicable, can the public or private body reject the application on this ground.*

PART III: MEASURES TO PROMOTE OPENNESS

Section 16– Guide to Using the Act

42. Section 16 requires the Information Commissioner to compile a guide on how to exercise one's rights using the Act, in simple language, updated regularly, disseminated widely and made available in forms that are accessible to disabled or illiterate people. This is a very positive provision, covering all the main aspects of publishing a guide, however, there is a great deal of leeway as to when the guide should be published, what it should include, what language it should be published in at a minimum and how regularly it should be updated.

43. Although the provisions cover these aspects to an extent – requiring it to be published as soon as practicable, and updated on a regular basis – these terms are open to interpretation and again leave room for lax administration. Therefore, it is recommended that these aspects are clarified. Section 10 of the South African *Promotion of Access to Information Act 2000* provides a good example of how to easily to include this level of detail in the law:

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

Recommendations:

- Amend section 16 to:

- *Include more detail as to the contents of the guide.*
- *Provide for a minimum time frame within which the first guide to using the Act will be published and then minimal intervals in which it must be updated and published, for example, every 2 years.*

Section 17 - Information Officer

44. Section 17 provides for the appointment of "an" information officer. It is recommended that the provision is reworded to allow for the appointment of as many information officers as necessary for providing easy access to information as quickly as practicable.

45. In order to ensure that the public body remains liable for the full suite of duties and obligations under the law, there should be a default provision, which requires that if no Information Officer has been appointed, the head of the public body will be deemed to be the Information Officer for the purposes of the Act.

Recommendations:

- *Amend section 17 to allow for the possibility that a public body may want to nominate more than one information officer to deal with requests of information.*
- *Insert a new provision that states that where no information officer is appointed, the head of the public body will be deemed to be the information officer for the purposes of the Act.*

Section 18 and 19 – Duty to Publish and Guidance on Duty to Publish

46. The new generation of access laws recognise that the underlying philosophy behind the right to information is increasing the information flow in society and that proactive disclosure can be a very efficient way of servicing the community's information needs efficiently, while reducing the burden on individual officials to respond to specific requests. The more information is actively put into the public domain in a systemised way, the less information will be requested by the public.

47. Section 18 requires public bodies to publish certain information. All of this information is valuable to the public, however, newer access to information laws establish a much more comprehensive list of information that should be proactively published as a minimum. Although section 18 is positive in that is establishes a basic regime of proactive disclosure, it suffers from the fact that it is not very comprehensive. Therefore, it is recommended that in addition to the information already required to be published, the list should be extended to include a minimum list of types of information that must be published by the public body.

48. Section 4 of the new Indian *Right to Information Act 2005* and Article 7 of the Mexican *Federal Transparency and Access to Public Government Information Law 2002* provide excellent models for consideration. They require the disclosure of other 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.

49. In accordance with the above, section 18 provides that all the proactively disclosed information must be updated annually. Notably, some of the information which is being collected and published may change very often, such that it could be terribly out of date if it is not updated sooner. Accordingly, a maximum time limit of six months should be allowed for updating and the rules should prescribe shorter time limits for specific categories of information, as appropriate (for example, new government contracts should be published weekly or monthly).

50. Section 19 is a very positive provision and is in line with international best practice and consistent with the role of the Information Commissioner as an overseer and

information champion. However, in recognition of the integral role such a guide will play, section 19 could be improved by requiring the Information Commissioner to publish the guide referred to within no more than six months of the Act coming into force, and thereafter updated regularly, so that early on in the Act's implementation, public bodies have guidance on how best to meet their proactive disclosure obligations.

Recommendations:

- Amend section 18 to include additional proactive disclosure obligations based on Indian & Mexican laws:

"(1) Every public body shall

(i) publish within 3 months the amendments coming into force:

- *the powers and duties of its officers and employees;*
- *the procedure followed in the decision making process, including channels of supervision and accountability;*
- *the norms set by it for the discharge of its functions;*
- *the rules, regulations, instructions, manuals and records, held by it or under its control or used by its employees for discharging its functions;*
- *a directory of its officers and employees;*
- *the monthly remuneration received by each of its officers and employees, including the system of compensation as provided in its regulations*
- *the budget allocated to each of its agency, indicating the particulars of all plans, proposed expenditures and reports on disbursements made;*
- *the manner of execution of subsidy programmes, including the amounts allocated and the details of beneficiaries of such programmes;*
- *particulars of concessions, permits or authorisations granted by it;*
- *details in respect of the information, available to or held by it, reduced in an electronic form;*
- *the names, designations and other particulars of the Public Information Officers, and appeals bodies under the Act;*
- *such other information as may be prescribed;*

and thereafter update there publications within such intervals in each year as may be prescribed;

(ii) publish all relevant facts while formulating important policies or announcing the decisions which affect public;

(iii) provide reasons for its administrative or quasi judicial decisions to affected persons;

(iv) 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.

(v) Upon signing, public authorities must publish all contracts entered into, detailing at a minimum for each contract:

- *The public works, goods acquired or rented, and the contracted service, including any sketches, scopes of service and/or terms of reference;*
- *The amount;*
- *The name of the provider, contractor or individual to whom the contract has been granted,*
- *The periods within which the contract must be completed.*

(2)Information shall be updated at least every 6 months, while regulations may specify shorter timeframes for different types of information, taking into account how often the information changes to ensure the information is as

current as possible.

(3)It shall be a constant endeavour of every public authority to take steps in accordance with the requirements of section 18 to provide as much information proactively 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.

- *Amend section 19 to require the Information Commissioner to publish a guide on proactive disclosure within six months of the law coming into force and that it be updated regularly.*

Section 20 – Maintenance of Records

51. 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 this context, it is positive that section 20(1) requires all public bodies to properly maintain their records. However, section 20(1) should more explicitly require that appropriate record keeping and management systems are in place "*to ensure the effective implementation of the law*". 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:

    Computerisation of records - Each public body shall endeavour within reasonable time and subject to availability of resources that all records covered by the provisions of this Ordinance are computerised and connected through a network all over the country on different system so that authorised access to such records is facilitated.

52. Section 20(2) requires public bodies to put in place procedures for the correction of personal information. While this is a positive step forward, consideration should be given to including more detail in the Bill as to what minimum requirements there must be for any such regime. The Organisation Privacy International (www.privacyinternational.org), may be able to provide assistance in this regard.

53. It is positive that section 20(3) empowers the Information Commissioner to develop a Code of Practice on Records Management. Again, this provision could be improved by including a *time frame* within which the first Code of Practice needs to be published. International best practice provisions stipulate a time frame for publishing such a Code within twelve months of the Act's commencement. An example of this is in the United Kingdom, where, under section 46 of the *Freedom of Information Act 2000*, the Lord Chancellor is responsible for developing a Code of Practice on Records Management.

Recommendations:

- *Amend section 20(1) to require every public body "to maintain its records in a manner which facilitates the right to information as provided for in this Act", including requiring bodies to computerise records and network information systems;*
- *Clarify the content of the requirements under section 20(2).*
- *Amend section 20(3) to include a time frame within which the Commission must publish the initial Code of Practice.*

PART IV: EXCEPTIONS

Section 23 – Public Interest Override

54. It is extremely positive that all exemptions outlined in the Act are subject to the blanket "public interest override" in section 23, 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. However, to ensure that the provision is properly applied, and to be consistent with the drafting of the rest of the Bill, it is recommended that section 23 make it explicit that the provision applies to both public and private bodies.

55. The meaning of "public interest" is variable according to the facts of each case. However, consideration may be given to including a *non-exhaustive* list of factors which may be taken into consideration when weighing the public interest, to give officials some guidance on what they should be taking into account when weighing the public interest.

Recommendations:

- *Amend section 23 to clarify that both public and private bodies must to disclose information in the public interest.*
- *Consider inserting an additional clause giving some – non-exhaustive – guidance on what can be considered when weighing the public interest:*
  "In determining whether disclosure is justified in the public interest, the public authority shall have regard to considerations, including but not limited to:
  - *obligations to comply with legal requirements,*
  - *the prevention of the commission of offences or other unlawful acts,*
  - *miscarriage of justice,*
  - *abuse of authority or neglect in the performance of an official duty,*
  - *unauthorised use of public funds,*
  - *the avoidance of wasteful expenditure of public funds or*
  - *danger to the health or safety of an individual or the public, or*
  - *the need to protect the environment, and*
  - *the need to improve public participation in, and understanding of, public policy making."*

Sections 26 – 34 – Exceptions

56. Exceptions to the rule of maximum disclosure should be kept to an absolutely minimum and should be narrowly drawn. The exceptions in the Bill are mostly appropriate, but in order to fulfil the right to information effectively, certain provisions should be reviewed and/or deleted.

- Section 30 is a legitimate provision, but to ensure that wrongful conduct is not protected, consideration should be given to including in section 27(a) a reference to the "lawful" prevention or detection of crime. For example section 30 (a) should read "the *lawful* prevention or detection of crime".
- Section 33(1)(c) is not appropriate because it could too easily be abused by secretive officials who believe that all their decision making processes are sensitive and should not be open to the scrutiny of the public. This is a very common reaction within the bureaucracy and needs to be broken down by an access law – not protected. Ironically, information which discloses advice given to the government during the policy and decision-making process is exactly the kind of information that the public *should* be able to access, unless it is particularly sensitive. The public has the right to know what advice and information the government bases its decisions on and how the government reaches its

conclusions. It is not enough to argue that disclosure 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.

- Section 33(2) which attempts to exempt Cabinet documents should be deleted because Cabinet documents can be protected under other exemptions clauses as necessary – for example, national security or management of the national economy. At the very least, all of the Cabinet exemptions need to be reviewed to ensure that they are very tightly drafted and cannot be abused. Currently, the provisions are extremely broadly drafted, with section 33(2)(b) protecting even documents simply "prepared…for the purpose of submission to Cabinet or which was "considered by Cabinet" and "which is related to issues that are or have been before Cabinet". Practically every government document could be said to be related to issues that have been before Cabinet at some time or the other! It is also not clear why section 20(2)(a) protects official records of the Cabinet. These records are presumably vetted by Cabinet before they are finalised – and if Cabinet members sign off on them as a legitimate record of discussions then why should they be worried about their release?

  It is notable that some MPs in some other jurisdictions have complained that broad Cabinet exemptions have been abused because Cabinet members simply take documents into Cabinet and then out again and claim an exemption. At the very least therefore, a provision should be added that all decisions of the Cabinet along with the reasons thereof, and the materials on which the decisions were taken shall be made public after the decisions have been taken and the matter is complete. Section 8(1)(i) of the Indian *Right to Information Act 2005* provides a good example of such a clause.

- Section 34(2) provides a 30 year time period after the record was made after which the exceptions no longer apply. Although this provision is a positive inclusion, 30 years is a very long time and best practice provides for a shorter time frame (10-20 years). In addition, it is not appropriate that section 30(2) does not apply to section 33, which deals with internal decision-making of public bodies. Surely after 30 years, the public has a right to know how decisions were made?

Recommendations:

- *Amend section 30 to ensure that the law enforcement activities that are exempted from the law relate to lawful law enforcement activities.*
- *Delete s.33(1)(b).*
- *Delete s.33(2) because Cabinet documents can be protected by other exemptions, or at the very least require that all decisions of the Cabinet along with the reasons thereof, and the materials on which the decisions were taken shall be made public after the decisions have been taken*
- *Amend section 34(2) to provide that the exceptions do not apply to a record which is more than 10 years old.*

PART V: COMMISSIONER

57. The provisions contained in this part of the Bill are generally in accordance with best practice, including establishing a Commissioner's office to oversee the implementation of the Act. However, some refinements could be made.

Section 35 - Appointment of Commissioner

58. It is very positive that the Bill provides that the appointment of the Commissioner will be done in a transparent, participatory and open manner. It is essential that the people chosen to Information Commissioners are appointed through an open selection process. In this context, it is recommended that section 34(1)(c) clarify that the names of all of the candidates who put in a nomination be published in the Officials Gazette, on the Government website, and ideally, in newspapers. The public should also be permitted to make submissions on the list of candidates to the relevant selection committee.

59. To ensure the best candidate is chosen, and a Commissioner with integrity and experience is appointed to be the champion of the move to open government and transparency, it would be ideal to include more detail in section 35(2) as to what broader experience and skills are essential to the role. These will ensure that the Commissioners are utterly impartial and well-respected by the pubic as an upstanding citizen who is pro-transparency and accountability. For example, s.12(5) of India's *Right to Information Act 2005* requires that "*…the Information Commissioners shall be persons of eminence in public life with wide knowledge and experience in law, science and technology, social service, management, journalism, mass media or administration and governance."*

60. With regard to removing a Commissioner under section 35(3), although a two-thirds majority of the National Assembly needs to vote on the Commissioner's removal, there should still be a transparent underlying reasoning for why a Commissioner can be dismissed so that they can be confident of their position and its independence from politics. Many laws around the world place their Information Commissioner's on par with a Justice of the High Court and therefore require that a Commissioner can only be removed for under the provisions (usually constitutionally enshrined) for removal of a High Court Justice. If any other reasons are contemplated, then these should be listed in the law. For example, the India *Right to information Act 2005* lists a number of specific reasons for removal in section 14(3):

…the President may by order remove from office the Chief Information Commissioner, or any Information Commissioner if the Chief Information Commissioner or a Information Commissioner, as the case may be, -

i. is adjudged insolvent; or
ii. has been convicted of an offence which, in the opinion of the President, involves moral turpitude; or
iii. engages during his term of office in any paid employment outside the duties of his office; or
iv. has acquired such financial or other interest as is likely to affect prejudicially his functions as the Chief Information Commissioner or a Information Commissioner.

Recommendations:

- *Insert minimum qualifications criteria for the Information Commissioner:*
  "The person to be appointed as the Information Commission shall –
  (a) be publicly regarded as a person who can make impartial judgments;
  (b) have a demonstrated commitment to open government
  (c) have sufficient knowledge of the workings of Government;

(d) *have not been declared a bankrupt;*
(e) *be otherwise competent and capable of performing the duties of his or her office."*

- *Insert more guidance on the grounds on which an Information Commissioner can be removed.*

Section 36 - Independence and Powers

61. It is extremely positive that the Information Commissioner has been given operational and administrative autonomy to effectively discharge his/her functions in office. However, section 36(1) should clarify specifically that the Information Commissioner also has budget making autonomy and that it is completely independent of the interference of any other person or authority other than the courts.

62. In addition to this a new section could be inserted into section 36 requiring the Information Commissioner to be properly resourced to undertake all the functions required by the law.

Recommendations:

- *Amend section 36 (1) to clarify that the Information Commissioner will have budgetary autonomy and is independent from the interference of any other person or authority other than the courts.*
- *Amend section 36 to explicitly state that the Information Commissioner will have the resources required to undertake the functions of the office as provided for under the law.*

SEPERATE INTO NEW PART – MONITORING AND EDUCATION

63. It is very positive that the Bill gives the Information Commissioner broad powers to make monitor and promote the law, and to submit reports and recommendations to Parliament. To give these provisions more importance within the legislative framework of the Bill however, it would be useful to separate them out into a separate part on monitoring and reporting, rather than embedding them amongst the provisions dealing with appointment and removal of the Commissioner.

Section 39 - General Activities

64. In addition to the list of activities of the Commission already mentioned in section 39, two additional activities could be included:

    - Section 39(b) should require the Commission to also identify and make recommendations for reform of other Acts, laws and administrative systems that affect the implementation of right to information.
    - Section 39(e) should specify that the Commission should conduct educational programmes to increase the understanding of the public of the Act, especially in under-resourced or disadvantaged communities.

Recommendations:

- *Elaborate on section 39(b) to empower the Commissioner to identify and make recommendations for reform of other Acts, laws and administrative systems that affect the implementation of right to information.*
- *Elaborate on section 39 (e) to require that the Commission should conduct educational programmes to increase the understanding of the public of the Act, and their rights under it, especially in under-resources or disadvantaged communities.*

Section 40 - Reports

65. In order to ensure that reports are comprehensive, section 40(1) should be amended to clarify the required content of the report. International best practice laws set out the minimum standards that such a report should contain to ensure that it is made public. For example, section 40 of the Trinidad & Tobago *Freedom of Information Act 1999* and sections 48 and 49 of the United Kingdom *Freedom of Information Act 2000* provide useful models of potential monitoring approaches.

66. Consideration should be given to specifically mentioning the requiring that the report be sent to a Parliamentary Committee for consideration and review in section 40(2). The Committee could then call on the Government to take action on key issues as necessary. This is the practice in Canada, where Information Commissioner reports are sent to a Parliamentary Committee designated or established to review the administration of the Act.

Recommendations:

- Move section 40 (along with other key sections throughout the Bill) into a new part titled "Monitoring and Reporting".

- Amend section 40(1) to set out the minimum requirements that the Information Commission's report should contain, namely:

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

(a) the number of requests made to each public authority;
(b) the number of decisions that an applicant was not entitled to access to a document pursuant to a request, the provisions of this Act under which these decisions were made and the number of times each provision was invoked;
(c) the number of appeals sent to the Information Commissioners for review, the nature of the complaints and the outcome of the appeals;.
(d) particulars of any disciplinary action taken against any officer in respect of the administration of this Act;
(e) the amount of charges collected by each public authority under this Act;
(f) any facts which indicate an effort by public authorities to administer and implement the spirit and intention of this Act;
(g) 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.

- Amend section 40(1) to specify that reports will be submitted to Parliament and must be referred to a parliamentary committee for consideration and comment.

Insert new section – Regular Parliamentary Review of the Act

67. To ensure that the Act is being implemented effectively, it is strongly recommended that the law provides for a compulsory parliamentary review after the expiry of a period of two years from the date of the commencement of the Act, plus regular five year reviews after that. Internationally, such reviews of legislation have shown good results because they enable governments, public servants and citizens to identify stumbling blocks in the effective implementation of the law. Identified areas for reform may be legislative in nature or procedural. In either case, a two year review would go a long way in ensuring that the sustainability, efficacy and continued applicability of the law to the changing face of Bangladesh. It would enable legislators to take cognizance of some of the good and bad practice in how the law is being used and applied and enable them to better protect the people's right to information. Section 38 of the Jamaican *Access to Information Act 2002* provides a useful model.

Recommendation:

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

PART VI: ENFORCEMENT BY COMMISSIONER

Section 42 – Complaint to Commissioner

68. Part VI has been drafted relatively comprehensively, and provides a strong mechanism for complaints where private or public bodies fail to properly respond to requests for information. However, while section 42 allows any type complaint in respect of non-compliance with Part II, consideration should also be given to empowering the Commission to deal with complaints in relation to non-compliance with Part III, which deals with the duties on public bodies to regularly publish information, and to provide public education actives and training for officials. The non-compliance with these duties – and in fact, any of the duties under the law – is legitimately of direct interest to the public and accordingly, the public should be able to complain where these duties are not met. Section 18 of the India the *Right to Information Act 2005* contains a good model.

69. Notably, section 42 appears to deal only with the Commissioner's function as an appellate mechanism. However, Information Commissioners internationally are also given the power to initiate their own investigations. Section 30(3) of the Canadian *Access to Information Act 1982* provides a good model. In practice, such a power is particularly useful in allowing a Commissioner to investigate delays in providing information, because these cases will often not reach the Commissioner 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 Commissioner uncovers a pattern of non-compliant behaviour.

Recommendation:

– *Broaden the grounds of appeal by the public, for example:*

> *"Subject to this Act, an appeal may be made to the Information Commissioner, by or on behalf of any persons:*
>
> *(a) who have been unable to submit a request, either because no official has been appointed to receive requests or the relevant officer has refused to accept their application;*
> *(b) who have been refused access to information requested under this Act;*
> *(c) who have been advised that access will be deferred;*
> *(d) who have not been given access to information within the time limits required under this Act;*
> *(e) 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;*
> *(f) who believe that they have been given incomplete, misleading or false information under this Act;*
> *(g) in respect of any other matter relating to requesting or obtaining access to records under this Act."*

- Empower the Information Commissioner to undertake his/her own investigations:

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

Section 43 – Complaint Decision

70. It is positive that section 43(1) clearly recognises the need for parties to be able to represent their views to the Commissioner before a decision is made, but the Commission should also be empowered to take oral statements from parties where appropriate. In a country where members of the public are often quite geographically dispersed and far from centres of power, it may be simpler to permit oral submissions.

71. Section 43 should provide that where the Commissioner fails to decide on a complaint within the 30 day time limit, it shall be deemed as a rejection and the complainant will have the right to appeal to a higher court.

72. It is of concern that section 43(2) allows for summary rejection of appeals, particularly on the grounds specified. It is not at all clear what applications would be considered "frivolous, vexatious or unwarranted" for the purposes of section 43(2)(a). These terms could easily be abused. If this clause is retained, at the very least the provision needs to be amended to clarify what constitutes a 'frivolous, vexatious or clearly unwarranted request'.

73. Of additional concern is the passing reference that section 43(2)(b) makes to the possibility of an internal appeals mechanism, which is not mentioned anywhere else in the law. Who is responsible for deciding whether an internal appeal mechanism will be developed? Will each department develop their own model? If so, how will the public easily find out what their appeal rights are? In the absence of further provisions about what comprises such complaints procedures, public authorities may have quite a broad discretion as to the procedures that applicants must comply with before redress before the Commissioner is available. The legislation itself should set out such important details to ensure clarity and ease of implementation, and 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. Either an internal appeal process should be described in the Bill or section 43(2)(b) should be deleted.

Recommendations:

- *Amend section 43(1) to permit oral submissions to be made to the Information Commissioner.*
- *Insert a new sub-section to provide that failure to comply with section 43(1) is deemed to be a rejection and the applicant has the right to appeal to a higher court.*
- *Delete section 43(2)(a) allowing for the summary rejection of frivolous, vexatious or unwarranted requests.*
- *Delete section 43(2)(b) regarding internal appeals or alternatively, comprehensively describe in the Bill the internal appeals mechanism all bodies must follow..*

Section 43(4) and section 44 –Decisions on complaints

74. It is not clear why there is a need for the provisions of sections 43(4) and 44 to be separated out. If the recommendation in paragraph 68 is adopted, then applicants will be able to make complaints to the Information Commissioner about non-compliance with both Parts II and III. Accordingly, the Commissioner can be empowered in a single provision to make decisions in relation to non-compliance with both of those Parts, and these powers would capture the powers currently listed in s.43(4) and s.44. This would make it simpler for the public and for officials to understand and utilise the complaints process.

75. It is extremely positive that section 43(4) (d) empowers the Commissioner to impose fines on public and private bodies for egregious failures to comply with the provisions of the law. However, as discussed below at 77 and 78 it is recommended that a new section on Penalties and Offences be included in Part 8 of the Bill which deals with Criminal and Civil Responsibility, and that section 43(4)(d) then cross-reference the new, more comprehensive penalty powers.

Recommendation:

- *Combine sections 43(4) and 44 into a single provision setting out the Commissioner's decision-making powers.*
- *Clarify the extent of the Commissioner's powers to impose penalties for non-compliance, in accordance with the recommendations in paragraph 74 and 75.*

Section 45 – Commission's Powers to Investigate

76. In order to ensure that the Information Commission can perform its appeal (and inquiry) functions effectively, it is imperative that Commissioners are explicitly granted the powers necessary to undertake a complete investigation and ensure enforcement of their orders. To ensure that the Commission is not obstructed in its work, consideration should be given to specifying the Commission's investigative powers in more detail. The powers granted to the Canadian Information Commissioner under section 36 of the Canadian *Access to Information Act 1982* provide a useful model:

Recommendation:

- Elaborate upon the Commissioner's investigative powers in more detail:

(1) The Information Commissioner has, in relation to the carrying out of the investigation of any complaint under this Act, power:

(a) to summon and enforce the appearance of persons and compel them to give oral or written evidence on oath and to produce such documents and things as the Information Commissioner deems requisite to the full investigation and consideration of the complaint, in the same manner and to the same extent as a superior court of record;

(b) to administer oaths;

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

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

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

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

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

Section 50 – Criminal Offences

77. It is positive that this section sets out a basic set of offences for various acts of wilful misconduct by officials. Sanctions for non-compliance – including both offences and penalties – are particularly important incentives for timely disclosure in jurisdictions where the bureaucracy is unused to hurrying at the request of public. While the provisions of the current Bill are a good start, they could be substantially extended to provide for the imposition of penalties (where the non-compliance is not serious enough to constitute an offence) and to cover more instances of non-compliance. Section 20 of the Indian *Right to Information Act 2006*; section 54 of the UK *Freedom of Information Act 2000*; section 34 of the Jamaican *Access to Information Act 2002*; and section 42 of the Trinidad & Tobago *Freedom of Information Act 1999* all provide useful models.

78. In the first instance, it is important to clearly detail what activities will be considered offences under the Act. Section 50(1) should be broadened to clearly specify the kinds of actions which are punishable under the law. Not only egregious criminal acts, but also negligent disregard for the law should be punished. This is important in a bureaucracy which is likely to be resistant to openness and may stop short of criminal acts, but may still delay and undermine the law in practice. Additional offences need to be created, for example:
    (a) unreasonable refusal to accept an application,
    (b) unreasonable delay, which in India incurs a fine of Rs250 per day,
    (c) unreasonable withholding of information,
    (d) knowingly providing incorrect information,
    (e) concealment or falsification of records,
    (f) non-compliance with the Information Commissioner's orders, which in the UK is treated as a contempt of court.

79. Once the offences are detailed, sanctions need to be available to punish the commission of offences. Notably, any 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. It is positive that in this context, section 50 (2) provides for the imposition of a maximum fine as opposed to (or in addition to) a minimum fine.

80. When developing penalties provisions, lessons learned from Indian are illuminating. In India, penalties can be imposed 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. 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 Information Officers. Instead, the official responsible for the non-compliance should be punished.

81. In addition to the possibility of fines and/or imprisonment, the Bill should also require that where a penalty is imposed on any officer under the Bill, *"the officer shall also be liable to appropriate disciplinary action under the service rules applicable to him".* This possibility of imposing additional disciplinary sanctions is permitted under the Indian *Right to Information Act 2006*.

82. In order to ensure that public authorities properly implement the law, they too should be liable for sanction for non-compliance. This would ensure that heads of department take a strong lead in bedding down the law and ensuring that staff across their authority undertake their duties properly. An additional provision should be

included in the Bill to penalise public authorities for persistent non-compliance with the law. A fine could be imposed for example, where a public authority fails to implement the proactive disclosure provisions in a timely manner, does not appoint an Information Officer or appellate authorities, consistently fails to process applications promptly and/or is found on appeal to consistently misapply the provisions of the law to withhold information. The minimum fine should be sufficiently large to act as a deterrent.

Recommendations:

- *Amend section 50 to provide for both offences and penalties and provide a more comprehensive list of what actions these will cover, for example:*

  (1) Subject to sub-section (3), where any Information Officer has, without any reasonable cause, failed to supply the information sought within the period specified under section 10, the Information Commissioner or the Courts shall, on appeal, impose a penalty of [XXX], 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 Information Officer a reasonable opportunity of being heard.

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

  - *Refused to receive an application for information*
  - *Mala fide denied a request for information;*
  - *Knowingly given incomplete or misleading information,*
  - *Knowingly given wrong information, or*
  - *Destroyed information, without lawful authority;*
  - *Obstructed access to any record contrary to the Act;*
  - *Obstructed the performance of a public body of a duty under the Act;*
  - *Interfered with or obstructed the work of an Information Officer, the Information Commissioner or the Courts; or*
  - *Failed to comply with the decision of the Information Commissioner or Courts;*

  the Information Officer commits an offence and the Information Commissioner or the Courts shall impose a fine of not less than [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 Information Officer for the performance of his/her duties under this Act shall be liable for penalty as prescribed in sub-sections (1) and (2) jointly with the Information Officer or severally as may be decided by the Information Commissioner 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 Information Officer, or if no salary is drawn, as an arrears of land revenue.

  (5) The 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 and the Information Commissioner or Courts will refer the case to the appropriate authority for action accordingly.

  (6) Where the Information Commission finds a public or private body guilty of persistent non-compliance it may impose a fine of not less than [XXX] on the body.

Annex 1: Best Practice Freedom of Information Principles

Maximum Disclosure: The value of access to information legislation comes from its importance in establishing a framework of open governance. In this context, the law must be premised on a clear commitment to the rule of maximum disclosure. This means that there should be a presumption in favour of access. Those bodies covered by the Act therefore have an *obligation* to disclose information and every member of the public has a corresponding *right* to receive information. Any person at all should be able to access information under the legislation, whether a citizen or not. People should not be required to provide a reason for requesting information.

To ensure that maximum disclosure occurs in practice, the definition of what is covered by the Act should be drafted broadly. Enshrining a right to access to "information" rather than only "records" or "documents" is therefore preferred. Further, the Act should not limit access only to information held by public bodies, but should also cover private bodies "*that carry out public functions or where their activities affect people's rights*". This recognises the fact that in this age where privatisation and outsourcing is increasingly being undertaken by governments, the private sector has increasing influence and impact on the public and therefore cannot be beyond their scrutiny. Part 3 of the South African *Promotion of Access to Information Act* 2000 provides a very good example to draw on.

Bodies covered by the Act should not only have a duty to disclose information upon request, but should also be required to proactively publish and disseminate documents of general relevance to the public, for example, on their structure, norms and functioning, the documents they hold, their finances, activities, any opportunities for consultation and the content of decisions/policies affecting the public.

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. It is important in order to send a message to the public that the government is serious about opening itself up to legitimate scrutiny.

Minimum Exceptions: The key aim of any exceptions should be to protect and promote the public interest. The law should therefore not allow room for a refusal to disclose information to be based on trying to protect government from embarrassment or the exposure of wrongdoing. In line with the commitment to maximum disclosure, exemptions to the rule of maximum disclosure should be kept to an absolutely minimum and should be narrowly drawn. The list of exemptions should be comprehensive and other laws should not be permitted to extend them. Broad categories of exemption should be avoided and blanket exemptions for specific positions (eg. President) or bodies (eg. the Armed Services) should not be permitted; in a modern democracy there is no rational reason why such exemptions should be necessary. The law should require that other legislation be interpreted, as far as possible, in a manner consistent with its provisions.

Even where exemptions are included in legislation, they should still ALL be subject to a blanket "public interest override", whereby a document which is presumed exempt under the Act should still be disclosed if the public interest in the specific case requires it.

Simple Access Procedures: A key test of an access law's effectiveness is the ease, inexpensiveness and promptness with which people seeking information are able to obtain it. The law should include clear and uncomplicated procedures that ensure quick responses at affordable fees. Applications should be simple and ensure that the illiterate and/or impecunious are not in practice barred from utilising the law. Any fees which are

imposed for gaining access should also not be so high as to deter potential applicants. Best practice requires that fees should be limited only to cost recovery, and that no charges should be imposed for applications nor for search time; the latter, in particular, could easily result in prohibitive costs and defeat the intent of the law. The law should provide strict time limits for processing requests and these should be enforceable.

All public bodies should be required to establish open, accessible internal systems for ensuring the public's right to receive information. Likewise, provisions should be included in the law which require that appropriate record keeping and management systems are in place to ensure the effective implementation of the law.

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

In practice, this requires that any refusal to disclose information is accompanied by substantive written reasons (so that the applicant has sufficient information upon which to appeal) and includes information regarding the processes for appeals. Any such process should be designed to include a cheap, timely, non-judicial option for mediation with review and enforcement powers. Additionally, final recourse to the courts should be permitted.

The powers of oversight bodies should include a power to impose penalties. Without an option for sanctions, such as fines for delay or even imprisonment for wilful destruction of documents, there is no incentive for bodies subject to the Act to comply with its terms, as they will be aware that the worst that can happen is simply that they may eventually be required to disclose information.

Monitoring and Promotion of Open Governance: Many laws now include specific provisions empowering a specific body, such as an existing National Human Rights Commission or Ombudsman, or a newly-created Information Commissioner, to monitor and support the implementation of the Act. These bodies are often be empowered to develop Codes of Practice or Guidelines for implementing specific provisions of the Act, such as those relating to records management. They are also usually required to submit annual reports to Parliament and are empowered to make recommendations for consideration by the government on improving implementation of the Act and breaking down cultures of secrecy in practice.

Although not commonly included in early forms of right to information legislation, it is increasingly common to actually include provisions in the law itself mandating a body to promote the Act and the concept of open governance. Such provisions often specifically require that the government ensure that programmes are undertaken to educate the public and the officials responsible for administering the Act.