
Analysis of the Lesotho draft Access and Receipt of Information Bill 2000

**Submitted by the
Commonwealth Human Rights Initiative, September 2004**

1. The Media Institute of Southern Africa (MISA) has forwarded a copy of the draft *Access and Receipt of Information Bill 2000* to the Commonwealth Human Rights Initiative (CHRI) for review and comment.
2. CHRI welcomes the opportunity to comment on the draft Bill and supports the broad distribution of the Bill to encourage broader discussion and input before it is finalised. Experience has shown that a participatory law-making process can be a major factor in laying a strong foundation for an effective right to information regime. Implementation is strengthened if right to information laws are 'owned' by both the government and the public. Participation – whether directly via submissions from the public, or indirectly via awareness-raising by the media - *during* the law-making process can provide a good foundation on which to build a strong platform for implementation. As one right to information advocate has argued, what needs to be remembered and facilitated are the laws of supply and demand:
 - Supply - Implementation will fail unless the officials responsible for providing information are committed to doing so, and have the know-how and technical and financial resources to facilitate the law;
 - Demand - The success of a right to information law is directly related to its use by the public, such that it is vital that the public are aware of the law, what its purpose is and how they can use it.

ANALYSIS OF DRAFT BILL AND SUGGESTIONS FOR IMPROVEMENT

3. Overall, CHRI's assessment is that the draft Bill is very comprehensive and covers most issues adequately. Notably however, it is worth considering the fact that the complexity of the drafting may cause difficulties at the implementation stage, as both bureaucrats and the public may be confused as to how the various sections all combine together. This observation supports an overall recommendation that the Act be reworked to reduce the complexity of some of the provisions, to remove repetition and to ensure that all cross-referencing and wording is correct. Further, consideration should be given to separating the Act into more separate parts to enable users to navigate its provisions more easily. For example, new chapters could be included for "Process for Making Applications", "Processes for Handling Applications", "Urgent Requests", "Monitoring and Education". Provisions could then be grouped together more comprehensibly.
4. In addition to these general comments, CHRI's strongly recommends the reconsideration of the proposed appeals regime – which currently only allows for one internal appeal followed by recourse to the courts – and the related penalty and enforcement provisions. CHRI recognises that the draft Bill has been strongly influenced by the provisions of the South African *Promotion of Access to Information Act 2000* (POIA Act). However, as the South African experience has shown, without a strong, cheap, speedy non-judicial independent appeals mechanism, the usefulness of a right to information (RTI) law can be severely undermined; internal appeals are not impartial and most aggrieved complainants will not have the time or money to spend on an appeal to the courts.

Preliminary Provisions

5. Consideration should be given to amending the **Preamble to make a strong statement** explaining why the law is being enacted. This can be important because courts will often look to the preamble of legislation when interpreting. The Preamble could usefully clarify that the Act aims to:
 - (i) *Enshrine the right to Information in law, which will contribute to strengthening democracy, improving governance, increasing public participation, promoting transparency and accountability and reducing corruption;*

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- (ii) *Establish voluntary and mandatory mechanisms or procedures to give effect to right to information in a manner which enables persons to obtain access to records of public authorities, and private bodies where the information is needed for the exercise and/or protection of a right, in a swift, effective, inexpensive and reasonable manner;*
- (iii) *Promote transparency, accountability and effective governance of all public authorities and private bodies by including but not limited to empowering and educating all persons to:*
- *understand their rights in terms of this Act in order to exercise their rights in relation to public authorities and private bodies;*
 - *understand the functions and operation of public authorities; and*
 - *effectively participating in decision making by public authorities that affects their rights.*
6. Section 1 requires the date of the Act coming into operation to be notified in the Gazette. Although it is understandable that the Government may wish to utilise such a provision to allow time to prepare for implementation, in practice such a formulation can be used to allow the Government and/or bureaucracy to undermine the Act by simply failing to notify it for months – or even years, as the case in India. Best practice requires that the Act itself **should specify a maximum time limit for implementation**, to ensure there is no room for the provision to be abused and implementation to be stalled indefinitely. Experience suggests a maximum limit of 1 year between passage of the law and implementation is sufficient (see Mexico for example).

Part I – Introductory Provisions

7. The **definition of “governmental body”** in s.2(1) is **overly restrictive**. This clause is crucial; it provides the foundation stone on which the right to access information is built because it sets out who is covered by the Act. In that context, it is important to ensure that it is not so narrowly or ambiguously drafted that it can be interpreted to restrict access to information held by or under the control of public bodies which should legitimately be covered by the law. Consideration should be given to the following:
- To aid clarity, each criterion for defining a “governmental body” should be separated out into its own clause. This will assist with interpretation and application of the law.
 - In using the term “governmental” body, too much emphasis is placed on the connection of the body to the Government, as opposed to its performance of public functions, whether specifically as part of the Government/bureaucracy or otherwise. Consideration should be given to referring instead to “public authorities”.
 - Currently, only “any department of state...”, “functionary or institution” is covered. If these terms are interpreted narrowly, they could be used to exclude a range of public bodies which *should* be covered by the Act. Consideration should be given to reworking the definition to cover, at a minimum, all “*national and local government ministries, departments, statutory corporations and bodies, commissions, organs, agencies and other government bodies, unless specifically exempted by this Act*”. In this context, s.2(2) should be merged into the definition of “governmental body”.
 - In recognition of the increasing corporatisation and privatisation of government bodies, consideration should be given to including an additional clause to cover “*any body owned, controlled or substantially financed by funds provided by a national or local government*”.
 - All arms of Government – the executive, legislature and the courts – should be explicitly covered by the law. Specifically, the President, as well as all Ministers and Members of Parliament should be covered, as should their advisors. Additionally, judges and other judicial officers should be covered.
8. The definitions in s.2(1) of “commercial”, “non-commercial” and “personal” requestors reflects the decision of the drafters to separate requesters into different categories, with different rights and obligations under the law. This approach does not accord with best practice which requires that **all individuals should have equal access rights** stemming from the fact that the right to information is a fundamental human right. Subject to this general criticism, consideration

should specifically be given to at least revising the definition of “non-commercial requestor” to cover access required for “(b) *research, education or other charitable purposes by a non-profit or an educational body...*”. The inclusion of the catch-all phrase “or charitable purposes” recognises that NGOs are engaged in considerable useful work beyond just research and education and should not be subject to the same charges as commercial bodies for access required to promote said charitable purposes.

9. The use of the **term “records” rather than “information”** – first referred to in s.2(1) and replicated throughout the Act – **unnecessarily restricts the right to access information**. Allowing access to “information” means that applicants are not restricted to accessing only information which is already collated into a “record” at the time of the application. Also, the use of the term “record” can exclude access to items such as videos, models or samples of materials. This is a serious oversight because it has been shown in many countries that the public’s 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. The term “information” should be used throughout the law and should be defined to replicate the current definition of “record” in addition to the following:

“any material in any form, including records, documents, file notings, memos, emails, opinions, advices, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models, data, material held in any electronic form and any information relating to a private body which can be accessed by a public authority under any law”

10. It is positive that s.4 establishes Public Information Officers (PIO), because in practical terms, it is good to set up a consistent process for accessing information across all governmental bodies. Notably however, the Act should make it clear that **PIOs must be nominated at the local level**, and not just at the headquarters. It is important that people in outlying areas and states are able to lodge and follow up requests locally. Accordingly, s.4(1) should be reworded to require that:

“Each public body must, subject to legislation governing the employment of personnel of the public body concerned, designate such number of persons as deputy information officers as are necessary to render the public body as accessible as reasonably possible for requesters of its records.”

Part II – Guide and Manuals About Functions of Governmental Bodies

11. Part II of the Act largely replicates the provisions of the South African *POAI Act*. This Part is commendable in its objective of ensuring that information about the Act is **disseminated to the public in an easily understood and accessible format**. To ensure that this objective is effectively implemented however, consideration should be given to including the following provision before s.5:

“For the purpose of this Part, all manuals and required information should be published widely and in a manner easily accessible to the public and at a minimum, on a dedicated Right to Information website. “Publish” shall mean appropriately making known to the public the information to be communicated through notice boards, newspapers, public announcements, media broadcasts, the internet or other such means and shall include inspection at all of the bodies offices. All materials shall be published keeping in mind the local language and the most effective method of communication in that local area.”

12. It is not clear why s.6(1) excludes bodies which are “public enterprises that operate a system of financial administration separate from the national and local spheres of government” from the proactive disclosure duties detailed in s.6(2). In accordance with best practice, which recognises that all public bodies should be as transparent and accessible as possible, the **proactive disclosure provisions should cover all “governmental bodies”** as defined by the Act.

13. Consideration should be given to **extending the proactive disclosure requirements** under s.6(2) to include the following information:

(i) *The powers and duties of the body’s officers and employees*

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- (ii) *Procedures followed during the decision making process, including chains of supervision and accountability.*
 - (iii) *The norms set by the public authority for the discharge of its functions.*
 - (iv) *Rules, regulations, instructions, manual and records held by or under its control used by its employees for discharging its functions.*
 - (v) *A statement of the categories of documents that held by or under the control of the public authority.*
 - (vi) *Particulars of any arrangement that exists for consultation with, or representation by, members of the public in relation to the formulation of policy in, or the administration of, the public authority.*
 - (vii) *A statement listing all boards, councils, committees and other bodies constituted by two or more persons, that are part of, or that have been established for the purpose of advising, the public authority, and whose meetings are open to the public, or the minutes of whose meetings are available for public inspection;*
 - (viii) *A directory of their public servants, from the level of the head of the department or his/her equivalent and below;*
 - (ix) *The monthly remuneration received for each position, including the system of compensation as established in regulations;*
 - (x) *Information concerning the budget assigned to each agency, including all plans, proposed expenditures and reports on disbursement,*
 - (xi) *The design and execution of subsidy programs, including the amounts allocated to them, criteria for access, implementation details and beneficiaries.*
 - (xii) *All concessions, permits or authorisations granted, with their recipients specified.*
 - (xiii) *The details of facilities available to citizens for obtaining information, including if the public authority maintains a library or reading room that is available for public use, a statement of that fact including details of the address and hours of opening of the library or reading room; and]*
 - (xiv) *The name, designation and other particulars of the Public Information Officer;*
 - (xv) *Such other information as prescribed by the appropriate government or Chief Information Commissioner from time to time which would promote transparency across public authorities or in specific public authorities, as appropriate;*
- on the basis that it shall be a constant endeavor of public authorities to take steps to provide as much information to the public suo moto at regular intervals through various means of communication so that the public have minimum resort to the use of this Act to obtain information.*

14. Consideration should also be given to including an additional clause requiring **routine disclosure of Government contracts**. Such information is extremely useful in enabling ordinary people to be more aware of the Government activities being undertaken in their local area and to hold contractors and public authorities accountable for the timely and competent completion of such activities. The following clause could be inserted after section 6(2):

Every governmental body shall, upon signing, publish all contracts entered into, detailing at a minimum for each contract:

- (i) *The public works, goods acquired or rented, and the contracted service, including any sketches, scopes of service and/or terms of reference;*
- (ii) *The amount of the contracts, broken down into useful line items;*
- (iii) *The name of the provider/contractor/individual to whom the contract has been granted;*
- (iv) *The periods within which the contract must be completed.*

15. Consideration should be given to including an additional requirement that **proactive disclosure be required in relation to development activities being undertaken by public bodies**. It is not easy to craft such provisions in a manner which allows for simple implementation in practice. Some attempt has been made in the Indian *Freedom of Information Act 2002* and the Sri Lankan civil society draft *Freedom of Information Bill 2004* (see below), although both of these provisions have flaws (see CHRI's analysis of the Sri Lankan Bill for

more¹). Despite these difficulties however, CHRI would encourage the inclusion of such a provision as international development practice has repeatedly demonstrated the central importance that an informed constituency has in ensuring effective participatory development. Proactively providing affected development constituencies with information is one strategy for ensuring this end.

- India – Section 4: *Every public authority shall... publish at such intervals as may be prescribed by the appropriate Government or competent authority... (e) before initiating any project, publish or communicate to the public generally or to the persons affected or likely to be affected by the project 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 interests of natural justice and promotion of democratic principles.*
- Sri Lanka – Section 8: *Prior to the commencement of any work or activity relating to the initiation of any project, it shall be the duty of the President or the Minister as the case may be, to whom the subject pertaining to such project has been assigned to communicate to the public generally and to any persons who are particularly likely to be affected by such project in such manner as specified in guidelines issued for that purpose by the Commission all such information relating to the project that are available as on the date of such communication.*

For the purpose of this section, “project” means any project the value of the subject matter of which exceeds :-

- (a) in the case of foreign funded projects, one million united states dollars; and*
- (b) in the case of locally funded projects five million rupees.*

16. It is **not appropriate** that s.6(7) allows the **Minister of Communications**, entirely at his/her own discretion, **to exempt bodies** from the proactive disclosure requirements under the law. At a minimum, (i) a brief set of criteria should be included, for example, where extra time is needed due to a shortage of resources; (ii) full exemptions should not be permitted, except perhaps by a regulation tabled in Parliament; (iii) a maximum time limit for any extensions of time should be set, at no more than 6 months; and (iv) decisions of the Minister should be reviewable by an independent appeal body.
17. Section 8 is a commendable open government provision. However, consideration should be given to providing clear direction in s.8(1) regarding the timeframe for making announcements. In the public interest, it would be more appropriate to require disclosures to be made “as soon as possible, subject to the other provisions of this Act”.

Part III – Access to Records of Governmental Bodies

Chapter 1: Right and Manner of Access

18. Taking into account the recommendations at paragraphs 7 and 9 above, consideration should be given to redrafting s.9 to enshrine a **broader right of access to information**:
Every person shall, subject to this Act, have the right to access information held by, legally accessible by or under the control of any Governmental body, including the right to :
- (a) Inspect of works, documents, records;*
 - (b) Take notes and extracts and obtain certified copies of documents or records;*
 - (c) Take certified samples of material;*
 - (d) Obtain information in the form of diskettes, floppies, tapes, video cassettes or in any other electronic mode or through printouts where such information is stored in a computer or in any other device.*
19. Consideration should also be given to extending the coverage of the Act from Governmental bodies only, to **cover information held by private bodies** which is necessary for the exercise or protection of a person’s rights. This accords with the best practice example provided by Part

¹ The Analysis can be found at http://www.humanrightsinitiative.org/programs/ai/rti/international/laws_papers/srilanka/foibil1-critique-v2-feb04.pdf. See paragraph 28 for more on the proactive disclosure provisions.

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- 3 of the South African *Promotion of Access to Information Act 2000* (POAIA). Private bodies are increasingly exerting significant influence on public policy, especially as a result of the outsourcing of public functions, such that they should not be exempt from public scrutiny simply because of their private status.
20. Consideration could be given to extending s.13 to require information to be translated into an official language where a **translation is in the public interest**. This is the approach that has been adopted in Canada, a bilingual country (see ss.12(2) of the Canadian *Access to Information Act*). A similar approach should also be adopted where information is requested in disability-friendly media, for example, in Braille or on tape for the hearing impaired.
21. Section 14(2), which deals with **applications for information**, should make it explicit that:
- A specific form need not be used. Rather, the only requirement should be that any application, whether by letter or email, should include the specific information listed in sub-sections (a) to (f).
 - At the very least, if a form is eventually prescribed by regulation, applications which are *not* made on the prescribed form should still be accepted by bodies covered by the Act, as long as the request complies with s.14(2).
 - The application does not have to specify a reason for requesting the information. In the absence of such a provision, in some countries this requirement has been included via regulations and then used by resistant bureaucrats to reject applications.
22. Taking into account the analysis in paragraph 8 above, s.14(3) should be reconsidered to ensure that any differential fees structure at least **minimises the imposition of high fees on requestors**. On the basis of this principle, it is not appropriate that s.14(3) seeks to levy the highest fee available, where one requestor falls under two categories. At a minimum, personal requests should, in all cases, attract no fees.
23. Section 15(4) should be merged with s.16 on the basis that both provisions deal with the issue of transfers of requests. At a minimum, s.15(4)(a) should be deleted. To ensure certainty for the public and to minimise the risk of public officials shirking their responsibilities, there should be **no room for officials to require applicants themselves to redirect their requests**. Public officials have access to the internal workings of government and can much more easily ensure effective transfers of requests. Further, if applicants are required themselves to transfer the request, they may also be required to pay a new fee by the new body receiving the request. This problem could be exacerbated if a request for one piece of information needs to be handled by multiple bodies.
24. The time limits in ss.16(1), (2) and (3) should be reduced to ensure **prompt disposal of all requests**. (Any amendments to the time limits should be reflected in related provisions throughout the Act.) This argument applies particularly forcefully to the “urgent request” provisions. Allowing 5 days to transfer an urgent request effectively undermines the entire provision – urgency is usually defined as 1 or 2 days. By the time the request is transferred, it may already be too late.
25. Section 16(5) should also all be revised to require the **time limit for responding to transferred requests** to be calculated from the date a request is received, not the date it is transferred. The current 30 day time limit for responding to requests is already relatively long. Some access laws require a response in as little as 5 days, or more commonly within 2 weeks. Taking this into account, it is clear that, although bodies dealing with transferred requests have slightly less time than others to respond, in practice this is not likely to cause actual hardship. Notably, this also accords with best practice; most laws CHRI has reviewed adopt this approach. It ensures that bodies do not use the transfer provisions to deliberately delay their response. On the basis of the current provisions, it is possible for a body to wait until the thirteenth day and then transfer a request, at which time the clock starts again, allowing for another 30 day period to start. Such delaying tactics can be particularly useful where the media, which often requires information quickly, makes requests.
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26. It is positive that s.17 specifically requires all records to be properly preserved while subject to a request. However, the provision should more generally recognise that **all records held by governmental bodies need to be maintained, managed and destroyed in accordance with all relevant laws**, such as national archives legislation and public service rules. For the provision to have any effect in practice, it is also imperative that strong penalty provisions are included in the law to penalise officials who do not comply with s.17 (see paragraphs 71-75 below for further discussion).
27. Section 18(1) permits the imposition of an **application fee**. Best practice requires that no fees should be imposed for accessing information, particularly government information, as costs should already be covered by public taxes. At the very least, no application fee should be levied because the initial work required to locate information and determine its sensitivity to disclosure is a routine and expected task of government. This is the case in Trinidad & Tobago where s. 17(1) of the *Freedom of Information Act 1999* specifically states that no fees shall be imposed for applications. In practice, it may actually be more complicated and time-consuming to levy an application fee, particularly if determinations need to be made at that point regarding whether a requester is “commercial” or not. Is further direction to be provided via regulations?
28. Section 18(3) should clarify that the request fee imposed by private bodies can, like s.18(2), only be imposed on commercial requesters. An additional clause should also be added requiring that **fee rates set by private bodies need to be approved** by the Government and/or need to be set in accordance with guidelines to be issued via regulation. Without such conditions, private bodies may simply charge extortionate rates, with a view to making access to information prohibitively expensive.
29. Section 18 should provide more detail regarding the **mode of fee payment**, or at least should require that more detailed guidance will be provided via regulations. Currently, it is not clear to whom fees should be paid, nor how proof of payment will be provided where an application is submitted by post or by email. In this context, consideration should also be given to including a clause requiring that **receipts be provided once applications are received** by bodies. This would ensure that requesters have written proof of the date on which they submitted the application and written recognition from the relevant body of the time limits which apply to the request.
30. Section 19(1) allows PIOs to require both commercial and non-commercial requestors to provide a deposit in certain cases, prior to a request being processed. Section 19(1) justifies the call for a deposit where an application “requires more than the prescribed time”. But would it not be more appropriate to use that criteria as a justification for extending the time for processing the request (see s.22 of the current Act), rather than for imposing a fee? More commonly, where such a provision is included in an access law, a deposit is usually required where it is anticipated that a large volume of documents will need to be located and copied. In any case, in accordance with the recommendations in paragraph 8 above, consideration should be given to requiring deposits from commercial requestors only.
31. The **imposition and calculation of fees should be appealable**, to ensure that bureaucrats do not arbitrarily exercise their powers under the Act. Likewise, decisions regarding the form of access to be provided should be reviewable. Accordingly, s.20(2) should be amended to require notices permitting access to include information regarding appeal rights in respect of the fees charged and the form of access provided (see paragraph 54 for further discussion).
32. While it is positive that s.21 attempts to establish a **process for expediting urgent requests**, the provision is currently confusingly drafted and contains a number of deficiencies:
- Five days to make a decision is too long. In India, urgent requests (defined as requests “which concern the life and liberty of a person”) must be processed within 48 hours and in the State of Maharashtra within 24 hours. In some countries, an ordinary request must be processed within 5 days.

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- Section 21(2) requires an officer only to “decide on the request” urgently. This is not helpful. The provision should be reworded to require that the officer must *provide the information* urgently.
 - It is not clear on what basis a requester can legitimately request that their application be expedited. Guidelines should be developed, to provide parameters for both the public and the officials required to make decisions in accordance with the provision.
 - It appears that s.21(2)(a) should have been worded to read “the requester will NOT suffer any prejudice...”. If this is correct, guidance should be provided to explain what will constitute prejudice for these purposes – a human rights violation? commercial harm? a missed journalistic deadline?
 - The imposition of an urgent request fee is unfair and unjustifiable. Presumably, urgent requests relate to serious matters, for example, as in India, where such information may be required to protect someone’s life or liberty. It is not appropriate that requests which are made for such important reasons will attract an additional fee. At the very most, commercial requestors could be required to pay a special urgent request fee, but only where the urgency relates to commercial need.
33. Section 22(2) should be reviewed to ensure that the **extension provisions cannot be abused by resistant officials**. Specifically, the opening clause of s.22(2) should make it explicit that only one extension is permissible. Further, s.22(2)(c) should be deleted because, in practice, it will allow bureaucrats to group together and argue that one, some or all of them are simply too busy to respond. This is not appropriate. Open government should be a priority for public officials, and meetings should accordingly be organised and attended promptly.
34. Section 25, dealing with records which cannot be found, should be made subject to **penalty provisions** (see paragraphs 71-75 below for further discussion). Safeguards and sanctions need to be in place to ensure that corrupt officials do not abuse the provision and simply pretend that incriminating documents cannot be located.
35. Section 28, which effectively operates as a **public interest override** in respect of the exemptions in Chapter 2, should be moved to sit with that chapter to enhance readability. It is commendable that such a comprehensive public interest override has been included, although the inclusion of two slightly different clauses (sub-section (1) and (2)) is unnecessarily complicated and may result in confusion at the implementation stage. Consideration should be given to applying the simpler public interest override in s.21(2) to ALL of the exemptions in Chapter 2 and then, if necessary, simply noting that the issues mentioned in s.28(1)(a) should carry particular weight when determining what is in the public interest. If this option is not preferred, then at a minimum, s.21(2) should be reworded to operate as a general catch all clause, such that rather than specifying the exact clauses to which it applies, it will simply apply to ALL exemptions not specifically referred to in s.21(1).
36. Section 29 is currently drafted so that documents which contain exempt information under s.42 cannot be **partially disclosed**. There is no justification for this approach, such that s.29 should be amended to bring s.42 within its ambit.
37. Section 30 permits the imposition of a variety of charges for access. As noted in paragraph 27 above, best practice requires that **no fees should be imposed for accessing information**. At the most, fees should be limited only to cost recovery, with no additional margin for profit, and a maximum limit should be imposed. Charges should only cover reproduction costs, not search or collation/compilation time. Imposing fees in respect of the latter could easily result in prohibitive costs, particularly if bureaucrats deliberately drag their heels when collating information in order to increase fees. Taking these issues into account:
- The current fee provisions should be preceded by a general statement of principle requiring that rates should be set with a view to ensuring that the costs imposed for access are not so high as to deter potential applicants. For example:
“Any fees charged for requesting or accessing information shall be reasonable, shall in no case exceed the actual cost of copying the information such as making photocopies
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or taking print outs and shall be set via regulations at a maximum limit taking account of the general principle that fees should not be set so high that they undermine the objectives of the Act in practice and deter applications”.

- It is positive that s.30 at least requires that personal requestors will only be charged for reproduction of records. This section should clarify however, that only the actual costs incurred in reproducing the information will be passed on and no profit margin will be included;
 - Consideration should be given to reviewing the fees regime imposed on non-commercial requestors. As noted in paragraph 8 above, many non-commercial requestors will be NGOs which are accessing information for charitable purposes. As such, it is unjustifiable to impose substantial costs on such requestors, many of whom commonly have only limited resource with which to do their work. Ideally, personal requestors and non-commercial requestors should pay the same charges. At a minimum, the fees that can be imposed on non-commercial requestors should be set at a maximum limit, and the initial amount of free search/preparation time should be set relatively high, for example, a minimum of 50 hours.
38. Consideration should also be given to including additional clauses which permit **fee waiver or reduction** in certain circumstances. For example, s.17(3) of the Trinidad & Tobago Act states that even where fees are imposed, if a body subject to the Act fails to comply with the time limits for disclosure of information, access to which the applicant is entitled shall be provided free of charge. In Australia, s.29(5) of the *Freedom of Information Act 1982* allows the waiver of fees where that is in the public interest. Such provisions are regularly included in access laws in recognition of the fact that fees may prove a practical obstacle to access in some cases. A definition of “public interest” may be included to provide direction to officials implementing the law. provides a useful model:
- Australia: Without limiting the matters the agency or Minister may take into account in determining whether or not to reduce or not to impose the charge, the agency or Minister must take into account:*
- (a) whether the payment of the charge, or part of it, would cause financial hardship to the applicant, or to a person on whose behalf the application was made; and*
 - (b) whether the giving of access to the document in question is in the general public interest or in the interest of a substantial section of the public.*
39. In accordance with the suggestions in paragraph 18 above, consideration should be given to including additional clauses which set out the forms of access where a requestor is seeking to **inspect works or take certified samples of material**. Further s.16(8) requires that where a copy of a record is requested it shall be sent by post. However, the Act should include an option for a requestor to pick up the copied material in person, if they choose. This may significantly reduce costs where a large number of records are being accessed.
40. Section 16(10), which deals with **access to records subject to correction**, should be amended to permit partial disclosure of such records, whereby the information subject to correction will be severed and the remainder of the record will be released.
41. It is not clear why the provision on **monitoring and reporting** is placed in Chapter 1 at s.32. Perhaps such provisions, which deal with implementation issues, could be placed in a separate chapter. In any case, consideration should be given to clarifying the reporting requirements to ensure that the most fulsome, useful information is provided. In particular, not only quantitative information, such as numbers of application received and processed, should be provided, but also qualitative information such as the reasons for decisions, refusals, appeals, etc. The following clauses could be used as a model:
- *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;*
 - *the number of complaints made to the appeals bodies with respect to the operation of this Act, the nature of those complaints and the result of the complaints;*

- *particulars of any disciplinary action taken against any officer in respect of the administration of this Act;*
- *the amount of charges collected by each public authority under this Act;*
- *recommendations for the development, improvement, modernisation, reform or amendment of this Act or other legislation or common law having a bearing on access to information held by public and private bodies, respectively; and*
- *any other facts which indicate an effort by public authorities to administer and implement the spirit and intention of this Act.*

42. In accordance with best practice, the monitoring and reporting provisions should be coupled with provisions mandating a body to promote and train people on the Act and the concept of open governance. Commonly, such provisions often specifically require that the government should ensure that programmes are undertaken to educate the public and the officials responsible for administering the law. Section 20 of the Article 19 Model FOI Law and section 83 of the South African *Promotion of Access to Information Act 2000* provide good models for a provision which places the responsibility on a specific body(s) for public awareness and training on the Act:

Article 19: *Every public body shall ensure the provision of appropriate training for its officials on the right to information and the effective implementation of this Act.*

South Africa: (2) *[Insert name of body], to the extent that financial and other resources are available--*

- (a) *develop and conduct educational programmes to advance the understanding of the public, in particular of disadvantaged communities, of this Act and of how to exercise the rights contemplated in this Act;*
- (b) *encourage public and private bodies to participate in the development and conduct of programmes referred to in paragraph (a) and to undertake such programmes themselves; and*
- (c) *promote timely and effective dissemination of accurate information by public bodies about their activities.*

(3) *[Insert name of body] may--*

- (a) *make recommendations for--*
 - (i) *the development, improvement, modernisation, reform or amendment of this Act or other legislation or common law having a bearing on access to information held by public and private bodies, respectively; and*
 - (ii) *procedures in terms of which public and private bodies make information electronically available;*
- (b) *monitor the implementation of this Act;*
- (c) *if reasonably possible, on request, assist any person wishing to exercise a right contemplated in this Act;*
- (d) *recommend to a public or private body that the body make such changes in the manner in which it administers this Act as [insert name of body] considers advisable;*
- (e) *train information officers of public bodies;*
- (f) *consult with and receive reports from public and private bodies on the problems encountered in complying with this Act;*

Chapter 2: Grounds for Refusal of Access to Records

43. Taking into account the suggestion in paragraph 36, in respect of the public interest override, consideration should be given to simplifying s.33 and simply **making all exemption provisions equally subject to a single, simplified public interest override clause**, whereby information falling within an exemption will still be released where the public interest in the disclosure of the record outweighs the need for non-disclosure. This test will be much simpler for officials to apply and is in line with international best practice.

44. The exemption provisions are often what will make or break a law in terms of its practical effectiveness in breaking down cultures of secrecy and opening up Government. In this context, the **exemptions in the Act are relatively satisfactory**; most are limited by a specific

requirement that disclosure would or is likely to cause harm and there are few blanket exemptions. Notwithstanding this general observation however, **some provisions would benefit from further consideration:**

- Section 35 could usefully be reviewed by health care experts to ensure that it accords with best practice and does not violate other legal principles regarding patient's privacy rights. CHRI is not expert in this area, such that this provisions has not been closely vetted.
- Section 38(c) is currently much too broadly worded. It reads as a **blanket exemption** – which is not justifiable – and should, at a minimum be tempered by a harm test. For example, it is not appropriate that any and all information which falls in the category of “foreign government information” can be exempted. Granted, some of this information may be highly sensitive, but not all information provide by or relating to foreign governments should reasonably be kept from the public. The entire clause should be reworked and narrowed to ensure that information can only be withheld where disclosure is likely to cause serious harm to national security or international relations.
- Query whether s.40(b) is appropriate, in that the law ordinarily requires that legal professional privilege remains in force *ad infinitum*, unless waived. The current clause fails to account for the fact that legal advice may continue to be sensitive and warrant protection beyond a single litigious case.
- The **standards of harm** in s.41 are too low. Non-disclosure should only be justifiable where it would or would reasonably be likely to cause “serious harm” or “substantial prejudice” to legitimate protected interests.
- Section 42 should be substantially amended because it is not appropriate that it attempts to exempt the disclosure of information which will provide the public with a better understanding of how and why the government reaches its decisions. Specifically, ss.42(a)(i), (c) and (d) should all be deleted. The kind of information they justify withholding 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. Notably, s.42(a)(ii) is justifiable, in that it will generally not be appropriate to disclose advice *prior* to a decision being reached because premature disclosure could frustrate the success of a policy or substantially prejudice the decision-making process. However, even this kind relevant information should still eventually be disclosed – it is only premature disclosure that should be protected.
- Consideration should be given to reducing the time limit in s.42(4)(a) from 15 years to ideally 10 years.

Chapter 3: Third Party Intervention

45. It is appropriate that provision has been made to permit third parties to make representations regarding disclosure of information which relates to them. Notably however, the entire Chapter suffers from the fact that the **current time limits permitted for third parties to make representation are much too long**. There needs to be balance between allowing third parties sufficient time to respond, and providing prompt responses to a requesters. For example, s.43(2) currently allows an official 21 days to notify a third party in respect of an ordinary request and 5 days where the request is urgent. And this despite the fact that the ordinary maximum time limit for responding to requests is 30 days and 5 days respectively. On the basis of the current provisions, the time taken to respond to urgent requests is quadrupled, once additional time for making a decision is allowed!
46. The process for facilitating third party interventions should be reconsidered. In relation to ordinary requests, it would be appropriate for third parties to be contacted with 5 days and allowed up to 10 days to make representations, which may be submitted in writing but which should also be permitted by telephone. The latter could speed up the process, particularly if

third parties are located far from the PIO. The PIO will then still have 15 days to make a decision. Alternatively, if it is felt that more time is needed to locate documents prior to contacting third parties, it would still be appropriate to allow 10 days at the start of the process to locate documents and undertake an initial review, allow 10 days for representations from third parties and then allow 10 days for decision-making, taking into account the fact that less time will be needed because the documents will already have been located.

47. Similarly, the process for considering urgent requests needs to be thoroughly reviewed to ensure that they are handled promptly. If urgent appeals are to be disposed of within 5 days as currently required under the Act, rather than 2 days as suggested, it would be permissible that third parties be notified within 48 hours, on the basis that urgent requests will in any case need to be expedited, documents located quickly and decisions made in a timely fashion. Third parties should be contacted by telephone and fax wherever possible. In the rare cases where this is not possible, an independent body – such as an independent appeals body (see paragraphs 58-70 for more) or the courts – could be called upon for advice. Where the third party can be contacted, they should be given 2 days to respond, unless they can demonstrate that the requester will not suffer from substantial prejudice if the request is not processed urgently. Once the third party representation is received, the PIO should make his/her decision within 24 hours. Alternatively, to ensure that appeals do not slow down the process for urgent requests, consideration could be given to requiring the PIO to pre-emptively require the Appellate Authority to make a determination on the request. This would address the problematic clause at s.45(3)(c)(ii), whereby urgent requests are still liable to an appeal which must only be lodged within 10 days of a decision and then disposed of within 30 days.

Part IV – Access to Correction fo And Control Over Personal Information Held by Private and Governmental Bodies

48. CHRI does not have expertise in the area of access to personal information for the purposes of correction, a specific subject area which is often dealt with separately due to the special public policy issues that attach to data collection, management and protection in the ICT era. As such, CHRI has not attempted to critically analyse Part IV. We recommend that this provision be discussed with Privacy International, an NGO that works on this issue specifically.

Part V: Protection of Whistleblowers

49. International practice endorses the inclusion of whistleblower protection provisions in access to information laws. This is justified on the basis that maximum information disclosure requires that individuals who disclose information in contravention of the law and/or their employment contracts because they believe that such disclosure is in the public interest should be protected. The inclusion of strong whistleblower protection is important in order to send a message to the public and officials that the government is serious about opening up to legitimate scrutiny.
50. It is positive that the Act includes an entire chapter dedicated to protecting whistleblowers. However, the provisions contain a number of deficiencies. For example, s.61 should be reviewed to take account of the following issues:
- The protection currently only extends to protect employees blowing the whistle on government wrongdoing. Considering the massive international scandals in private bodies that were exposed by whistleblowers in recent years – most notably, the collapse of Enron and the WorldCom debacle – this approach is unjustifiably narrow. **Whistleblowers in both the public and private sectors deserve protection.**
 - Section 61(2) currently only extends protection if the whistleblower did not disclose the information for personal gain. This is an unjustifiable restriction and could see genuine whistleblowers being left exposed. Although in an ideal situation, a whistleblower will be motivated purely by the public interest, they should not be disqualified from protection just because they also obtained personal gain from the disclosure. **The fundamental test should be whether the disclosure was in the public interest.**

- It is **not appropriate to limit the legitimate recipients of whistleblower information** via s.61(3). While the individuals/bodies currently listed may be common recipients of such information, a whistleblower who may honestly approach another party – whether to get advice, to seek assistance or simply to unburden themselves – should not thereby be left unprotected. Considering that whistleblowers are permitted to approach the media under s.61(3)(b), it is not clear why they should not also be able to approach another civil society organisation such as a trade union or an NGO.
- Section 61(4) appears to be incorrectly drafted and should refer to the protection in sub-section (2) not sub-section (1).

51. It is not clear how s.62 is intended to operate in practice. Is it directed at protecting whistleblowers where the information they have disclosed privately to a non-government official is published in the media? This should be clarified.

Part VI – Appeals Against Decisions

52. Best practice international standards require that an effective access to information law include an appeals mechanism which is independent of government, as well as cheap, quick and procedurally simple. Currently, the Act allows for one internal appeal and then recourse to the Courts. While both of these appeal avenues are permissible, the failure of the Act to include an intermediate appeal to an independent body is one its most serious deficiencies.

53. Taking into account the suggestions made throughout this analysis in terms of ensuring that all decisions of the PIO should be open to review to ensure that officials cannot exercise their discretion without oversight, consideration should be given to inserting an additional provision prior to s.65 specifically setting out the various **grounds upon which a requestor can make a complaint to any of the appeals bodies under the Act**. For example, the following clause should be inserted and any relevant provisions in Chapters 1 and 2 amended accordingly:

The Appellate Authority, Independent Appeals Body and Courts shall receive and investigate complaints:

- Where a PIO has refused to accept an application for information from the requestor;*
- From persons who have been refused access to a record requested under this Act or a part thereof;*
- From persons who have been required to pay an amount under the fees provisions that they consider unreasonable;*
- From persons who have requested access to records in respect of which time limits have been extended where they consider the extension unreasonable;*
- From persons who have not been given access to a record or a part thereof in the official language requested by the person, or have not been given access in that language within a period of time that they consider appropriate;*
- From persons who have not been given access to a record or a part thereof in an alternative format pursuant to a request or have not been given such access within a period of time that they consider appropriate;*
- In respect of any other matter relating to requesting or obtaining access to records under this Act.*

54. Taking into account the suggestions made in paragraphs 33, 46 and 47 above in relation to the time limits that should be imposed in relation to urgent requests and in relation to applications involving third parties, the **time limits for appeals under Chapters 1 and 2 should all be reconsidered to ensure that such applications are processed promptly**. Currently, the time limits are far too generous. For example, it is not unjustifiable that s.68(3) sets out a time limit of 15-30 days for deciding appeals, but s.68(4) then allows an *additional* 10 days after the appeal is decided to notify the complainant of the decision! All the time limits should be amended to require notification of a decision within the shortest timeframe.

Chapter 1: Internal Appeals

55. It is **arguable that internal appeals are relatively ineffective, in that they simply permit one partial bureaucrat to oversee another**. In practice, it seems ridiculous that two

bureaucrats working in the same office, both with the same obligations under the same Act, rather than discussing a difficult case and coming to an agreed decision, will instead come to separate and potentially conflicting decisions, one in their position as PIO and the other as an Appellate Authority. Despite this practical flaw in the logic of the internal appeals process, it is not uncommon for access laws to allow for at least one internal appeal. Internal appeals can be a cost-effective way of allowing the government to verify its own decisions. In practice, it is recognised that a middle level official is usually responsible for making the initial decision, which will then be cross-checked on appeal by a senior official.

56. The current internal appeals regime should be reconsidered in certain respects:

- To assist requesters to more easily identify and understand the appeals process, it may be useful to consistently refer to the body responsible for dealing with the internal appeal as the Appellate Authority.
- Consideration should be given to amending the requirement in s.66(1)(a) that appeals must be submitted in a prescribed form. Requiring complainants to submit a specific form may in practice prove an obstacle to access, as some people may not have easy access to the relevant forms, for example because they cannot download it from the internet or because they are not proximate to a government office where they can be obtained. As long as the requestor provides sufficient particulars to allow the appeal to be processed, that should be sufficient.
- Section 66(1)(c) should cross-reference to s.66(5) not (4);
- There is no reason justification for s.66(7), which allows a PIO to take up to 10 days pass on internal appeal documentation to the Appellate Authority or for s. 69(a), which appears to require certain urgent appeals to be sent to the PIO. To expedite appeals, all internal appeal complaints under all provisions of Chapter 1 should be sent directly to the Appellate Authority, rather than the PIO. The Appellate Authority will then process the appeal, including requesting the PIO to forward all information relevant to the appeal and/or explain the decision in person.
- Section 68(1)(a) incorrectly cross-references s.66(1)(c).
- Section 68(2) should permit the Appellate Authority to impose penalties on defaulting officers, in certain circumstances (see paragraphs 71-75 below for further discussion).

Insert new Chapter: Independent Appeals Body

57. While internal appeals provide an inexpensive first opportunity for review of a decision, **oversight by an umpire independent of government pressure is a major safeguard** against administrative lethargy, indifference or intransigence and is particularly welcome where court-based remedies are slow, costly and uncertain. The fear of independent scrutiny ensures that exemption clauses are interpreted responsibly and citizens' requests are not unnecessarily obstructed. While the courts satisfy the first criteria of independence, they are notoriously slow and can be difficult to access for the common person. As such, in many jurisdictions, special independent oversight bodies have been set up to decide complaints of non-disclosure. They have been found to be a cheaper, more efficient alternative to courts and enjoy public confidence when they are robustly independent, well-funded and procedurally simple.

58. Best practice supports the **establishment of a independent body with a mandate to review refusals to disclose information, compel release and impose sanctions for non-compliance**. Experience from a number of Commonwealth jurisdictions, including Canada, England, Scotland and Western Australia, has shown that Information Commission(er)s have been very effective in raising the profile of the right to information and balancing against bureaucratic resistance to openness. Of course, there are alternatives to an Information Commission. For example, in Australia, the Administrative Appeals Tribunal has appeal powers and in New Zealand and Belize the Ombudsman can deal with complaints. A number of states in India have appointed an existing administrative tribunal or a Lokyukta (Ombudsman) to hear appeals. However, experience has shown that these bodies are often

already overworked and/or ineffective, such that they have rarely proven to be outspoken champions of access laws.

59. It is strongly **recommended either that an independent Information Commission is created or an existing independent oversight body is given power to review all decisions under the Act.** Notably, the members of any such Independent Appeals Body need to be, and be seen to be, people of integrity who are also qualified to hear appeals. They will have an important role to play in countering possible resistance within Government towards openness and information disclosure such that it is important that candidates are well-respected as well as highly competent. The draft Kenyan *Access to Information Bill 2000* provides a useful model:

10(2) The person appointed to the [independent appeal body] shall -

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

60. The procedure for appointing Members to the **Independent Appeals Body must be impartial and independent of government interference**, to ensure that they are seen as non-partisan. They must be given security of tenure and salary. In accordance with the principles of the separation of powers, removal should only be permitted through impeachment proceedings in Parliament. Consideration should be given to adopting similar appointment and removal procedures to those currently used for the appointment of judges. To ensure the absolute independence of the Independent Appeals Body, a specific provision affirming their independence should be included in the Act. It should be explicitly stated that the Independent Appeals Body must have *“budgetary, operational and decision-making autonomy and should be completely independent of the interference or direction of any other person or authority, other than the Courts”*.

61. In setting up the appeals regime of the Independent Appeals Body, it is first necessary to detail the **parameters of the Body’s appeal remit**. This issue has already been discussed at paragraph 54 above and a model provision suggested.

62. In order to ensure that the Independent Appeals Body can perform its appeal functions effectively, it is imperative that the Body is explicitly granted the **powers necessary to undertake a complete investigation and ensure enforcement of its orders** (see paragraphs 71-75 below for more re enforcement). The powers granted to the Canadian Information Commissioner under s.36 of the Canadian *Access to Information Act 1982* provide a useful model:

(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 before the Information Commissioner and compel them to give oral or written evidence on oath and to produce such documents and things as the 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 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 the Commissioner on any grounds.

63. In addition to the Independent Appeals Body investigative powers, it is necessary to clearly set out the Body's **decision-making powers**, to ensure that bureaucrats cannot attempt to ignore its decisions as recommendatory only. In accordance with best practice evinced in a number of jurisdictions (eg. the State of Queensland in Australia, Mexico), the Independent Appeals Body **should have the power to make binding determinations, compel parties to take action, enforce compliance with orders and impose sanctions** as appropriate. Without strong powers, the Independent Appeals Body could easily be ignored and sidelined by a bureaucratic establishment which is determined to remain closed. Section 82 of the South African *Promotion of Access to Information Act* and ss.42-43 of the Article 19 Model FOI Law provide useful examples:

South Africa: The [appeal body] hearing an application may grant any order that is just and equitable, including orders--

- (a) confirming, amending or setting aside the decision which is the subject of the application...;*
- (b) requiring [the relevant body] to take such action or to refrain from taking such action as the court considers necessary within a period mentioned in the order;*
- (c) granting an interdict, interim or specific relief, a declaratory order or compensation; or*
- (d) as to costs.*

Article 19: 42(2) In his or her decision pursuant to sub-section (1), the Commissioner may: -

- a. reject the application;*
- b. require the public or private body to take such steps as may be necessary to bring it into compliance with its obligations under Part II;*
- c. require the public body to compensate the complainant for any loss or other detriment suffered;...*
- d. in cases of egregious or wilful failures to comply with an obligation under Part II, impose a fine on the public body.*

(3) The Commissioner shall serve notice of his or her decision, including any rights of appeal, on both the complainant and the public or private body.

43. (1) The Commissioner may, after giving a public body an opportunity to provide their views in writing, decide that a public body has failed to comply with an obligation under Part III.

(2) In his or her decision pursuant to sub-section (1), the Commissioner may require the public body to take such steps as may be necessary to bring it into compliance with its obligations...including by: -

- a. appointing an information officer;*
- b. publishing certain information and/or categories of information;*
- c. making certain changes to its practices in relation to the keeping, management and destruction of records, and/or the transfer of records to the [insert relevant archiving body];*
- d. enhancing the provision of training on the right to information for its officials;*
- e. providing him or her with an annual report, in compliance with section 21; and/or*
- f. in cases of egregious or wilful failures to comply with an obligation under Part III, paying a fine.*

(3) The Commissioner shall serve notice of his or her decision, including any rights of appeal, on the public body.

64. An additional provision replicating s.30(3) of the Canadian *Access to Information Act 1982*, which gives the Information Commissioner the **power to initiate its own investigations**, should also be included. In practice, this will be useful in allowing the Independent Appeals Body to investigate delays in providing information, because these cases will often not reach the Independent Appeals Body 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 Independent Appeals Body uncovers a pattern of non-compliant behaviour.

Chapter 2: Applications to Court

65. It is very positive that the Act recognises the **Courts as the final arbiter** in respect of decisions under the law. The judiciary, unlike the bureaucracy or the Executive, is an impartial body which should be relied upon not to be swayed by partisan, personal or political considerations when deciding upon whether or not to disclose sensitive information.

66. Taking into account the suggestions in paragraph 54 above, consideration should be given to amending the jurisdiction clause at s.74 to reflect the broader appeals remit of the internal appeal/Appellate Authority and the recommended Independent Appeals Body. Notably, s.74 should also be reconsidered for coherency as the provision currently appears to contain incorrect cross-references and some provisions do not make sense.

67. Section 76 is a good provision, in that it attempts to make it explicit that the Courts should have access to all relevant documents that they require in order to make a decision. This accords with best practice. Notably however, the section has been poorly drafted and should read:

Notwithstanding any provision of this Act, any Court hearing an application or an appeal against a decision on an application may examine any record of a governmental body to which this Act applies, and the record may NOT be withheld from that Court on any grounds.

Insert new Chapter: Offences and Penalties

68. The Act is seriously **weakened by the absence of comprehensive offences and penalties provisions**, a shortcoming which should be rectified as a priority. Sanctions for non-compliance are particularly important incentives to timely disclosure in jurisdictions where the bureaucracy is unused to hurrying at the request of public.

69. Although s.80 includes some basic offences, it is interesting that they are all directed at imposing sanctions where information is wrongly disclosed, rather than with **penalising non-compliance officers who fail to comply with the provisions of the Act requiring timely and accurate disclosure of information**. Section 80 should be reworked:

- So that it comprehensively identifies all possible offences committed at all stages of the request process – for example, unreasonable delay or withholding of information, knowing provision of incorrect information, concealment or falsification of records, wilful destruction of records without lawful authority, obstruction of the work of any public body under the Act and/or non-compliance with the Independent Appeals Body's orders.
- To ensure that sub-section (c) can only be utilised according to strict guidelines. Sub-section (c) permits certain documents to be "classified" via regulations. This provision may, in practice, give the Government a powerful discretion to exempt huge swathes of information. At a minimum, the Act itself should provide clear direction on when such regulations can be made and what type of information is intended to be captured under the provision. Consideration should also be given to requiring an independent body, such as the Courts, the Independent Appeals Body, or perhaps Parliament itself to specifically sign off on any such guidelines.

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

71. When developing penalties provisions, lessons learned from the Indian states with right to information laws are illuminating. In Maharashtra, penalties are able to 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. It is therefore important in combating entrenched cultures of secrecy that individual officers are faced with the threat of personal sanctions if they are non-compliant. The relevant provisions need to be carefully drafted though, to ensure that defaulting officers, at whatever level of seniority, are penalised. It is not appropriate for penalty provisions to assume that penalties will always be imposed on PIOs. If the PIO has genuinely attempted to discharge their duties but has been hindered by the actions of another official, the PIO should not be made a scapegoat. Instead, the official responsible for the non-compliance should be punished.

72. Most Acts contain combined offences and penalty provisions. Consideration should be given to inserting the penalties provisions set out below, which have been developed drawing on the good practice evinced in s.12 of the Maharashtra *Right to Information Act 2002*; s.49 of the Article 19 Model Law; and s.54 of the UK *Freedom of Information Act 2000*.

- (1) *Subject to sub-section (3), where any Public Information Officer has, without any reasonable cause, failed to supply the information sought, within the period specified under section 7(1), on appeal, the Appellate Authority, Independent Appeals Body or the Court shall impose a penalty of [M amount], which amount must be increased by regulation at least once every five years, for each day's delay in furnishing the information, after giving such Public Information Officer a reasonable opportunity of being heard.*
- (2) *Subject to sub-section (3), where it is found in appeal that any Public Information Officer has –*
 - (i) *Refused to receive an application for information;*
 - (ii) *Mala fide denied a request for information;*
 - (iii) *Knowingly given incorrect or misleading information,*
 - (iv) *Knowingly given wrong or incomplete information, or*
 - (v) *Destroyed information subject to a request;*
 - (vi) *Obstructed the activities of a Public Information Officer, the Independent Appeals Body or the Courts;**commits an offence and will be liable upon summary conviction to a fine of not less than [M amount] imprisonment of up to two years, or both.*
- (3) *An officer whose assistance has been sought by the Public Information Officer for the performance of his/her duties under this Act shall be liable for penalty as prescribed in sub-sections (1) and (2) jointly with the Public Information Officer or severally.*
- (4) *Any fines imposed under sub-sections (1), (2) and (3) shall be recoverable from the salary of the concerned officer, including the Public Information Officer, or if no salary is drawn, as an arrears of land revenue.*
- (5) *The Public Information Officer or any other officer on whom the penalty under sub-sections (1), (2) and (3) is imposed shall also be liable to appropriate disciplinary action under the service rules applicable to him/her.*

73. Officials responsible for making decisions regarding disclosure of information may legitimately be concerned that wrong decisions on their parts, that is, decisions which result in the disclosure of information that their superiors believe should not have been released, could result in action being taken against them. Similar concerns could be harboured at an institutional level. In order to encourage openness and guard against this possibility, consideration should be given to inserting a new provision to **protect officials/bodies acting in good faith to discharge their duties under the law**. Section 89 of the South African *Promotion of Access to Information Act 2000* provides a good model:

No person is criminally or civilly liable for anything done in good faith in the exercise or performance or purported exercise or performance of any power or duty in terms of this Act.

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