# ***THE FREEDOM OF INFORMATION (STATE OF SELANGOR) ENACTMENT 2010***

***A PRELIMINARY ANALYSIS OF THE ENACTMENT***

***AND***

***RECOMMENDATIONS FOR IMPROVEMENT***


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**February 2011**

# *THE FREEDOM OF INFORMATION (STATE OF SELANGOR) ENACTMENT 2010*

## *AN ANALYSIS OF THE ENACTMENT AND RECOMMENDATIONS FOR IMPROVEMENT*

### *CONTENTS*

# ***THE FREEDOM OF INFORMATION (STATE OF SELANGOR) ENACTMENT 2010***

***AN ANALYSIS OF THE BILL AND RECOMMENDATIONS FOR IMPROVEMENT***

## Introduction

The Government of Selangor, Malaysia led by the Pakatan Rakyat Party tabled the Freedom of Information (State of Selangor) Enactment 2010 in the Selangor Legislative Assembly on 14th July 2010 amidst strong opposition from the Barisan Nasional Party- the party in opposition. After its introduction in the legislative assembly the state government has held several public consultations. The Bill is currently with a special committee set up for overseeing the Bill.

CHRI congratulates the Government of State of Selangor for demonstrating its commitment to promoting right to information as an instrument to promote transparency and accountability in the government of Selangor. It also appreciates the state government's efforts to engage the civil society in the drafting of this Bill.

Over the past months several concerns regarding the Bill have arisen. Lack of the provision of a 'harm test' to determine whether information related to national security or confidentiality should be disclosed in public interest, requirement of reasons while asking for information, penalty of RM 50,000 or imprisonment of up to 5 years if use of requested information is in contradiction to the reasons provided and most significantly the lack of an overriding clause that allows information covered by the Official Secrets Act of 1972 to be excluded from the purview of the FOI legislation are being viewed as weaknesses in the Bill.

CHRI has analysed the provisions in the Bill, drawing on International best practice standards, and good legislative models from the Commonwealth, in particular from South Asia. This submission contains preliminary recommendations for improving the effectiveness of the access law. CHRI hopes that the Government of Selangor will take these recommendations into consideration and incorporate the necessary changes in the RTI Bill.

## General Comments

CHRI appreciates the inclusion of several positive provisions in the Bill like:

- The Bill guarantees every individual an opportunity to access information. This is a positive step as it recognizes every person's right to access information as a fundamental human right irrespective of citizenship status. This position is in tune with international best practice standards. The terms individual and person seem to have been used interchangeably as the title of the Bill which states *"to provide to every individual"* whereas clause 5(1) *states "every person may be given access to information…"*. CHRI recommends the usage of the term 'person' (as will be explained later, see para #10) However, the term 'person' itself needs to be defined in the section on Interpretation.
- The Bill provides for a multi-member Appeal Board for the purpose of inquiring into appeals related to information access disputes. This is also in tune with international best practice where adjudication of information access disputes is vested in a quasi-judicial authority. Multi-member Information Commissions have been set up in India, Nepal and more recently in Bangladesh. This measure ensures that the dispute resolution mechanism is less burdensome and cumbersome for citizens as compared to the older practice of referring such matters to regular courts of law. In accordance with our recommendation at para #43 that the Appeal Board be replaced with a multi-member Information Commission that will not only adjudicate over access disputes but also

oversee and guide the implementation process CHRI recommends that the relevant provisions be strengthened further.

- The Bill requires the Information Officer to reduce into writing oral applications from any person who is unable, because of illiteracy or any disability and give a copy of the application form to the applicant. This is a positive provision as it requires the officer concerned to provide reasonable assistance to such applicants.

**CHRI would like to point out the following changes that may be made at various places throughout the RTI Bill in order to maintain uniformity of usage:**

- **The phrase "Freedom of Information" may be replaced by "Right to Information"**: The phrase "Right to Information" maybe be used wherever applicable throughout the Bill in accordance with our recommendation in para #7.
- **Gender sensitive language must be used**: It is common practice in both developed and developing countries to use gender-sensitive language in the drafting of legislation. The Indian Right to Information Act provides such an example where gender-friendly language is used in the drafting of provisions.[1] **Consideration may be given to incorporating gender-sensitive language wherever applicable throughout the Bill.**
- **The term "Information Commission" may be used instead of "Appeal Board":** CHRI recommends the usage of the term 'Information Commission' in place of *'Appeal Board'* in accordance with the recommendation made at para #43. **Consideration may be given to replacing the term 'Appeal Board' with the term 'Information Commission' throughout the Bill.**
- **The term "department" may be replaced by the term "public body":** The Bill provides every individual an opportunity to access information made by every *"department"* of the State Government. The Interpretation section defines *"department"* as any department of the state government. However, the term department is not adequate following our recommendation to extend the scope of the Bill to cover the legislative and judiciary and also private bodies of the state. **Consideration may be given to replacing the term 'department' with the term 'public body' throughout the Bill.**

## Specific Comments

1. **Insert a comprehensive provision on objectives of the Bill:** The objectives of the proposed statute are not comprehensively laid down in the Bill. To ensure that this legislation is interpreted and applied in the most fulsome spirit it would be useful to insert an objects provision where it is made explicit that "the right to information" is valuable to democracy and development because it "promotes accountability, transparency and public participation". To assure the most liberal interpretation of the right to information in accordance with democratic principles, and to promote a presumption in favour of access, the object clause should also establish clearly the principle of maximum disclosure and make it clear that all decisions should be made in accordance with the "public interest". The objects clause should also prioritise timely, cheap, user friendly processes for providing access. Section 2 of the Jamaican *Access to Information Act 2002* provides a

[1] For the authentic text of India's *Right to Information Act, 2005* see: http://rti.gov.in/rti-act.pdf - accessed on 3rd January, 2011.

good model. It is important to get this clause right because courts will often look to the objects clause in legislation when interpreting provisions of an Act.[2]

2. **Make a reference to public interest override in the objects clause:** The objects provision must also include a reference to public interest override. The Bill contains a list of information exempt from disclosure. These standalone exemptions are contrary to S20 where even exempt information may be disclosed in the larger public interest test. . In the absence of such an assertion the objects of the law are liable to be misinterpreted. The Indian RTI Act mentions the public interest that it seeks to promote and also those that it seeks to protect. It also contains an important principle as to how these interests are to be harmonized.[3] **Consideration may be given to including the public interest clause in the objects provision.**

***Recommendation:***

**Insert an objects section in the preliminary part of the Bill which reads:**

***The objects of this Law are to:***

***i) provide for a Right to Information regime which will contribute to strengthening democracy, improving governance, increasing public participation, promoting transparency and accountability, promoting and protecting human rights and containing corruption;***

***ii) establish voluntary and mandatory mechanisms and procedures to give effect to the right to information in a manner which promotes maximum disclosure and minimum exemptions in accordance with the public interest, and enables persons to obtain access to records of public authorities, and private bodies where the information is needed for the exercise and/or protection of a right, in a swift , effective, inexpensive and user-friendly manner;***

***iii) provide for the disclosure of even exempt information when the harm caused by non-disclosure to public interest is greater than the harm caused by disclosure.***

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[2] S2*: "The objects of this Act are to reinforce and give further effect to certain fundamental principles underlying the system of constitutional democracy, namely—*

*(a) governmental accountability;*

*(b) transparency; and*

*(c) public participation in national decision-making,*

*by granting to the public a general right of access to official documents held by public authorities, subject to exemptions which balance that right against the public interest in exempting from disclosure governmental, commercial or personal information of a sensitive nature."*

[3] The Preamble of the Indian RTI Act lists out the public interests that it seeks to promote and protect and how the conflicting interests may be harmonized as follows:

"*WHEREAS the Constitution of India has established democratic Republic;*

*AND WHEREAS democracy requires an Informed Citizenry and transparency of Information which are vital to its functioning and also to contain corruption and to hold Governments and their instrumentalities accountable to the governed;*

*AND WHEREAS revelation of Information in actual practice is likely to conflict with other public interests including efficient operations of the Governments, optimum use of limited fiscal resources and the preservation of confidentiality of sensitive information;*

*AND WHEREAS is necessary to harmonise these conflicting interests while preserving the paramountcy of the democratic ideal;"*

3. **Legal status of the RTI Act vis-à-vis other laws:** Clause 5(2) of the Bill states that - "If the information sought to be accessed by any person is contained in a document disclosure of which is subject to any written law, access to such information shall be subject to such written law". This statement dilutes the overriding goal of the legislation which is to establish the principle of maximum disclosure. The RTI Bill purports to create a general regime of rights of access to information held by public authorities. According to international best practice, it is commonplace to give primacy to the access legislation over other contradictory laws. The access legislation must not prevent the operation of provisions governing disclosure of information under other laws. However it should also be the paramount legislation to determine whether information should be disclosed or not irrespective of what other laws may say. The reasons for not disclosing information under certain circumstances are contained in the exemptions clause of the RTI Bill. These provisions must reflect broadly the public interests that may be protected by non-disclosure. This is the very purpose of listing exemptions to disclosure in an access law. No other ground for denial contained in any other law must be allowed to interfere with the operation of the RTI Act. Therefore the RTI Act must have an overriding effect over all other laws in force at the time of enacting this legislation. In the absence of such an overriding effect conflicting laws will create confusion and give rise to clearly avoidable litigation. Later on care must be taken to ensure that all legislation subsequently enacted by the legislature of Selangor are in tune with this law in relation to information access and do not contradict it or create new areas of exclusion for newer or old categories of information held by public bodies. Section 8 of India's RTI Act lists out several circumstantial and a few class exemptions to disclosure. S22 provides this access law with the power to override all other laws to the extent of inconsistency.[4] This provision ensures that no consideration extraneous to the RTI Act has an overbearing effect on the decision-making process related to information requests. This positive principle ensures that the vision of creating an overarching regime of transparency is not derailed by older laws that were enacted at a time when transparency was not the defining value of governance. **Consideration may be given to amending Clause 5(2) in order to provide the RTI Act an overriding effect on all other laws to overcome any inconsistency regards application or interpretation.**

> ***Recommendation:***
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> **Clause 5(2) may be replaced with the following:**
>
> ***"The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any law for the time being in force or in any instrument having effect by virtue of any law other than this Act."***

4. **Enlarge the scope of the Bill to cover all organs of the State**: The Bill is named as an enactment to enhance disclosure of information for public interest and to provide to every '*individual'* an opportunity to access information made by *'every department of the State Government'*. Current international best practice on RTI legislation is to cover not only the executive but also the legislative and judicial arms of the state as these bodies are also funded by the tax-payer and are a part of the democratic set up of the state of Selangor, people have the right to seek information relating to their functioning. Similarly a range of private bodies may be carrying out public functions such as providing telephone services, supplying water, electricity or running road transport services. There may be other agencies that may be utilising public funds in the performance of their functions. They

[4] Sec 22:"*The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in the Official Secrets Act, 1923, and any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act*."

must also be accountable to the people they serve. The access legislation must include such bodies as well. **Consideration may be given to amending the long title of the Draft Bill to include references to the legislature and the judiciary and private bodies performing public functions or utilizing public funds as being covered by the access law.**

> ***Recommendation:***
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> **In the long Title of the Bill after the phrase *"every department of the State Government"* the following words may be inserted:**
>
> ***"the legislature, the judiciary and other agencies performing public functions or providing public services or utilizing public funds."***

5. **Extend the scope to the Bill to private bodies:** The Bill covers departments under the State Government but leaves out private bodies entirely. Many private bodies – in the same way as public bodies – are institutions of social and political power which have a huge influence on people's rights, security and health. More so, with the outsourcing of government activities or due to privatization of erstwhile public bodies, it is conceivable that private bodies will hold information whose disclosure is in the public interest as a means of fostering transparency and accountability. In accordance with international best practice, consideration should be given to extending the right to access information to cover private bodies, at least where it is necessary to exercise or protect one's rights. A number of countries around the world have already brought private bodies within the ambit of their right to information regimes. South Africa's Access to Information law provides access to records of private bodies.[5] The Jamaican Access to Information Act 2002 covers private bodies which provide services of a public nature.[6] The Indian RTI Act recognises the right of every citizen to access information about a private body from the regulatory agencies that oversee their functioning.[7] However protection for trade secrets and legitimate commercial interests is provided in the exemptions clause**. Consideration may be given to extending the right of access to information to private bodies where it is necessary for the exercise or protection of a right.**

> ***Recommendation:***
>
> **Insert an additional sub-clause to the Title of the Bill extending the right of**

[5] S3 : '*This Act applies to—*
*(a) a record of a public body; and*
*(b) a record of a private body,*
regardless of when the record came into existence.

[6] S5(3): *"The Minister may, by order subject to affirmative resolution, declare that this Act shall apply to—*
*(a) such government companies, other than those specified in paragraph (e) (i) of the definition of "public authority", as may be specified in the order;*
*(b) any other body or organization which provides services of a public nature which are essential to the welfare of the Jamaican society, or to such aspects of their operations as may be specified in the order."*

[7] S2, clause *(f)* of Indian RTI Act *: "information" means any material in any form, including records, documents, memos, e-mails, 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'*

**access to information to private bodies where it is necessary for the exercise or protection of a right recognised at national or international law.**

6. **Enlarge the scope of the Bill to cover all information contained in records of public bodies:** The Bill provides access to information *"made"* by every department of the State Government. Access to information *"made"* by a department is very limited in its scope as a department in its course of performing its duties not only makes information but also receives and maintains information from other individuals and departments. Under the current definition, this information is not covered. To address this problem, the public should be able to access information "held by, maintained or under control of" the department. **Consideration may be given to replacing the word *"made"* by the words *"held by or under control of".***

***Recommendation:***

**In the Title of the Bill, the word "made" may be replaced by the words "held by, maintained or under the control of".**

## PART I

## Short Title and Commencement

7. **The phrase "Freedom of Information" may be replaced by "Right to Information"**: The short title of the draft Bill calls *it "The Freedom of Information (State of Selangor) Enactment 2010"*. The term *'freedom'* implies the freedom of an individual to seek and receive information and that the State or anybody else should not create obstacles in the enjoyment of that freedom. However, this term does not impose an obligation on the information holder, namely a public body or a government department to provide the information to the requestor. CHRI recommends the phrase 'Right to Information' in place of Freedom of Information as it is indicative of an individual's right to seek and receive information while also imposing a duty on the information holder to provide the requested information. **Consideration may be given to usage of the term "Right to Information" in place of "Freedom of Information.**
8. **The Act must contain a specific time for commencement:** Clause 1(2) states that The Freedom of Information (State of Selangor) Enactment 2010 "*shall come into operation on a date to be appointed by His Royal Highness the Sultan by notification in an official gazette"*. Information access legislation must provide for a specific timeline for commencement and implementation of the operative provisions of the Bill. 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 included in its provisions. Although it is understandable that the Government may wish to allow for time to prepare for implementation, international best practice requires that the Act itself should specify a maximum time limit for implementation, to ensure there is no room for postponing implementation of this law indefinitely. Even if a phased approach is adopted, which may require key departments to implement in the first few months, and other agencies to implement sometime 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.). **Consideration may be given to amending S1(2) to include a specific date for the Act to come into force or a time period for a phased approach to allowing for the preparatory work before the implementation of the Act.**

***Recommendation:***

1. **In clause 1(1) the term "Freedom of Information" may be replaced by "Right to Information".**
2. **Please specify a maximum time limit for the Act coming into force, which may be no later than eight months from the date the Act receives royal assent.**

   **Or, consider including a provision on phased commencement and implementation of the different provisions in the Bill, for example:**

   **3-4 months should be allowed before people can make formal requests for information;**

   **4 months should be allowed for the Appeal Board to start entertaining appeals;**
3. **Please list out the order of the provisions that will be implemented in a phased manner.**

## Interpretation Clause

9. **Expand the Interpretation section to make it more comprehensive. Also include definitions of special terms used in the law:** The Interpretation section contained in the Bill provides limited interpretations of the terms *"document", "department", "information" and "information officer"***.** The Bill provides all persons access to information made by every department of the state government and hence it is imperative that a more wider and explicit definition of the term *'person'*, *'information',* and *'department'* be provided in the Interpretation section. Following our recommendations for private bodies to be covered by the Bill (see para #9), term *'department'* to be replaced by public body (see para #11) and designation of an Appellate Authority (see para #33) these terms also need to be defined in the Interpretation section. **Consideration may be given to expanding the Interpretation section to include definitions of the terms *'person'*, *'information', 'private body'*, *'public body'*, *'third party' and 'appellate authority'* in the Bill.**
10. **Clarify the meaning and scope of the term 'person':** Clause 5(1) of the Bill provides every person access to information made by every department. However, the draft Bill does not contain a definition of the term 'person' who according to the RTI Bill is the bearer of the right of access. As a public law defining the rights of private persons vis-à-vis agencies of the State it is important that that there is absolute clarity as to who is the rights bearer. In common parlance the term 'person' connotes a biological human being. However in the context of law a person is anybody or any entity that has a personality and is capable of suing or being sued. So in addition to biological beings the term 'person' includes artificial juridical entities such as societies, organizations, labor unions, partnerships associations, corporations, legal representatives of individuals or bodies, trusts and trustees and such other entities. Therefore it is important that a definition of the term 'person' may be taken from the Interpretation of Statutes Act or any tax-related law in force in Malaysia/Selangor.[8] This will ensure that individuals and organised groups such as civil society organisations and companies can also access information under this law. **Consideration may be given to including a new clause to define "person" in the Interpretation section so that organisations and companies may be enabled to seek and obtain information under the Act.**

[8] For example, Section 2 (The Interpretation section) of the Malaysian Income Tax Act 1967 defines 'person' as follows: *"person" includes a company, a body of persons and a corporation sole.*

11. **Replace the term 'department' with 'public body':** The term 'department' covers only the executive machinery of the state leaving out the other agencies and local authorities. CHRI has recommended extending the scope of the Bill to cover all the organs of the state (see para #4). Keeping with this recommendation consideration may be given to replacing the term 'department' with the term 'public body'.

12. **Replace the term 'document' with 'information' and enlarge its scope:** Clause 2 of the Bill states that the term *'document'* is to hold the same meaning as defined in the Malaysian Evidence Act of 1950.[9] In the same clause the term "information" is defined as any "document" made by any department of the state government. In CHRI's experience, the word 'document' is much more limiting than the term 'information'. The current formulation excludes access to materials such as models; samples of materials used in public works and information that may exist in disaggregate form in multiple records that may require compilation or collation. **Consideration may be given to amending the Interpretation clause to include the term 'document' as part of the definition of the term 'information'. Other forms of information may be incorporated in the definition of information in the Bill.**

13. CHRI has recommended extending the scope of the Bill to cover private bodies, see para #3. The term 'private body' must be defined in the Interpretation section. **Consideration may be given to including a definition of 'private body' in the Interpretation section.**

14. The Interpretation section makes a reference to information related to 'third party' as being exempt from disclosure but does not provide a definition of the term 'third party'. This term needs to be defined in the Interpretation clause of the Bill. Experience from developing countries like India[10] has shown that public authorities take the advantage of vague definitions of this term and claim third party rights over the applicant. **Consideration may be given to including a clear definition of the term 'third party' in the Interpretation section of the RTI Bill.**

15. The interpretation section also includes a set of information that is exempt from disclosure under the enactment such as information classified under the Official Secrets Act 1972, information related to third party, information disclosure of which would harm the formulation of State government policy or the administration, economic development and security of the state government. Inclusion of information that is to be exempt from disclosure in the Interpretation section is not in tune with international best practice on drafting of laws because the purpose of this section is to explain the meaning of terms used throughout the text of the law. Exemptions to disclosure must be placed in the substantive provisions of the law. To exclude a range of categories from the definition of information defies commonsense as it is apposite for the lay reader to treat even the exempt information as 'information' meaning data, images, sounds, ideas, figures and

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[9] The Malaysian Evidence Act of 1950 defines document as:

*"document" means any matter expressed, described, or howsoever represented, upon any substance, material, thing or article, including any matter embodied in a disc, tape, film, sound track or other device whatsoever, by means of—*

*(a) letters, figures, marks, symbols, signals, signs, or other forms of expression, description, or representation whatsoever;*

*(b) any visual recording (whether of still or moving images);*

*(c) any sound recording, or any electronic, magnetic, mechanical or other recording whatsoever and howsoever made, or any sounds, electronic impulses, or other data whatsoever;*

*(d) a recording, or transmission, over a distance of any matter by any, or any combination, of the means mentioned in paragraph (a), (b) or (c), or by more than one of the means mentioned in paragraphs (a), (b), (c) and (d), intended to be used or which may be used for the purpose of expressing, describing, or howsoever representing, that matter;"*

[10] S2(n): *"third party" means a person other than the citizen making a request for information and includes a public authority."*

other possible representations of thought. Merely by excluding these categories from the definition of the term 'information' they do not lose their character as 'information' for the lay person. **CHRI recommends that the exemptions to disclosure be contained in a substantive provision further down in the body of the statute (see para #32).**

***Recommendation:***

**1. Definition of these terms may be included in the Interpretation section:**

- ***"Person" includes a company, a body of persons and a corporation sole;***
- ***"Information" includes any document as defined in the Evidence Act 1950 and includes models and samples;***
- ***"Public body" means:***
  - ***(i) any department, or autonomous office under the State Government;***
  - ***(ii) any authority, agency or body established, controlled or financed directly or indirectly by funds provided by, the State Government;***
  - ***(iii) the Legislature of the State of Selangor including its Secretariat;***
  - ***(iv) any court of law or tribunal functioning in the State of Selangor; and***
  - ***(v) any commission constituted by the State of Selangor.***
- ***"Private body' means any body that is not a public body but performing public functions or utilizing public funds for carrying out any work or providing any service;***
- ***"Third party' means "any person other than the person seeking information under this Act and the public body that holds or exercises control over the information sought under this Act."***
- ***"Appellate Authority" means the officer as defined in section 33 of this Act;***
- ***"Selangor Information Commission" means the Selangor Information Commission constituted under section 14 of this Act;***
- ***"Chairman" means the Chairman of the Selangor Information Commission as appointed under section 14 of this Act;***
- ***"Deputy Chairman" means the Deputy Chairman of the Selangor Information Commission as appointed under section 14 of this Act;***
- ***"member" means any member of the Selangor Information Commission as appointed under section 14 of this Act.***

**2. Section 2 (a), 2(b), 2(c) & 2(d) in the Interpretation section may be deleted and incorporated in a separate section for Exempt Information.**

## Part II

## Appointment of Information Officer

16. Clause 3 states that an Information Officer will be *"appointed"* for every department. Experience from other countries with similar laws shows that it is advisable to designate officers from the existing officers as Information Officers to handle information requests. **Consideration may be given to empowering entities covered by this law to**

**designate Information Officers in every public body for giving effect to the provisions of this law.**

17. **Duty to provide assistance to the information officer must be clearly spelt out:** There is no provision in the RTI Bill that empowers an information officer to seek the assistance of other officers in his or her office and expect that such assistance will be provided. In both India and Bangladesh the public information officers have the authority to seek the assistance of any other officer in the public authority while dealing with an information request. Such officers whose assistance has been sought are duty bound to give assistance. If they fail to do so, as a result of which the rights of the applicant are violated then they may be penalised.[11] This ensures that the information officer is not made a scapegoat during the decision-making process. It is not uncommon for bureaucrats to look upon RTI as the headache solely of the person appointed as the information officer. **Consideration may be given to empower the information officer to seek assistance from any other officer in a public authority while dealing with an information request.**

***Recommendation:***

**In S3 two new subsections 3 and 4 may be inserted below subsection 2 as follows:**

***3. An information officer may seek the assistance of any other officer within the public authority, for the purpose of giving effect to the provisions of this Act.***

***4. Any officer whose assistance has been sought under subsection (c) shall render all reasonable assistance to the information officer and for the purpose of determining whether a contravention of the provisions of this Act has occurred, such officer shall also be deemed to be the information officer in that case."***

## Control of Information

18. Clause 4(2) of the Enactment imposes an obligation on the Information Officer to maintain *"under his control"* all information relating to a department. The Department, in its course of work, generates a whole lot of information and it is not practicable for the Information Officer alone to control or maintain all that information as it may be held in different sections and units. In such cases he/she may have to seek the assistance of officers in charge of those other sections and units. In order to ensure that assistance is provided when sought the Information Officer must be clothed with the power to seek assistance and the duty of providing such assistance must be placed on an officer to whom such a request is directed. **Consideration may be given to amending this provision to allow him or her to seek the assistance of any other officer as he or she considers necessary for the proper discharge of his or her duties.**

19. Another provision may be inserted to say that the officer whose assistance has been sought by the Information Officer, for the purpose of any contravention of the provisions of this Act, shall be treated as the Information Officer.

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[11] S 5(4), *"The Central Public Information Officer or State Public Information Officer, as the case may be, may seek the assistance of any other officer as he or she considers it necessary for the proper discharge of his or her duties."* And S 5(5), *"Any officer, whose assistance has been sought under sub-section (4), shall render all assistance to the Central Public Information Officer or State Public Information Officer, as the case may be, seeking his or her assistance and for the purposes of any contravention of the provisions of this Act, such other officer shall be treated as a Central Public Information Officer or State Public Information Officer, as the case may be."*.

***Recommendation:***

1. **In clause 3(1) the words "*shall designate*" may replace the words *"may appoint".***
2. **Sub clause (1) of clause 4 may be amended to read:**

   ***"Every Information Officer may seek the assistance of any other officer as he or she considers it necessary for the proper discharge of his duties"***
3. ***Sub clause (2) of clause 4 may be amended to read:***

   ***"Any officer, whose assistance has been sought under subsection 4, shall provide all assistance to the Information Officer seeking his or her assistance and for the purpose of any contravention of the provisions of this Act, such other officer shall be treated as the Information Officer".***

## Part III

## Application for Information

20. **Application forms must not be compulsory:** Clause 6(1) of the Bill makes a reference to a specific application form prescribed by the State Authority to be used by any person who seeks information. Best practice requires that access procedures should be as simple as possible and designed for the convenience of all persons. Allowing public bodies the liberty to create their own formats will result in their insistence upon applicants to compulsorily fill in many personal details such as father's name or husband's name (in the case of married women), their parental address, name of religion or some other identity marker which are truly unnecessary for the purpose of determining whether the information ought to be disclosed or not. In India the Union Government and several State Governments have not notified any form for filing information requests.[12] Applicants are free to submit requests on plain paper so long as they mention their name and contact details, as well as the contact details of the public authority and a clear description of the information required and the form in which the information is sought. The exercise of the right to information should not be contingent on the filling and submission of forms. If forms are made compulsory potential applicants may be deterred from filing requests when forms go scarce. In fact causing scarcity of forms may become a preferred way of deterring persons from making information requests. Such practices are not unknown in bureaucracies that are resistant to the idea of transparency. **Consideration may be given to adding a sub clause to clause 6(1) stating that plain paper applications will also be accepted by the information officer of the public authority provided they contain the minimum details required to identify and communicate with the applicant and identify the information requested.**
21. **No reasons should be demanded from applicants for seeking information:** Clause 6 (2)(d) of the draft Bill makes it compulsory for the applicant to mention the *"reason and purpose"* behind making the information request. In other words a requester has to justify why he or she wants the information from a public body. This provision is not in tune with international best practice. RTI is a universally recognized human right enshrined in the Universal Declaration of Human Rights[13]. If this provision is allowed to remain in the law

[12] Non-Implementation of various provisions of the RTI Act, 2005 by public authorities http://persmin.gov.in/WriteReadData/RTI/1_2_2007_IR.pdf: accessed on January, 2011.

[13] Article 19. For the complete text of the UDHR please see: http://udhr.org : accessed on January, 2010.

officers steeped in the age-old mentality of maintaining secrecy in public affairs without sufficient justification are likely to harass requesters for reasons and delay the decision-making process unnecessarily. Further, if the statement of reasons is made compulsory for exercising this right then an RTI Bill must contain the range of reasons that are considered acceptable under law in order to prevent the abuse of the power to reject a request for invalid reasons. Listing all possible valid reasons is a near impossible exercise. Then again an applicant may quote a legitimate reason but he or she may use the information for some other purpose. Under such circumstances the public body will have to launch its own investigation into the truthfulness of the reasons provided by an applicant or file a suit against the requester for acquiring information through fraudulent means. In both instances the public body will end up wasting its time and resources. The test to be applied regards an information request is not whether the applicant has a valid reason for seeking information or not. Instead the test should be whether any public interest protected by the exemption clauses will be violated by disclosing the information. If the harm to the public interest is likely to be greater than the benefits of disclosure then such information must not be disclosed whatever be the applicant's reason for seeking it. If on the other hand none of the protected interests are likely to be compromised by disclosing the information then what the applicant's reasons are for seeking the information need be of no concern to the public authority. In India the RTI Act explicitly states that no one may compel an applicant to disclose reasons for seeking information from a public authority.[14] In several RTI laws in Commonwealth countries and elsewhere there is no mention anywhere of the requirement of justifying why he or she wants the information. **Consideration may be given to deleting clause 6(2)(d) of the RTI Bill.**

***Recommendation:***

1. **In clause 6(1) para (a) may be inserted :**

   ***"When a printed application form is not easily available, or if the public authority has not prescribed the application form yet, a person may make the request on plain paper or in electronic form or by email."***

2. **In clause 6(2) sub-clause (d) may be deleted.**

22. **No fee should be collected at the time of filing application**: Clause 6(3) requires a person seeking information to submit his application together with fee prescribed by the State Authority and clause 17 provides the state authority the power to prescribe forms and fees for the purpose of the enactment of the legislation. It is international best practice to collect only such fees that may be necessary for reproducing the information requested by the applicant. There is no need to collect any fee at the stage of filing the application as neither the applicant nor the information officer would have a clear idea of how much it would cost to reproduce the requested information. In cases where the requested information is covered by one or more exemptions and no public interest is served by disclosure it is not proper to expect the applicant to pay a fee for information that he/she is not likely to get. Furthermore this law is being passed to give effect to a basic human right of persons in the State of Selangor. The Government should not treat this as an opportunity of increasing its revenue receipts from the public every time a person chooses to exercise his/her fundamental right to access information. **Consideration may be given to deleting clause 6(3).**

***Recommendation:***

[14] S6(2): *"An applicant making a request shall not be required to give any reason for requesting the information or any other personal details except those that that may be necessary for contacting him."*

**Clause 6(3) may be deleted.**

## Response to Applications

23. **Reduce the time limit for response from the department:** Clause 7(1) of the draft Bill stipulates a period of 30 days for a "response" from the department receiving an information request. This statement is confusing as it is not clear whether the stipulated time period is for information to be given or for merely a response related to the information sought. Presuming that this 30 day period is for information to be provided or for the request to be rejected if it is exempt information; this is in tune with best practice in India. However, the time limit is too liberal considering that law will apply to only the State of Selangor and not a larger entity like the national government of Malaysia. Public authorities must endeavour to dispose information requests within a shorter period. In Belize public authorities are required to dispose a request within a period of 14 days.[15] In Uganda the national RTI laws stipulate a deadline of 21 days for disposing off information requests.[16] **Consideration may be given to reducing the time limit for disposing off an information request from 30 days to 21 days.**

24. **Reduce the time limit for response in life or liberty related information requests:** Clause 7(2) of the draft Bill stipulates a period of 7 days for a "response" for information requests related to life or liberty of a person. Here again, it must be clarified that the time period is for information to be provided and not merely a response. This time period is too long for a situation concerning a person's life or liberty, especially when it is under threat. In India, the RTI Act explicitly states that requested information concerning life and liberty will be provided within forty-eight hours (2 days)[17] while in Bangladesh, information related to the life and death of a person will be provided within twenty four hours[18]. Give Bangladesh's example- 24 hours. **Consideration may be given to reducing the time limit for disposing off an information request concerning a person's life or liberty from 7 days to 2 days.**

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[15] S16 of Belize Freedom of Information Act, 1994:

*"… the Ministry or prescribed authority shall take all reasonable steps to enable the applicant to be notified of a decision on the request as soon as practicable but in any case not later than **two weeks** after the day on which the request is received by or on behalf of the Ministry or prescribed authority."*
URL: http://www.freedominfo.org/documents/Belize%20FOIA%201994.pdf : accessed on 4th January, 2011.

[16] S16 of Uganda Access to Information Act, 2005: *"The information officer to whom a request for access is made or transferred shall , subject to section 17, as soon as reasonably possible, be in any event, within 21 twenty one days after the request is received –*

*(a) determine in accordance with this Act, whether to grant the request; and*

*(b) notify the person requesting the access of the decision and, if the person stated as required by section 11(2)(b), that he or she wishes to be informed of the decision in any other manner, inform him or her in that manner if it is reasonable possible".*

*URL:* http://www.freedominfo.org/documents/uganda_ati_act_2005.pdf *accessed on 4th January, 2011.*

[17] S7(1) of Indian RTI Act: *"Provided that where the information sought for concerns the life or liberty of a person, the same shall be provided within forty-eight hours of the receipt of the request."*
URL: http://rti.gov.in/rti-act.pdf - accessed on 3rd January, 2011.

[18] S9(4) of Bangladesh RTI Act: *"Notwithstanding anything contained in sub-section (1) and (2), if a request made under sub-section (1) of section 8 is relating to the life and death, arrest and release from jail of any person, the officer-in-charge shall provide preliminary information thereof within 24 (twenty-four) hours."*
URL: http://www.moi.gov.bd/RTI/RTI_English.pdf accessed on 4th January, 2011.

***Recommendation:***

**1. In S7(1) the figure "30" may be substituted by the figure "21".**

**2. In S(7)(2) the figure "7" may be substituted by the figure "2"**

25. **Standardise the regime of fee payment for obtaining information:** Clause 6(3) of the RTI Bill states that *"every application shall be submitted together with payment of fee as prescribed by the State Authority"*. However, there is no clarity if the fee prescribed would be the normal minimum application fee or fee for the information requested. Internationally it has been recognised that the law must make it clear as to what is being collected. It is important that a clear fee structure and procedure for payment be laid down in accordance with some reasonable principles so that seeking information does not seem like a financial burden to the requestor while at the same time leaving no ground for any misinterpretation. **Consideration may be given to including a separate clause to contain all fee related provisions in clause 7.**

26. It is also important to institute a uniform free structure for information across all public authorities covered by the access law in Selangor. If public authorities are allowed to prescribe their own fee rates it will only result in chaos. Ordinarily the cost of obtaining information of the size of, say, 10 pages must be the same across all public authorities in Selangor. No scope must be allowed for any arbitrariness in the collection of fees. Therefore the administrative authority responsible for the implementation of the access law must be empowered to make fee-related Regulations in consultation with the proposed Information Commission (see para #43 below). **Consideration may be given to amending the relevant provisions of the RTI Bill to provide for the institution of a uniform fee regime across all public authorities.**

27. It is international best practice not to charge fees that is more than the actual cost of reproduction of the information from the original source. It is also international best practice in developing countries not to pass on the burden of the costs incurred by the public authority on searching, compiling or collating the record. The costs incurred on searching, compiling and collating the information are all paid for by the taxpayer. There is no reason why the tax-payer must be burdened twice. The RTI regime in India allows for the collection of a nominal application fee initially and additional fees at prescribed rates at the time of providing the information. These rates are reasonable and cover the cost of reproduction of the information from the original source. The public information officer is required to provide the applicant with details of how the final fee amount was calculated. Similarly the Bangladesh RTI Act also states that the fees charged for providing information must be reasonable.[19] **Consideration may be given to laying down the principle that the fees charged for providing information shall be reasonable and not exceed the cost of reproducing the information from the original source.**

28. **Make information available to the poor for free**: Clause 7(4)(b) states that "*access to information shall be given when fee under subsection 6(3 has been paid".* This means that all persons, including the economically weaker sections of the State of Selangor will be required to pay a fee for accessing information. In both developed and developing countries it is common practice to waive the requirement of payment of fees for requestors of meagre means. It is also common practice for countries to waive fees for disclosing

[19] S8(4), *"In the case of obtaining information under sub-section (1), the person making the request shall pay reasonable fees as may be prescribed by the officer-in-charge for such information." S8(5). "The Government may, in consultation with the Information Commission, fix the fees for having any information by notification in the official Gazette, and, if necessary, may fix the price of information, or as the case may be, may exempt an individual or a class of individuals or any other class from paying such price."*

information that it is of relevance to large segments of the public. For example, in Australia payment of fees may be waived on grounds of financial hardship or where it is in the public interest to do so.[20] In Malta fees may be waived for an applicant on similar grounds.[21] The Indian RTI Act does not require citizens living below the official poverty line to pay any fees for seeking information.[22] In Antigua and Barbuda the *Freedom of Information Act* provides for the waiver of fees in the public interest.[23] **Consideration may be given to adding a sub-clause which states that no fee shall be charged from indigent applicants who fall below the poverty line determined by the Government of Selangor.**

29. Further, it is also international best practice to provide the information free of cost if it is disclosed after the stipulated time limit. For example in India the RTI Act states that information must be provided free of cost if it is given after the lapsing of the 30-day deadline.[24] In Trinidad and Tobago also a similar practice applies. Further if the fees have been collected but the public authority fails to provide the information within the deadline the fee must be refunded.[25] Similarly in Malta it is possible to obtain the information free of cost past the stipulated deadline.[26] **Consideration may be given to including in the RTI Bill these progressive principles for determining fees.**

***Recommendation:***

**1. In clause 7(4) para (c) may be added to read: *"No such fee shall be charged from***

[20] S29(5)," *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."* For the complete text of *Australia's Freedom of Information Act, 1982* see: http://www.austlii.edu.au/au/legis/cth/consol_act/foia1982222/ ; accessed on 01 February 2011.

[21] Article 9(5)(b), "*payment of the fee would cause financial hardship to the applicant, bearing in mind the applicant's means and circumstances*;" or 9(5) (*c*), "*disclosure of the information requested is in the public interest*." For a complete text of Malta's access to information law see: http://docs.justice.gov.mt/lom/Legislation/English/Leg/VOL_16/chapt496.pdf;accessed on 01 February 2011.

[22] S 7(5*). "Provided that the fee prescribed under sub-section (1) of section 6 and sub-sections (1) and (5) of section 7 shall be reasonable and no such fee shall be charged from the persons who are of below poverty line as may be determined by the appropriate Government."*

[23] S20(2). "*Payment of a fee shall not be required for requests for personal information, and requests in the public interest.*" For the complete text of the access law in Antigua and Barbuda please see: http://www.ab.gov.ag/gov_v2/government/parliament/laws/freedom_of_info.pdf accessed on 01 February 2011.

[24] S7(6). *"Notwithstanding anything contained in sub-section (5), the person making request for the information shall be provided the information free of charge where a public authority fails to comply with the time limits specified in sub-section (1)."*

[25] S17(1). "*No fee shall be charged by a public authority for the making of a request for access to an official document." S17 (4) " Notwithstanding subsection (2), where a public authority fails, to give an applicant access to an official document within seven working days of the payment of the relevant fee pursuant to section 16(1)[c], the applicant shall, in addition to access to the official document requested, be entitled to a refund of the fee paid."* For the complete text of Trinidad and Tobago's *Freedom of Information Act, 1999* see: http://www.nalis.gov.tt/Socio_economic/THE-FREEDOM-OF-INFORMATION-ACT1999.htm accessed on 01 February 2011.

[26] Article 9(6). "*Where a public authority fails to meet the time limit set by article 10 or, if applicable, article 11, it shall not charge any fee for access to a document*." For the complete text of Malta's Freedom of Information Act see: http://www.foreign.gov.mt/Library/FOI/FOI%20Act.pdf accessed on 01 February 2011.

***persons who are below the poverty line as may be determined by the State Government"*.**

**2. A separate sub-clause 5 may be inserted to clause 7 to read:**

***5(1)(a) An authority may charge a fee for grating access to information in accordance with the rates prescribed in the Regulations. Any fee payable under this Act shall be reasonable and shall not exceed the actual cost of reproducing the information from the source. No fee shall be charged for searching, compiling or collating the information requested under this Act.***

***(b) No fee may be charged from the class of requestors identified in the Regulations.***

***(c) No fee shall be charged where the requested information relates to the applicant's personal affairs or where the disclosure of information is in the larger public interest.***

***(d) Where the public authority fails to provide the information within the time limits stipulated under this Act, the person making the request has the right to obtain the information free of cost.***

***(2)(a) If the information officer intends to disclose the information requested, he or she, as the case may be, shall as expeditiously as possible inform the person making the request, in writing, of the fee payable for obtaining the information. The information officer shall inform the applicant, of the calculations made to arrive at the amount of fee payable, in accordance with the rates prescribed in the Regulations. The period intervening between the intimation of the fee payable and the actual payment of fee shall not be taken into consideration for the purpose of calculating the time limits specified under this Act.***

***(b)The information officer shall inform the applicant of his right to seek a review of the specified fee before the appellate authority appointed under S9 of this Act in the same public authority.***

## Refusal to Applications

30. Clause 8(1) lists out situations when a department may refuse access to information. Clause 8(1)(a) states that "*information will be refused if the applicant is not entitled to access the information".* This is in contradiction to clause 5 of the Bill which grants any person access to information. There should be no other reason for refusal to provide information other than the exemptions mentioned in the Bill. **Consideration may be given to deleting this clause.**

***Recommendation:***

1. ***Clause 8(1)(a)* may be deleted.**
2. **Clause 8(2) may be moved as sub-clause (6) of clause 7.**

31. **The Bill should include provisions for transfer:** Clause 8(1)(b) states that "*information will be refused if the information requested does not exist or is not under the control of the department*". CHRI recommends that the department which receives the request transfers it to the correct department because it is not cost or time effective to require the applicant to follow up with another office. Public officials have access to the internal workings of government and can much more easily ensure effective transfers of requests. Imposing duty on authorities to transfer applications is in line with international best practice

principles. Furthermore, the department receiving the information request may hold part of the information requested. In such cases it cannot simply refuse because information is not "under the control of the department". If only a part of the requested information is available with the public authority receiving the request, it should deal with that part and transfer the remaining portion of the request to the other public authority that is most likely to have that information. **Consideration should be given to including the provision of severability and transfer in this section which deals with responses to applications.**

***Recommendation:***

**1. Another sub-clause (7) may be included in clause 7 to include the provision on transfer. It may read as:**

**"*Where an application is made to a department requesting for information-***

***(i) which is held by another department; or***

***(ii) the subject matter of which is more closely connected with the functions of another department,***

***the department, to which such application is made, shall transfer the application or such part of it as may be appropriate to that other department and inform the applicant immediately about such transfer.***

***Provided that the transfer of an application pursuant to this subsection shall be made as soon as practicable but in no case later than five days from the date of receipt of the application.***

**2. S7 may also include a provision on severability. It may read as:**

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

## New provision: Exemptions

32. It is important to clearly but narrowly draw the limits to the right to information. As such a law aims to provide access to information rather than inhibit access the exemptions to disclosure must be tightly drawn, sensitive information must be subjected to a harm test prior to making a decision about disclosure. Even exempt information must be accessible if there is a countervailing public interest in support of disclosure. In this Bill, exemptions to disclosure are contained in the Interpretation section where it is implied that such categories do not even constitute information within the meaning of that term used in the Bill. This is not in tune with international best practice for reasons explained above at paras #15 & 38. Further, the sensitivity of certain categories of information also diminishes with the passage of time and public interest may not be harmed in any way by disclosing such information after a considerable period of time has lapsed. The principle of subjecting exemptions to time limits (also known was sunset clauses) is in tune with international best practice standards. In India the sunset clause is set at 20 years from the date of creation of the information.[27] An entire generation would have passed since the time of the creation

[27] S8(3), "Subject to the provisions of clauses (a), (c) and (i) of sub-section (1), any information relating to any occurrence, event or matter which has taken place, occurred or happened twenty years before the date on which any request is made under section 6 shall be provided to any person making a request under that section".

of the information and its disclosure. **Consideration may be given to having a separate clause detailing the exemptions and the public interest override under Section 8. The exemptions must also be subjected to a sunset clause to make exempt information accessible after a considerable time period.**

***Recommendation:***

**Clause 8 of the Bill may be amended in its entirety to include the following:**

***8. (1) Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen,—***

***(a) information, disclosure of which would prejudicially affect the sovereignty and integrity of the state of Selangor, the security, strategic, scientific or economic interests of the State, relation with foreign State or lead to incitement of an offence;***

***(b) information which has been expressly forbidden to be published by any court of law or tribunal or the disclosure of which may constitute contempt of court;***

***(c) information, the disclosure of which would cause a breach of privilege of the State Legislature;***

***(d) any information including commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party;***

***(e) information available to a person in his fiduciary capacity, unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information;***

***(f) information received in confidence from foreign Government;***

***(g) information, the disclosure of which would endanger the life or physical safety of any person or identify the source of information or assistance given in confidence for law enforcement or security purposes;***

***(h) information which would impede the process of investigation or apprehension or prosecution of offenders;***

***(i) cabinet papers including records of deliberations of the Cabinet Ministers, Secretaries and other officers:***

***Provided that the decisions of Cabinet, the reasons thereof, and the material on the basis of which the decisions were taken shall be made public after the decision has been taken, and the matter is complete, or over:***

***Provided further that those matters which come under the exemptions specified in this section shall not be disclosed;***

***(j) information which relates to personal information the disclosure of which would cause unwarranted invasion of the privacy of the individual:***

***(2) While invoking any of the exemptions listed in sub-section 1 regard shall be had to the principle that information which cannot be denied to the Parliament or a State Legislature shall not be denied to any person.***

***(3) Notwithstanding anything in the Official Secrets Act of 1972 nor any of the exemptions permissible in accordance with sub-section (1), a public authority may allow access to information, if public interest in disclosure outweighs the harm to the protected interests.***

***(4) Subject to the provisions of clauses (a), (c) and (i) of sub-section (1), any information relating to any occurrence, event or matter which has taken place, occurred or happened twenty years before the date on which any request is made***

***under section 6 shall be provided to any person making a request under that section"***

## Appeal to Board of Appeal

33. **Internal review mechanism must be established:** Clause 9 of the draft Bill allows any applicant dissatisfied with the decision of the Information Officer to appeal to the Board of Appeal by filing a written submission against the decision within 21 days from the date of receipt of the notice informing such decision. There is however no provision for a review mechanism that is internal to the bodies that have obligations to give information under this law. An internal review mechanism which allows the applicant a review of the decision made by the Information officer is in tune with international best practices. This mechanism is an efficient way to dealing with appeals internally and also helps in preventing the Appeal Board from becoming overburdened with appeals against the decisions of Information Officers.

    The RTI laws in several developed and developing countries provide for a two-stage appeals process where the fist appeal is heard within the public body. For example, In the UK the first appeal against the decision on the information request lies within the public authority.[28] In South Africa every public authority is required to identify an authority that is competent to hear internal appeals against the decisions made on the information request.[29] In India the appeal against the decision of the public information officer is required to be heard by an officer who is senior in rank within the same public authority.[30] In Bangladesh the head of the authority is competent to review the decision of the information officer.[31] In Nepal any person aggrieved by the decision of the Information Officer may make a complaint to the Chief of the public authority before seeking redress at the Nepal Information Commission.[32] In all such instances the internal appellate authority is required to give his or her decisions within specific time limits. Where the requested information relates to third parties and may not be disclosed without their consent, such

[28] S45(2)(e), "*the provision by public authorities of procedures for dealing with complaints about the handling by them of requests for information."* for the complete text of the UK FOI Act see: http://www.opsi.gov.uk/acts/acts2000/ukpga_20000036_en_5#pt3-l1g45 ; accessed on 15 January 2011.

[29] S75(1) "An internal appeal—

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(b) must be delivered or sent to the information officer of the public body 35 concerned at his or her address, fax number or electronic mail address;" For the complete text of the South Africa's Promotion of Access to Information Act, 2000 see: http://www.info.gov.za/view/DownloadFileAction?id=68186 ; accessed on 15 January , 2011.

[30] S19(1), "Any person who, does not receive a decision within the time specified in sub-section (1) or clause (a) of sub-section (3) of section 7, or is aggrieved by a decision of the Central Public Information Officer or State Public Information Officer, as the case may be, may within thirty days from the expiry of such period or from the receipt of such a decision prefer an appeal to such officer who is senior in rank to the Central Public Information Officer or State Public Information Officer as the case may be, in each public authority:"

[31] S24(1), "(1) If Any person fails to receive information within the time specified in sub-section (1), (2) and (4) of section 9 or is aggrieved by a decision of the officer-in-charge may, within 30 (thirty) days from the expiry of such period or, as the case may be, from the receipt of such a decision, prefer an appeal to the appellate authority.".

[32] S9, Right to Information Act, 2064 (B.S.), "(1) If Information Officer do not provide information, deny to provide information, partially provides information, provides wrong information or does not provide information by stating that the applicant is not stakeholder, the concerned person shall make a complaint to Chief within (7) days from the date of information denied or partial information received."

third parties have a right to be heard before the appellate authority.[33] CHRI recommends designating an officer or a panel of officers senior in rank to the Information Officer – as the Appellate Authority in each department to look into applications for internal review. **Consideration may be given to designating an officer or a panel of officers senior in rank to the Information Officer, to be called the 'Appellate Authority', in every office to conduct internal reviews.**

34. Requesters may not be able to seek internal review within the deadline for very genuine reasons such as ill-health or breakdown of transport and communication due to natural calamities. In order to provide for such circumstances the appellate authority should be vested with the power to condone delays in submission of the application for internal review. **Consideration may be given to vesting the appellate authority with the power to condone delays in filing applications for internal review.**

35. International best practice requires that where information that is the subject of a dispute under RTI laws pertains to confidential or sensitive information relating to a third party such third party ought to be given an opportunity to make a representation during the internal review proceedings. **Consideration may be given to inserting a new sub clause to provide third parties with an opportunity to make a representation at internal review proceedings.**

***Recommendation:***

**Clause 9 may be amended to read:**

**"S9. 1 (a)** ***A public body must appoint an officer or a committee of officers, senior in rank to the information officer, for the purpose of hearing internal appeals.***

***(b) Any applicant who, does not receive a decision within the time specified in sub-section (1) of section 7, or is dissatisfied with the decision of the Information Officer, shall within 21 days after the date of receipt of the notice informing such a decision, appeal against such decision with the appellate authority appointed under sub-section (a).***

***(c) The Appellate Authority may admit the appeal after the expiry of the period of 21 days if he or she is satisfied that the appellant was prevented by sufficient cause from filing appeal in time.***

***(d) If the application for review relates to information of a third party protected under this Act, the appellate authority shall give such third party a reasonable opportunity of being heard before arriving at a decision on that application.***

***(e) An appellate authority must decide every appeal in accordance with the principles of natural justice within a period of twenty-one working days. The appellate authority may extend the time limit for an additional period of 10 working days for reasons to be recorded in writing.***

***(f) All parties to a proceeding under this section are entitled to receive a copy of the decision of the appellate authority free of charge in the first instance.***

***2(a )Any applicant who, does not receive a decision within the time specified in sub-section (1) of section 9, or is dissatisfied with the decision of Appellate Authority, shall within 21 days after the date of receipt of the notice informing such a decision, appeal against such decision with the Appeal Board appointed under***

[33] S19(2), "Where an appeal is preferred against an order made by a Central Public Information Officer or a State Public Information Officer, as the case may be, under section 11 to disclose third party information, the appeal by the concerned third party shall be made within thirty days from the date of the order.".

***section 14 of the Act.***

***(b)The Appeal Board may admit the appeal after the expiry of the period of 21 days if he or she is satisfied that the appellant was prevented by sufficient cause from filing appeal in time.***

***(c)If the application for review relates to information of a third party protected under this Act, the Appeal Board shall give such third party a reasonable opportunity of being heard before arriving at a decision on that application.***

## Modes of Access to Information

36. **Provide additional modes of access to information:** Clause 10(1)(b) states that "…*where information are words in the form of record which are capable of being reproduced in the form of sound or words in the form of shorthand writing or in codified form, the department may reproduce the information in the form of a written copy".* International best practices also include inspection of documents and taking certified samples of materials as modes of accessing information. CHRI recommends expanding these modes of access to include the rights of inspection and of taking certified samples of materials used by a public authority or in public works. **Consideration may be given to amending this section to include inspection of documents and records and taking certified samples of material.**

37. Clause 10(2) of the Bill states that information will be provided in the form or manner most "*practical to the department*" subject to the form of information itself. This is vaguely worded as it is difficult to ascertain what is practical or not practical to the department. International best practice makes information available to the citizen ordinarily in the form requested by the applicant or in any other form if it would disproportionately divert the public body's resources or would be detrimental to the safety or preservation of the information. **Consideration may be given to amending this clause to make information available to the applicant in the form requested unless it involves one of the above conditions, in which case information may be provided in any other form.**

38. **Distinction between information that may be refused and information that may not be given in the form requested**: Clause 10(3) contains a list of instances like when the information requested interferes unreasonably with the operation of the department or would involve an infringement of copyright or when providing it in the form requested would be detrimental to its preservation. **CHRI recommends that the first two instances – clause 10(3) (a) and (b) be removed from this section and included in clause 8 whose amendment is recommended below at para #32.**

39. The proviso to the above mentioned clause states that "*access may be refused and access may be given in another form*". A clarity of language is required as the term *'refused'* is likely to be misunderstood as information that will not be given when the intent of this proviso is not to refuse but to provide the information in a form other than the one requested in which is agreeable to the applicant. **Consideration may be given to deleting the words 'access may be refused' from the proviso to clause 10(3).**

***Recommendation:***

1. **In clause 10, sub-clause (c) may be added which reads: "*Inspection of documents and records",***
2. **In clause 10, sub-clause (d) may be added which reads: "taking certified samples of material",**
3. **In clause 10(3) sub-clauses (a) & (c) may be deleted,**

**4. In the proviso to clause 10(3) the words 'access may be refused' may be deleted.**

## Information Not In Possession

40. **Place on public authorities the duty to confirm or deny the existence of information in their possession:** We have already argued above in para #31 for the inclusion of a transfer provision for transfer of information requests related to other departments. However, if the information requested is related to the department receiving the application but is no longer in possession of the information due to some reasons such as the information being destroyed according to the department record retention schedule, the Information Officer must inform the applicant in writing also providing reasons such as mentioned above. **Consideration may be given to amending this provision to include providing of reasons by the Information Officer in case information is not in his/her possession.**

***Recommendation:***

**In clause 11 the please insert the words "providing reasons for it" after the words "…matter in writing."**

41. **Vexatious, unreasonable or repetitive applications:** Clause 12 of the Bill allows every department of the State of Selangor to ignore information requests which are vexatious, unreasonable or if it has already been provided to the person making the request. Vesting the Information Officer with powers to reject applications on the grounds that they are vexatious or frivolous is dangerous and liable to misuse. In the absence of a clear understanding of what constitutes a 'vexatious request' in the law any application for information that may reveal poor decision making, corruption, wastage or misuse of public funds is liable to be treated as vexatious. Furthermore what may appear to be serious and public spirited to an applicant may be termed as frivolous information request by unscrupulous officials who stand to gain from continued secrecy about their actions. **Consideration may be given to deleting this clause.**

***Recommendation:***

**Clause 12 may be deleted.**

## Personal Information of a Third Party

42. **Information related to Third Party:** Sub 13(1) states that every department "*may refuse to indicate whether or not it holds any information"* or *"refuse to communicate information"* which relates to personal information of an individual third party. There is no reason why all personal information relating to a third party should be denied. International best practice requires that where information that is the subject of a dispute under RTI laws pertains to confidential or sensitive information relating to a third party such third party ought to be given an opportunity to make a representation at the applications stage following which it is up to the Information Officer to decide whether or not to provide the information to the applicant based on an examination of such submissions. The third party should also be provided an opportunity to make a representation during the internal review proceedings of the public body and at the external appeal stage. **Consideration may be given to inserting a definition of 'third party' in the Interpretation section (as already**

**recommended in para #14) and laying down the process of dealing with information requests related to third party in clause 13.**

**Recommendation:**

**Third Party may be defined in the Interpretation Section (S2)**

**S13 may read:**

***(1) Where a Information Officer intends to disclose any information or record, or part thereof on a request made under this Act, which relates to or has been supplied by a third party and has been treated as confidential by that third party, Information Officer shall, within five days from the receipt of the request, give a written notice to such third party of the request and of the fact that the Information Officer, intends to disclose the information or record, or part thereof, and invite the third party to make a submission in writing or orally, regarding whether the information should be disclosed, and such submission of the third party shall be kept in view while taking a decision about disclosure of information.***

***(2) Where a notice is served by the Information Officer under sub-section (1) to a third party in respect of any information or record or part thereof, the third party shall, within ten days from the date of receipt of such notice, be given the opportunity to make representation against the proposed disclosure.***

***(3) Notwithstanding anything contained in section 7, the Information shall, within thirty one days after receipt of the request under section 6, if the third party has been given an opportunity to make representation under sub-section (2), make a decision as to whether or not to disclose the information or record or part thereof and give in writing the notice of his decision to the third party.***

***(4) A notice given under sub-section (3) shall include a statement that the third party to whom the notice is given is entitled to prefer an appeal under the appeal procedures provided in the Act against the decision***

## Part IV

## The Appeal Board

43. The Selangor Freedom of Information Bill provides for an Appeal Board to inquire into appeals related to information related disputes under the Act. This is in tune with international best practice. However, its role is limited to only looking into appeals. Information Commissions around the world not only inquire into appeals against the decision given in internal review proceedings but also monitor the implementation of RTI laws and submit reports to Parliament regarding nature and of extent compliance in public bodies. The term "Appeal Board" restricts it to the role of an adjudicating body and nothing more. **CHRI recommends the usage of the term "Information Commission" and assignment of a broader set of duties toward implementing the provisions of the Act.**
44. The Information Commission should be an independent body with operational, financial and staffing autonomy in order to function without fear or favour from any agency. The Commission's rank and prestige should be kept sufficiently high in order to ensure that their orders are obeyed. **Consideration may be given to inserting a clause stating the financial and operational autonomy of the Information Commission.**

45. There is no provision in the Bill on the manner of appointment of the members of the Information Commission. In order for the Selangor Information Commission to become an effective champion of transparency it is necessary to have an objective and unbiased public process for appointment of its members. **Consideration may be given to inserting para (c) after clause 14(1) mentioning the Committee that will recommend names for members of the Information Commission.**

46. Clause 14(2) of the Selangor Bill lays down that the Chairman and Deputy Chairman of the Appeal Board are to be appointed from amongst ex-judges or advocates and solicitors of the High Court or are to be from the Judicial and legal Service of Malaysia. In addition to this, para (b) of clause 14(2) states that *"fit persons"* (not exceeding 6 in number) are to be appointed as additional members of the Appeal Board. It is unclear what would qualify as "fit". International best practice requires that the qualifications of the members of the adjudicating body such as the Information Commission be laid down in the Act itself so as to ensure an unbiased process of appointment. Members of the Information Commission should be drawn from a wide pool of talent available in a variety of fields such as law, governance, social service, journalism, science, technology and management **Consideration may be given to amending this provision to include the fields of law, governance, social service, journalism, science, technology and management as areas of expertise that a person will be required to possess for appointment as a member of the Information Commission and include it in para (e) of clause 14(1).**

47. Clause 14(3) states that any person appointed as the Chairman, Deputy Chairman or member of the Appeal Board *"shall, unless he resigns or his appointment is revoked' hold office for a period of 3 years"* and *"shall be eligible for reappointment"*. Three years is too short and the frequent entry and exit of the members to the Information Commission and the gap during the process of the appointment is likely to affect its smooth functioning. Furthermore, reappointment of the Chairman, Deputy Chairman and other members of the Information Commission for the same positions held by them earlier could lead to extended period of office with greater possibility of misuse of their positions. **Consideration may be given to increasing the term of the Chairman, Deputy Chairman and the members of the Information Commission to 5 years or 65 years of age, whichever is earlier.**

48. The Deputy Chairman or a member of the Board may be made eligible for appointment as the Chairman and Deputy Chairman respectively. However, the aggregate term of a person appointed to more than one post should not exceed 5 years or cross the 65 year age limit, whichever is earlier. **CHRI recommends modeling this clause on the corresponding provision in the Indian RTI Act.**[34]

49. Clause 14(4) states that State Authority *"may revoke the appointment of a member of the Appeal Board without assigning any reason therefore".* This provision is arbitrary and detrimental to the effective functioning of the proposed Information Commission. International practice dictates that a procedure be laid in the Act for the removal of the members of independent adjudicating bodies such as Information Commissions. In India, the RTI Act contains a separate entire section for the removal of the members of the

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[34] S16(2),*"Every State Information Commissioner shall hold office for a term of five years from the date on which he enters upon his office or till he attains the age of sixty-five years, whichever is earlier, and shall not be eligible for reappointment as such State Information Commissioner:*

*Provided that every State Information Commissioner shall, on vacating his office under this sub-section, be eligible for appointment as the State Chief Information Commissioner in the manner specified in sub-section (3) of section 15:*

*Provided further that where the State Information Commissioner is appointed as the State Chief Information Commissioner, his term of office shall not be more than five years in aggregate as the State Information Commissioner and the State Chief Information Commissioner."*

Central Information Commission (constituted for Central Government bodies) and those of the State Information Commission (constituted for State Government bodies). This section lays down that the Information Commissioners both at the Centre and States can only be removed from office by the President and Governor respectively on grounds of proved misbehavior after an enquiry has been conducted by the Supreme Court. Where other specified grounds apply such as being judged insolvent, conviction for an offence, engagement in paid employment, being physically or mentally unfit or acquiring financial or other interests that are likely to prejudicially affect the incumbent's role as the Information Commissioner, the President/Governor may remove them from office by decree. **CHRI recommends amending clause 14(4) of the Bill to include clear provisions for the removal of the members of the proposed Information Commission.**[35]

50. Clause 14(6) states that the Chairman shall call upon *"any two members appointed under subsection 2(b)"* to serve with him on the Appeal Board (recommended to be replaced by the Information Commission) *"whenever a need arises"*. Information Commissions around the world convene on a regular basis. This is not the Parliament which convenes a few times a year as its members have other duties to fulfill as representatives of their constituencies. The members of the Information Commission are appointed for the sole purpose of inquiring into appeals and other matters related to information requests and must function like any other specialized body does. They must function on a regular basis. Therefore this provision may be amended to grant powers to the Chief Information Commissioner to constitute benches of the proposed Information Commission to hear and decide access disputes **Consideration may be given to amending this provision to ensure the regular functioning of the Selangor Information Commission.**

51. Clause 14(7) states that in the case of a member of the Appeal Board (recommended to be replaced by the Information Commission) having an interest in any matter before it, he or she is to, soon after being aware, disclose the fact and nature of the interest to the Chairman and he or she will thereafter not take part in the proceedings related to it. This is

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[35] S17: "(1) Subject to the provisions of sub-section (3), the State Chief Information Commissioner or a State Information Commissioner shall be removed from his office only by order of the Governor on the ground of proved misbehaviour or incapacity after the Supreme Court, on a reference made to it by the Governor, has on inquiry, reported that the State Chief Information Commissioner or a State Information Commissioner, as the case may be, ought on such ground be removed.

(2) The Governor may suspend from office, and if deem necessary prohibit also from attending the office during inquiry, the State Chief Information Commissioner or a State Information Commissioner in respect of whom a reference has been made to the Supreme Court under sub-section (1) until the Governor has passed orders on receipt of the report ofthe Supreme Court on such reference.

(3) Notwithstanding anything contained in sub-section (1), the Governor may by order remove from office the State Chief Information Commissioner or a State Information Commissioner if a State Chief Information Commissioner or a State Information Commissioner, as the case may be,—

(a) is adjudged an insolvent; or

(b) has been convicted of an offence which, in the opinion of the Governor, involves moral turpitude; or

(c) engages during his term of office in any paid employment outside the duties of his office; or

(d) is, in the opinion of the Governor, unfit to continue in office by reason of infirmity of mind or body; or

(e) has acquired such financial or other interest as is likely to affect prejudicially his functions as the State Chief Information Commissioner or a State Information Commissioner.

(4) If the State Chief Information Commissioner or a State Information Commissioner in any way, concerned or interested in any contract or agreement made by or on behalf of the Government of the State or participates in any way in the profit thereof or in any benefit or emoluments arising therefrom otherwise than as a member and in common with the other members of an incorporated company, he shall, for the purposes of sub-section (1), be deemed to be guilty of misbehaviour."

a good provision and prevents situations of conflicting interests in matters under consideration. However, in the Bill this provision is only applicable to the members of the Board and not to the Chairman or Deputy Chairman. This leaves space for matters involving conflict of interests to be decided by the Chairman/Deputy Chairman rendering this provision in particular and the Act in entirety ineffective. **Consideration may be given to amending this provision to include all members of the Board including the Chairman and Deputy Chairman and disallowing them from holding any office of profit nor having any party affiliations.**

52. Clause 14(8) of the Bill requires the disclosure of interest made by a member of the Board to be recorded. However, there is no mention of who is responsible for the recording. **Consideration may be given to entrusting a particular member with this responsibility in the Act to ensure the actual recording of the disclosure leaving no space for passing the buck.**

53. Clause 14(10) lists the powers of the Appeal Board (recommended to be replaced by the Information Commission) that can be exercised when dealing with an appeal. Clause 14(10)(d) grants the Appeal Board the power "*to compel the production and delivery of any document that it considers relevant or material to the appeal"* but "*not including document which is rejected by the Information Officer".* This provision defeats the very purpose of the appeal process. It is only through the power granted to it to compel the production of any document necessary from all the parties to the case under consideration that the Board can fairly decide if the information requested is exempt under the Act or has been unlawfully denied to the applicant or even if exempt calls for disclosure in larger public interest. **Consideration may be given to deleting the phrase "but not including document which is rejected by the Information Officer". Recommendation corresponding to this provision is provided below.**

54. Clause 14(11) states that every person summoned by the Appeal Board (recommended to be replaced by Information Commission) to attend its proceedings is *"legally bound"* to attend at the place and time specified in the summons. This provision does not take into account the possibility of the person not being able to appear in the date or time specified due to unavoidable circumstances like illness or occurrence of a natural disaster. In such circumstances adjournment of the hearing may be required. However care must be taken not to allow too many adjournment requests to unduly delay the disposal of the case. **Consideration may be given to allowing for an adjournment of the proceeding once provided there is a reasonable cause.**

55. **Indicate where the appeals against the decisions of the proposed Selangor Information Commission lie:** Clause 13 of the Bill states that "*an order made by the Appeal Board on an appeal before it shall be final, shall not be called into question in any court, and shall be binding on all parties to the appeal or involved in the matter"*. The provision that the decision of the Appeal Board (recommended to be replaced by the Information Commission, see para #43) shall be binding is a positive and welcome provision. However, the provision that the order of the Appeal Board shall not be called into question in any court is highly unsatisfactory. Ordinarily laws specify the name of the court where appeals against the decision of the appellate authority under any law shall lie. In the context of RTI laws the adjudicating bodies such as the Information Commissions act as specialist independent appellate bodies for the purpose of adjudicating over access disputes. So it is common for such laws to oust the jurisdiction of courts in relation to matters falling under the jurisdiction of such independent appellate bodies. For example, the Indian RTI Act ousts the jurisdiction of courts in relation to access disputes.[36] However

[36] S23 of Indian RTI Act: *"No court shall entertain any suit, application or other proceeding in respect of any order made under this Act and no such order shall be called in question otherwise than by way of an appeal under this Act."*

more than six decades of constitutional jurisprudence has established the position that any decision of administrative and quasi-judicial bodies is amenable to judicial review before the High Courts and the Supreme Court even though a specific provision regards ouster may exist in any law. The writ jurisdiction of these courts provides the scope for launching such a challenge. The Bangladesh RTI Act also ousts the jurisdiction of courts but the power of judicial review brings all decisions of the Bangladesh Information Commission within the jurisdiction of the Supreme Court.[37] **Consideration may be given to allow for the filing of an appeal against the decision of the proposed Selangor Information Commission before the High Courts /Selangor Federal Court of Malaysia.**

56. Clause 14(15) mentions fees payable in respect of the procedure of appeals to the Appeal Board (recommended to be replaced by the Information Commission). It is international best practice to collect only such fees that may be necessary for reproducing the requested information. No fees should be collected for an appeal to an information dispute as there is already a fee prescribed for the information itself. An appeal is only made following dissatisfaction on the part of the applicant to the information provided or if no information is provided. **Consideration may be given to amending this provision to remove the appeal fee payable by the applicant to the Appeal Board** (recommended to be replaced by the Information Commission)**.**

57. Clause 14(16) lays down the salaries and allowances of the members of the Appeal Board (recommended to be replaced by the Information Commission). The Board includes staff who support the work of the members of the Information Commission. **Consideration may be given to including the salaries and allowances of such supporting staff in this provision.**

58. It has been observed that instances of prolonged vacancies in adjudicating bodies such as the Information Commission can lead to unnecessary delays in disposal of cases and a great amount of inconvenience to citizens exercising their right to access information. In order to avoid this, the Bill must contain a provision for the timely filling of vacancies created or likely to be created in the Selangor Appeal Board (recommended to be replaced by Information Commission). This must be ensured by placing a duty on the Government of Selangor to initiate and complete the process of filling vaancies within a stipulated time frame. **Consideration may be given to including a provision for timely filling of vacancies in the Selangor Appeal Board (recommended to be replaced by Information Commission).**

***Recommendation:***

Please insert a new chapter relating to the constitution, powers and functions of the Selangor Information Commission as follows-

"**The Selangor Information Commission**

***14.(1) Constitution of the Selangor Information Commission:***

***(a)The Government of the State of Selangor shall, by notification in the Gazette, constitute a body to be known as the Selangor Information Commission to exercise the powers conferred on, and to perform the functions assigned to it, under this Act.***

***(b) The Selangor Information Commission shall consist of—***

***(i) the Chairman and Deputy Chairman; and***

[37] S29, "Bar against filing suit: No person shall, except preferring an appeal before an appellate authority or, as the case may be, lodging a complaint before the Information Commission under this Act, raise any question before any court for anything done or deemed to be done, any action taken or the legality of any order passed or any instruction made under this Act."

***(ii) such number members, not exceeding six, as may be deemed necessary.***

***(c) The Chairman, Deputy Chairman and members of the Information Commission shall be appointed by His Royal Highness the Sultan on the recommendation of a committee consisting of—***

***(i) the Chairman of the State Executive Council, who shall be the Chairperson of the committee;***

***(ii) the leader of the opposition in the State Assembly and***

***(iii) any member of the State Executive Council to be nominated by the Chairman of the State Executive Council.***

***(d) The general superintendence, direction and management of the affairs of the Selangor Information Commission shall vest in the Chairman who shall be assisted by the Deputy Chairman and members of the Board and may exercise all such powers and do all such acts and things which may be exercised or done by the Information Commission autonomously without being subjected to directions by any other authority under this Act.***

***(e) The Chairman, Deputy Chairman and members of the Information Commission 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.***

***(f) The Chairman, Deputy Chairman and members of the Appeal Board shall not be a Member of Parliament or Member of the Legislature of any State, as the case may be, or hold any other office of profit or connected with any political party or carrying on any business or pursuing any profession.***

***14(2) <u>Term of Office and conditions of service:</u>***

***(a) The Chairman of the Appeal Board shall hold office for a term of five years from the date on which he or she enters upon his or her office and shall not be eligible for reappointment:***

***Provided that no Chairman shall hold office as such after he or she has attained the age of sixty-five years.***

***(b)The Deputy Chairman / members of the Appeal Board shall hold office for a term of five years from the date on which he or she enters upon his or her office or till he or she attains the age of sixty-five years, whichever is earlier, and shall not be eligible for reappointment as Chairman/ member of the Appeal Board:***

***Provided that every Deputy Chairman/member shall, on vacating his or her office under this sub-section be eligible for appointment as the Chairman in the manner specified in sub-section (2) of section (14):***

***Provided further that where a Deputy Chairman/ member of the Appeal Board is appointed as Chairman, his or her term of office shall not be more than five years in aggregate as a Deputy/ member and the Chairman of the Appeal Board..***

***15. The Chairman, Deputy Chairman/ member of the Appeal Board may, at any time, by writing under his or her hand addressed to the President, resign from his or her office:***

***Provided that the Chairman, Deputy Chairman/ member of the Appeal Board may be removed in the manner specified under section S17 .***

***16. 1. <u>The salaries and allowances payable to and other terms and conditions of service of</u>—***

***(a) the Chairman shall be the same as that of the Chief Justice of the High Court;***

***(b) the Deputy Chairman/members shall be the same as that of a judge of the High Court:***

***Provided that if the Chairman, Deputy Chairman/ member, at the time of his appointment is, in receipt of a pension, other than a disability or wound pension, in respect of any previous service under Government of Selangor, his or her salary in respect of the service as the Chairman, Deputy Chairman/ member shall be reduced by the amount of that pension including any portion of pension which was commuted and pension equivalent of other forms of retirement benefits excluding pension equivalent of retirement gratuity:***

***Provided further that if the Chairman, Deputy Chairman/ member if, at the time of his or her appointment is, in receipt of retirement benefits in respect of any previous service rendered in a Corporation established by or under any Act or a Government company owned or controlled by the Government, his or her salary in respect of the service as the Chief Information Commissioner or an Information Commissioner shall be reduced by the amount of pension equivalent to the retirement benefits:***

***Provided also that the salaries, allowances and other conditions of service of the Chairman, Deputy Chairman/ member shall not be varied to their disadvantage after their appointment.***

***2. The Government of State of Selangor shall provide the Chairman, Deputy Chairman/ members with such officers and employees as may be necessary for the efficient performance of their functions under this Act, and the salaries and allowances payable to and the terms and conditions of service of the officers and other employees appointed for the purpose of this Act shall be such as may be prescribed.***

***17. <u>Removal of Chairman, Deputy Chairman and members of the Selangor Information Commission</u>***

***(1) Subject to the provisions of sub-section (15), the Chairman, Deputy Chairman/ member shall be removed from his or her office only by order of the Sultan on the ground of proved misbehaviour or incapacity after the Supreme Court, on a reference made to it by the Sultan, has, on inquiry, reported that the Chairman, Deputy Chairman/ member, as the case may be, ought on such ground be removed.***

***(2) The Sultan may suspend from office, and if deemed necessary prohibit also from attending the office during inquiry, the Chairman, Deputy Chairman/ member in respect of whom a reference has been made to the Supreme Court under sub-section (1) until the Sultan has passed orders on receipt of the report of the Supreme Court on such reference.***

***(3) Notwithstanding anything contained in sub-section (1), the Sultan may by order remove from office the Chairman, Deputy Chairman/ any member if the Chairman, Deputy Chairman/ member, as the case may be,—***

***(a) is adjudged an insolvent; or***

***(b) has been convicted of an offence which, in the opinion of the President, involves moral turpitude; or***

***(c) engages during his term of office in any paid employment outside the duties of his office; or***

***(d) is, in the opinion of the President, unfit to continue in office by reason of***

***infirmity of mind or body; or***

***(e) has acquired such financial or other interest as is likely to affect prejudicially his functions as the Chairman, Deputy Chairman/ member.***

***(4) If the Chairman, Deputy Chairman or any member in any way, concerned or interested in any contract or agreement made by or on behalf of the Government of Selangor or participates in any way in the profit thereof or in any benefit or emolument arising therefrom otherwise than as a member and in common with the other members of an incorporated company, he shall, for the purposes of sub-section (1), be deemed to be guilty of misbehaviour.***

***(5) In the event of the posts of the Chairman and the Deputy Chairman both falling vacant simultaneously the senior-most member of the Selangor Information Commission shall exercise the functions of the Chairman until such time as the State Government may appoint a new Chairman or Deputy Chairman and for the purposes of this Act be deemed to be the Chairman of the Selangor Information Commission,***

***(6) It shall be the duty of the Government of Selangor to fill up any vacancy, arising due to the retirement or resignation or removal of the Chairman, Deputy Chairman/ member, appointed under this Act, as expeditiously as possible and in any case no later than a period of ninety days from the date of commencement of such vacancy.***

***(7) The Chairman of the Selangor Information Commission shall have the power to constitute a bench comprising of one or more members of the Commission as may be necessary for the purpose of hearing and deciding an appeal received under Part IV of this Act.***

***(8) A member of a bench comprising of two members or more constituted in accordance with sub-section (7) may deliver a separate opinion affirming or dissenting from the decision of the majority of members.***

***(9) The Selangor Information Commission shall have the power to review its decision or order in any case when an error of law or fact is pleaded by any party within a period of one hundred eighty days from the date of such decision or order.***

***18.1. <u>Powers and functions of Selangor Information Commission</u>. — (1) Subject to the provisions of this Act, it shall be the duty of the Selangor Information Commission to receive and inquire into a complaint from any person,—***

***(a) who has been unable to submit a request to an Information Officer, either by reason that no such officer has been appointed under this Act, or because an Information Officer has refused to accept his or her application for information;***

***(b) who has been refused access to any information requested under this Act;***

***(c) who has not been given a response to a request for information or access to information within the time limit specified under this Act;***

***(d) who has been required to pay an amount of fee which he or she considers unreasonable;***

***(e) who believes that he or she has been given incomplete, misleading or false information under this Act; and***

***(f) in respect of any other matter relating to requesting or obtaining access to information under this Act.***

***(2) Where the Selangor Information Commission is satisfied that there are reasonable grounds to inquire into the matter, it shall initiate an inquiry in respect thereof.***

***(3) In an inquiry proceeding pursuant to a complaint received under sub-section (1), the onus to prove that a denial of a request was justified shall be on the Information Officer who denied the request.***

***(4) The Selangor Information Commission shall, while inquiring into any matter under this section, have the same powers as are vested in a civil court while trying a suit under the laws of the State of Selangor, in respect of the following matters; namely:—***

***(a) summoning and enforcing the attendance of persons and compel them to give oral or written evidence on oath and to produce the documents or things;***

***(b) requiring the discovery and inspection of documents;***

***(c) receiving evidence on affidavit;***

***(d) requisitioning any public record or copies thereof from any court or office;***

***(e) issuing summons for examination of witnesses or documents; and***

***(f) any other matter which may be prescribed.***

***(5) Notwithstanding anything inconsistent contained in any other Act or instrument having the effect of law for the time being in force in State of Selangor, the Selangor Information Commission may, during the inquiry of any complaint under this Act, examine any record to which this Act applies which is under the control of the public body, and no such record may be withheld from it on any grounds.***

***(6). (1) Notwithstanding anything inconsistent contained in any other law for the time being in force, the Selangor Information Commission shall during any inquiry initiated of its own accord or upon receipt of a complaint, under this Act have the power –***

***(a) to enter any premises occupied by any public body that is the subject of the inquiry;***

***(b) to conduct a search for any information that is the subject of the inquiry;***

***(c) to seize records, documents, files and any material defined in sub-section (a) of section (2) of this Act relating to information that are the subject of the inquiry;***

***(d) to examine any information seized from a public body under this section;***

***(e) to converse in private with any person in any premises entered pursuant to paragraph (a) and otherwise carry out therein such inquiries within the authority of the Appeal Board as may be appropriate.***

***(2) A public body that is the subject of an inquiry under this Act shall provide all reasonable assistance to Selangor Information Commission and any of their authorised representative to enable the smooth conduct of the inquiry and shall not withhold access to any information from the Selangor Information Commission or its authorised representative.***

***(7) A complaint under sub-section (1) shall be disposed of by the Selangor Appeal Board within ninety working days of the receipt of the complaint.***

***(8) An appeal against the decision of the appellate authority under section 9(1) shall lie with the Selangor Information Commission within ninety working days from the date on which the decision should have been made or was actually received:***

***Provided that Selangor Information Commission may admit the appeal after the***

***expiry of the period of ninety working days if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time.***

***(9) If the appeal or complaint filed before Selangor Information Commission relates to the information of a third party, the Selangor Information Commission shall give that third party a reasonable opportunity of being heard.***

***(10) In any appeal proceedings initiated under this section, the onus to prove that the denial of access to information was justified shall be on the Information Officer who denied such access.***

***(11) An appeal filed under this section shall be disposed of within ninety working days of the receipt of the appeal.***

***(12) The Selangor Information Commission shall exercise all powers specified in this section while deciding an appeal.***

***(13) In its decision on an appeal or complaint filed before it, the Selangor Information Commission shall have the power to—***

***(a) require the government agency or private body as the case may be to take any such steps as may be necessary to secure compliance with the provisions of this Act, including—***

***(i) by providing access to information, if so requested, in a particular form;***

***(ii) by appointing an Information Officer;***

***(iii) by publishing certain information or categories of information;***

***(iv) by making necessary changes to its practices in relation to the maintenance, management and destruction of records;***

***(v) by enhancing the provision of training on the right to information for its officials and employees;***

***(vi) by providing it with an annual report relating to compliance with the provisions of this Act;***

***(b) require the government agency or private body as the case may be to compensate the person filing the appeal or complaint as the case may be, for any loss or other detriment suffered;***

***(c) impose any of the penalties provided under this Act;***

***(d) reject the appeal or complaint as the case may be.***

***(14) The decision of the Selangor Information Commission shall be binding.***

***(15)The Selangor Information Commission shall give notice of its decision, including any right of appeal, to the person filing the complaint under sub-section (1) and the public body.***

***(16) An appeal against a decision of the Selangor Appeal Board shall lie before the High Court/Federal Court within a period of one hundred and twenty working days from the date of such decision.***

***(17) The Selangor Information Commission may also initiate of its own accord an inquiry, as may be appropriate, against any Government agency or private body into any matter relating to non-compliance with the provisions of this Act including but not restricted to any of the circumstances in sub-section (1).***

***(18) The Selangor Information Commission shall complete an inquiry initiated under sub-section (11) within such reasonable time as it may deem appropriate and shall exercise all such powers as are granted to it under this section in relation to such***

***inquiry.***

***(19) During or on completion of an inquiry initiated on complaint from any person or of its own accord, if it appears to the Selangor Information Commission that the practice of a government agency or private body in relation to the exercise of its functions under this Act does not conform with the provisions or spirit of this Act, it may give to the public body a recommendation specifying the steps which ought in its opinion to be taken for promoting such conformity.***

***(21) On completion of an inquiry, initiated of its own accord under sub-section (10), the Selangor Information Commission shall submit to the Legislature of Selangor a report of its findings along with any recommendations for ensuring better compliance with the provisions of this Act.***

***(22) On receipt of a report from the Selangor Information Commission under sub-section (14) the Legislature of Selangor may debate the findings and recommendations contained in the report and may call upon the President to take such action as may be necessary to ensure better compliance with the provisions of this Act.***

***(23) The Selangor Information Commission shall conduct an inquiry under this section in accordance with such procedure as may be prescribed in the Regulations."***

## Part V

## General

59. **An applicant must not be convicted or fined for so called "offences":** This Bill proposes to establish a mechanism for seeking and obtaining information for citizens in Selangor. The right to seek and obtain information is an internationally recognised basic human right. It is patently unfair to include in a law that gives effect to basic human rights harsh sanctions for simple technical defects such as providing false information about oneself. This provision is liable to be misused. If a person changes residence between the submission of an information request and actual receipt of the information from the public body, this can be treated as a case of providing false information. These kinds of misuse of the Act by unscrupulous elements in the bureaucracy will discourage people from accessing information thereby defeating its very purpose.

    Clause 15(1)(a) criminalizes use of information obtained under the RTI Act for purposes other than what has been mentioned in the application. We have provided a detailed recommendation (see para #21) that no reason or purpose should be provided by the applicant at the time of submitting an information request. When reasons are not pertinent for seeking information criminalizing usage of such information makes little sense. Such a provision can be misused to harass any socially sensitive citizen or a media-person who may select to publicise the information to seek accountability for the actions of the bureaucracy. If the information obtained under this law is sued for unlawful purposes such persons may be prosecuted under the relevant criminal laws or special laws applicable ordinarily to such cases. **Therefore consideration may be given to amending clause 15 to include the provisions for penalty and disciplinary action (see para #61) and deleting clause 16.**

60. **Power to enforce decisions must be stronger:** Clause 15 contains provisions for the prosecution of the applicant for what it terms as offences (using the information obtained for reasons contrary to what was given during the filing of the application and giving false information in the prescribed form) and also imposes a penalty of upto RM 50,000 (Fifty

Thousand Malaysian Ringgit) on the applicant for an offence committed but does not contain any provision for enforcing the public body to comply with the law. This is highly discouraging for the applicants who want to access information. This also leaves the office of the Appeal Board (recommended to be replaced by the Information Commission) relatively weak so far as its enforcing authority is concerned. The Appeal Board (recommended to by replaced by the Information Commission) must have the powers of sanction in order to secure compliance with its decisions. This is a key feature of international best practice legislation. In South Asia most of the RTI laws empower the independent appellate authorities to enforce their decisions through sanctions. In India the Information Commissions may impose monetary penalties on errant officials who violate the provisions of the RTI Act.[38] Repeated contraventions of the RTI Act will be dealt with through a recommendation to the concerned public authority for initiating disciplinary action against the erring officials.[39] If a requestor for information has suffered any financial loss or detriment, the Commissions may also order the public authority to compensate such person.[40] While the monetary fine is an individual liability of the public information officer, the public authority is liable to pay the compensation amount to the requestor. In Nepal the Information Commission may impose monetary fines for refusal of access or delay in furnishing the information without reasonable cause.[41] In Bangladesh the

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[38] S20, " Where the Central Information Commission or the State Information Commission, as the case may be, at the time of deciding any complaint or appeal is of the opinion that the Central Public Information Officer or the State Public Information Officer, as the case may be, has, without any reasonable cause, refused to receive an application for information or has not furnished information within the time specified under sub-section (1) of section 7 or malafidely denied the request for information or knowingly given incorrect, incomplete or misleading information or destroyed information which was the subject of the request or obstructed in any manner in furnishing the information, it shall impose a penalty of two hundred and fifty rupees each day till application is received or information is furnished, so however, the total amount of such penalty shall not exceed twenty-five thousand rupees:

Provided that the Central Public Information Officer or the State Public Information Officer, as the case may be, shall be given a reasonable opportunity of being heard before any penalty is imposed on him:

Provided further that the burden of proving that he acted reasonably and diligently shall be on the Central Public Information Officer or the State Public Information Officer, as the case may be."

[39] S20(2), " Where the Central Information Commission or the State Information Commission, as the case may be, at the time of deciding any complaint or appeal is of the opinion that the Central Public Information Officer or the State Public Information Officer, as the case may be, has, without any reasonable cause and persistently, failed to receive an application for information or has not furnished information within the time specified under sub-section (1) of section 7 or malafidely denied the request for information or knowingly given incorrect, incomplete or misleading information or destroyed information which was the subject of the request or obstructed in any manner in furnishing the information, it shall recommend for disciplinary action against the Central Public Information Officer or the State Public Information Officer, as the case may be, under the service rules applicable to him." .

[40] S19(8), "In its decision, the Central Information Commission or State Information Commission, as the case may be, has the power to—

X X X

(b) require the public authority to compensate the complainant for any loss or other detriment suffered".

[41] S32, "Punishment:

(1) If the Commission finds that Chief of public Body or Information Officer has held back information without any valid reason, refused to part with information, provided partial or wrong information or destroyed information; the Commission may impose a fin to such Chief or Information Officer from Rupees 1,000 to 25,000 and if such Chief or Information Officer is in a Post to be punished by Department, it may write to the concerned Body for departmental action.

(2) If the Chief of public Body or Information Officer delay to provide information which has to be provided on time without reason, they shall be punished with a fine Rupees 200 per day for the information is delayed to provide.

Information Commission is similarly empowered to impose penalties on erring officials and order the payment of compensation to the applicants.[42] **Consideration may be given to providing the proposed Selangor Information Commission with powers of sanction to enforce its decisions.**

61. **Imposing penalties and treatment of offences:** We have recommended above that the proposed Selangor Information Commission must have the powers of sanction to ensure compliance with its orders and for penalizing errant officers. Certain acts of commission or omission may result in the violation of the individual's right to access information. For actions such as delays, denials, lack of response without reasonable cause, demanding exorbitant fees etc., information officers must be made liable. At the same time taking up such matters in court will only result in delays in imposing sanctions. Instead the proposed Selangor Information Commission must have the powers to impose penalties on the erring officials directly (including deemed information officers in any case – see para #17 above). It must also have the power to recommend to the public body for launch of disciplinary proceedings to tackle officials who persistently contravene the provisions of this law. (For more details of penalty provisions in other countries see para #59 above). More grave actions such as falsification or destruction of records must be treated as offences triable in the appropriate court on the recommendation of the proposed Selangor Information Commission. Consequently the penalty must be higher and also include a jail term of one year.[43] **Consideration may be given to including a provision in the RTI Bill mentioning the grounds on which the proposed Selangor Information Commission may impose monetary fines on an information officer or recommend disciplinary action. Consideration may also be given to mentioning where offences identified under this law are triable.**

***Recommendation:***

**Section 15 in its entirety may be replaced by the following:**

***"Contraventions and Offences***

***56.(a) The Selangor Information Commission may impose a monetary fine not exceeding RM 50,000 (Fifty Thousand Malaysian Ringgit) on an information officer for any or all of the following contraventions of this Act:***

***(i) refusing to receive an information request without reasonable caus;.***

***(ii) not furnishing the requested information within the time limits stipulated in this Act without reasonable cause;***

***(iii) malafidely denying information;.***

***(iv) knowingly providing false, misleading or incomplete information.***

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(3) If the Commission writes to the concerned Body for Departmental action in accordance with Sub-section (1), the Public Body will have to take Departmental action against that Chief or Information Officer within three months and notify the Commission thereon.

(4) The Commission may impose a fine between NRS 5000 to 25000 considering that seriousness of misuse of information if any person is found misusing the information acquired from public Body instead of using it for purpose it was obtained for.

(5) The Commission may impose a fine up to Rupees 10,000 to the concerned person in case its decision or order in accordance with this Act is not obeyed." .

[42] S 11 (a)(vi), "At the time of taking decision under this section, the Information Commission shall have the following powers namely :

X X X

(vi) to give compensation for any loss or damage;".

[43] However if the offences listed under the proposed S15 attract a higher prison term or monetary fine under the existing penal laws of Selangor then the figures may be substituted accordingly.

***Provided that the Information Officer shall be given a reasonable opportunity of being heard before any penalty is imposed on him or her;***

***Provided further that the burden of proving that he or she acted reasonably and diligently shall be on the Information Officer.***

***(b)The Selangor Information Commission may recommend to the head of the public authority for launching disciplinary proceedings against an information officer for repeated contraventions of this Act.***

***(c) The following are offences under this Act triable in a court of appropriate jurisdiction upon the recommendation of the Selangor Information Commission:***

***(i) obstructing a public body or officer from the performance of a duty under this Act;***

***(ii) obstructing the Selangor Information Commission or any person authorised by it in the performance of a duty under this Act;***

***(iii) malafide destruction of information that is the subject of a request under this Act;***

***(iv) falsification of the records of a public body;***

***(d) A person convicted of any offence mentioned in subsection (c) may be sentenced to prison up to a maximum of one year or with a fine not exceeding RM 50,000 (Fifty Thousand Malaysian Ringgit), or with both."***

## New Provisions

**Records management**

62. The huge volume of information in government's hands requires that information be carefully managed so that authorities can locate and provide requested information in a timely and efficient way. In recognition of this fact, a new provision should be inserted in the Bill specifically requiring that *"Every public body is under an obligation to maintain its records in a manner which facilitates the right to information as provided for in this Act.* Consideration should also be given to empowering an appropriate body - perhaps the Chairman of the Appeal Board (to be replaced by the proposed Information Commission: see para #43) to develop guidelines or a Code on records management to this end. This has been done in the UK where, under s.46 of the *Freedom of Information Act*, the Lord Chancellor is responsible for developing a Code of Practice on records management[44]. Ensuring efficient records management is a major input towards institutionalising transparency in government. If records are not properly maintained or managed many difficulties will arise when requests for information are received in public bodies. In order to avoid such circumstances it is necessary to give the proposed Information Commission powers of oversight in relation to records management. **Consideration may be given to inserting a new clause on record management.**

***Recommendation:***

**Insert a new provision requiring appropriate record keeping and management**

[44] S.46 (1) of Freedom of Information Act of UK: Issue of code of practice by Lord Chancellor -
*"The Lord Chancellor shall issue, and may from time to time revise, a code of practice providing guidance to relevant authorities as to the practice which it would, in his opinion, be desirable for them to follow in connection with the keeping, management and destruction of their records".*

**systems to be implemented to ensure the effective implementation of the law.**

***(1) Every public body shall maintain all its records duly catalogued and indexed in a manner and the form which facilitates the right to information under this Act and ensure that all records that are appropriate to be computerized are, within a reasonable time and subject to availability of resources, computerized and connected through a network all over the country on different systems so that access to such records is facilitated;***

***(2) The Information Commission shall issue guidelines for the effective management and maintenance of records in a public body.***

***(3) Every public body shall submit a report every year and at such other times as may be required by the Information Commission containing details of the steps taken to improve the management and maintenance of its records and documents.***

## Proactive Disclosure

63. The Bill currently lacks a fundamental requirement and feature of best practice of right to information laws namely, provisions setting out proactive publication of certain information by all bodies covered by the Bill. The notion of a right to information holds within it the duty on public bodies to actively disclose, publish and disseminate, as widely as possible, information of general public interest – for example, updates about structure, norms and functioning of public bodies, the documents they hold, their finances, activities and any opportunities for consultation - even when not asked for. Proactive disclosure is a particularly important aspect of access laws because often the public has little knowledge of what information is in the possession of government and little capacity to seek it. It is a duty that is fundamental to increasing transparency in public bodies and thereby reducing corruption and increasing accountability of officials. Proactive disclosure also works to increase confidence in government, while at the same time reducing the number of request made under access legislation. Article 7 of the Mexican *Federal Transparency and Access to Public Government Information Law2002 and s.4 of the Indian Right to Information Act 2005* provide excellent models for consideration. They require disclosure of information such as the recipients of government subsidies, concessions and licenses, publication of all government contracts and information about proposed development works. Such provisions operate to assist the public to keep better track of what the government is doing as well as ensuring key activities of public bodies are always and automatically kept open to public scrutiny. Notably, although the initial effort of collecting, collating and disseminating the information may be a time-consuming exercise, over time it will be worth the investment as it will reduce requests in the long run because people will be able to easily access routine information without having to apply to public bodies. **Consideration may be given to adding a clause on proactive disclosure.**

64. It is International best practice to include an obligation on the public body to be accountable for their decisions in the proactive disclosure provision. **Consideration may be given to including in this section a provision that makes it mandatory for government agencies and private bodies to – *1) disclose all information and relevant facts while formulating any important policy, project or decision that may affect people or sections of people and 2) give reasons for its administrative or quasi-judicial decisions to persons affected by such decisions.***

65. This provision must also provide for broad dissemination of information. Specifically, information disclosed by each Ministry proactively must be accessible to all in society equally with little effort required. Therefore the only consideration should be that this proactively disclosed information must be effectively disseminated to reach everyone

including the unlettered, minority groups and those who are located in rural regions within its outreach. The most effective method of dissemination and the language spoken by the people must be guiding factors behind the dissemination efforts. **Consideration may be given to adding an explanation to the term 'disseminate' beneath clause 3(4) describing the form and manner of dissemination.**

***Recommendation*:**

**Insert clause 3 with a comprehensive proactive disclosure provisions simplified to facilitate easier implementation by public officials as follows:**

***"3 (1) Every department shall -***

***(a) publish within 5 months of the commencement of this Act:***

***(i) the powers and duties of its officers and employees;***

***(ii) the procedure followed in the decision making process, including channels of supervision and accountability;***

***(iii) the norms set by it for the discharge of its functions;***

***(iv) the rules, regulations, instructions, manuals and records, held by it or under its control or used by its employees for discharging its functions;***

***(v) a directory of its officers and employees;***

***(vi) the monthly remuneration received by each of its officers and employees, including the system of compensation as provided in its regulations***

***(vii) the budget allocated to each of its agency, indicating the particulars of all plans, proposed expenditures and reports on disbursements made;***

***(viii) the manner of execution of subsidy programmes, including the amounts allocated and the details of beneficiaries of such programmes;***

***(ix) particulars of concessions, permits or authorisations granted by it;***

***(x) details in respect of the information, available to or held by it, reduced in an electronic form;***

***(xi) the names, designations and other particulars of the Information Officers, and appeals bodies under the Act;***

***(xii) such other information as may be prescribed; and thereafter update their publications within such intervals in each year as may be prescribed;***

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

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

***(d) before initiating any project, or formulating any policy, scheme, programme or law, publish or communicate to the public in general or to the persons likely to be affected thereby in particular, the facts available to it or to which it has reasonable access which in its opinion should be known to them in the best interest of natural justice and promotion of democratic principles.***

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

***(i) The public works, goods acquired or rented, and the contracted service, including any sketches, scopes of service and/or terms of reference;***

***(ii) The amount;***

***(iii) The name of the provider, contractor or individual to whom the contract has been granted,***

***(iv) The periods within which the contract must be completed.***

***(2) Information shall be updated at least every 6 months, while regulations may specify shorter time frames 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 office to take steps in accordance with the requirements of clause (b) of sub-section (1) 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.***

***(4) All materials shall be disseminated taking into consideration the local language and the most effective method of communication in that local area and the information should be easily accessible ,including through notice boards, newspapers, public announcements, media broadcasts, the internet or any other means, including inspection at the offices of a public body.***

***(5) the head of the public body shall be responsible for the preparation and updating of information disclosed under this section.***

***Explanation.—For the purposes of sub-sections (3) and (4), "disseminated" means making known or communicated the information to the public through notice boards, newspapers, public announcements, media broadcasts, the internet or any other means, including inspection of offices of any public body.***

## Whistleblower protection

66. **Strengthen the protection for whistleblowers:** In order to support maximum information disclosure, the law should also provide protection for "whistleblowers", that is, individuals who disclose information in contravention of the law and/or their employment contracts because they believe that such disclosure is in the public interest. Whistleblower protection is based on the premise that individuals should be protected from legal, administrative or employment-related sanctions for releasing information on wrongdoing. The inclusion of strong whistleblower protection is important in order to send a message to the public and officials that the government is serious about opening up to legitimate scrutiny. **Consideration may be given to including a provision for the protecting persons who have disclosed, in good faith, information about the commission or intent to commit a breach of law by any person.**

***Recommendation:***

**Please insert a new provision in the form of section 18 as follows:**

***"S18. 1. No one may be subject to any legal, administrative or employment-related sanction, regardless of any breach of a legal or employment obligation, for releasing information on wrongdoing, or that which would disclose a serious threat to health, safety or the environment, as long as they acted in good faith and in the reasonable belief that the information was substantially true and disclosed evidence or wrongdoing or a serious threat to health, safety or the environment***

***2. For the purposes of sub-section (1), wrongdoing includes the commission of a criminal offence, failure to comply with a legal obligation, a miscarriage of justice,***

***corruption or dishonesty, or serious maladministration regarding a government agency or private body."***

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**Annexure 1: Best Practice Legislative Principles**

In CHRI's 2003 Report, *Open Sesame: Looking for the Right to Information in the Commonwealth* (see enclosed), the RTI team captured the key principles which should underpin any effective right to information law, drawing on international and regional standards, evolving State practice, and the general principles of law recognised by the community of nations. Article 19, an NGO which specifically works on right to information, has also developed "Principles on Freedom of Information Legislation" which were endorsed by the United Nations Special Rapporteur in 2000.[45] The Organisation of American States[46] and the Commonwealth[47] - both of which Grenada is a member - have also endorsed minimum standards on the right to information. These generic standards have been summarised into the five principles below, which we would encourage you to consider when you finalise your own right to information bill.

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 in the objectives clause of any Act. Every member of the public should have a specific *right* to receive information and those bodies covered by the Act therefore have an *obligation* to disclose 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 is gaining 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. 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. Section 4 of the Indian *Right to Information Act 2005* provides a useful model.

An Act should also provide that bodies covered be required to make every reasonable effort to assist applicants on request. "Every reasonable effort" is an effort which a fair and rational

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[45] Hussain, A. (2000) Report of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression submitted in accordance with Commission resolution 1999/36, Doc.E/CN.4/2000/63, 5 April. See also Ligabo, A., Haraszti, M. & Bertoni, E. (2004) *Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression*.

[46] See Organisation of American States - General Assembly (2003) *Access to Public Information: Strengthening Democracy*, resolution adopted at the fourth plenary session, June 10 2003, AG/RES.1932 (XXXIII-O/03).

[47] See (1999) Commonwealth Freedom of Information Principles, in *Promoting Open Government Commonwealth Principles And Guidelines On The Right To Know*, Report of the Expert Group Meeting on the Right to Know and the Promotion of Democracy and Development, Marlborough House, London, 30-31 March 1999.

person would expect to be done or would find acceptable. The use of "every" indicates that a public body's efforts are to be thorough and comprehensive and that it should explore all avenues in verifying the completeness of the response. The burden of proof should be on the public body to show that it has conducted an adequate search. Section 6 of British Columbia's *Freedom of Information and Protection of Privacy Act* provides a useful model.

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 absolute 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 (e.g., President) or bodies (e.g., the Electoral Commission) 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, consistently 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, Cheap and Quick 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. Officials should be tasked with assisting requesters. 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.

***Effective Enforcement: Independent Appeals Mechanisms & Penalties***

Effective enforcement provisions ensure the success of access legislation. 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.

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.

Best practice supports the establishment of a dedicated Information Commission with a broad mandate to investigate non-compliance with the law, compel disclosure 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. 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.

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 willful 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.

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

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.

***Monitoring and Promotion of Open Governance***

Many laws now include specific provisions empowering a 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 empowered to develop Codes of Practice or Guidelines for implementing specific provisions of the Act, such as those relating to records management. They are 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 incorporated in early forms of right to information legislation, it is increasingly common to include provisions in the law itself mandating a body to promote the Act and the concept of open governance. Such provisions specifically require that the government ensure that programmes are undertaken to educate the public and the officials responsible for administering the Act.

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**Annexure 2: Arguments in Support of the Right to Information**

When presenting any Bill in the State legislature, you may wish to draw on some common arguments as to why the right to information is so crucial to democracy, development and human rights. In fact, more than fifty years ago, in 1946 the United Nations General Assembly recognised that "Freedom of Information is a fundamental human right and the touchstone for all freedoms to which the United Nations is consecrated".[48] Soon after, the right to information was given international legal status when it was enshrined in Article 19 of the International Covenant on Civil and Political Rights which states: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and *to seek, receive and impart information and ideas through any media and regardless of frontiers*" (emphasis added). Over time, the right to information has been reflected in a number of regional human rights instruments, including the American Convention on Human Rights[49]. This has placed the right to access information firmly within the body of universal human rights law.

In addition to the overarching significance of the right to information as a fundamental human right which must be protected and promoted by the state, the following arguments in support of the right should also be recalled when advocating the right to parliamentarians and other key stakeholders:

***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 thoughtfully to choose its representatives on the basis of the strength of their record and that is able to hold their government accountable for the policies and decisions it promulgates. The right to information has a crucial role in ensuring that citizens are better informed about the people they are electing and their activities while in government. Democracy is enhanced when people meaningfully engage with their institutions of governance and form their judgments on the basis of facts and evidence, rather than just empty promises and meaningless political slogans.

***It supports participatory development*:** Much of the failure of development strategies to date is attributable to the fact that, for years, they were designed and implemented in a closed environment - between governments and donors and without the involvement of *people*. If governments are obligated to provide information, people can be empowered to more meaningfully determine their own development destinies. They can assess for themselves why development strategies have gone askew and press for changes to put development back on track.

***It is a proven anti-corruption tool*:** In 2004, of the ten countries scoring best in Transparency International's annual Corruption Perceptions Index, no fewer than eight 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

[48] UN General Assembly, (1946) Resolution 59(1), 65th Plenary Meeting, December 14.

[49] See Art. 13(1), *American Convention on Human Rights*, 1969, Costa Rica, OAS Treaty Series No. 36, 1144 U.N.T.S. 123.

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 elected officials. 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, 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.

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