

Analysis of the FOIA Coalition – Malaysia's *Right to Information Bill 2006* For the State of Kelantan

Recommendations for Amendments

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

--- Kofi Annan



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Commonwealth Human Rights Initiative
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ANALYSIS OF THE STATE OF KELANTAN'S DRAFT RIGHT TO INFORMATION BILL 2006

1. The Malaysian Freedom of Information Advocates Coalition has drafted a Right to Information Bill (RTI Bill) for the Malaysian state of Kelantan. A copy of the draft Bill was forwarded to the Commonwealth Human Rights Initiative (CHRI) for comment. CHRI understands that the Bill has been drafted with a view to submitting it to the Kelantan State Assembly to be passed as law. CHRI welcomes the opportunity to comment on the Bill. Based on CHRI's experience in drafting and reviewing access to information legislation across the Commonwealth, this paper suggests some amendments to the Bill to ensure that the final legislation which is drafted is in line with recent international best practice on access to information and is appropriate for the specific circumstances of Kelantan.
2. CHRI takes this opportunity to support the Coalition's efforts to ensure wide consultation with the public and other key stakeholders before the Bill is finalised and tabled in Parliament. Experience has shown that a participatory law-making process can be a major factor in laying a strong foundation for an effective right to information regime. Implementation is strengthened if right to information laws are 'owned' by both the government and the public. Best practice requires that policy-makers proactively engage civil society groups and the public during the legislative process. This can be done in a variety of ways, for example, by: setting up a committee of stakeholders (including officials and public representatives) to consider and provide recommendations on the draft Bill; inviting submissions from the public before Parliament votes on the Bill; convening public meetings to discuss the proposed law; and strategically and consistently using the media to raise awareness and keep the public up to date on progress.

ANALYSIS OF DRAFT RIGHT TO INFORMATION BILL 2006

3. Overall, CHRI's assessment is that the RTI Bill is quite comprehensive. It is very positive that the draft Bill draws heavily on the best practice contained in the Model Freedom of Information Law spearheaded by Article 19. Although CHRI was a party to the drafting of the Model Law, since it was agreed in 1999 CHRI has witnessed a number of important developments in the area of access legislation across the world which have extended and broadened the right to information. CHRI draws on recent lessons learned and practical implementation experiences to suggest additions and amendments which the Coalition may want to consider which CHRI believes could strengthen the Bill; some are procedural/technical but others are more substantive (for example, strengthening proactive publication provisions and penalty provisions).

PART I: DEFINITIONS AND PURPOSE

Section 1 - Definitions

Definition of "commission" and "commissioner"

4. Section 1 defines "commission" and "commissioner" by referring to the Information Commission in Part V. However, throughout the draft Bill, different terms are used – both "state information commission" and "information commission" (see for example section 6(2) for use of "state information commission"). In order to leave room for the possibility of a national freedom of information law, and to avoid confusion if this happens, it may be better to call the Kelantan Information Commission the "state information commission" and the information commissioners, "state information commissioners".

Definition of “minister”

5. The term “minister” is defined in section 1 but it is not used in the rest of the Bill. Instead, the term “State Executive Committee” has been substituted. Accordingly, the definition of Minister in section 1(e) should be replaced with a definition of State Executive Committee.

Definition of “public body”

6. The term “public body” is defined in section 1 but the term “public authority” is used occasionally throughout the draft Bill. These references should all be made consistent.

Definition of “publish”

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

Definition of “personal information”

8. Consideration needs to be given to the definition of “personal information” because the current clause may inadvertently be overly broad in its application, when read in conjunction with the exemption in section 23 because it requires only that the information “relates” to a living individual who can be identified via that information. Such a vague definition may allow for abuse of the section 23 exemption by public officials. Consideration should be given to amending section 1(h) to tighten the scope and definition of personal information within the law itself to prevent misinterpretation. Section 3(II) of the Mexican *Federal Transparency and Access to Public Government Information Law* provides a good example:

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

Recommendations

- Amend all references in the Bill to “Information Commission” and “Information Commissioners” to “State Information Commission” and “State Information Commissioners”.
- Replace the definition of “Minister” in section 1(e) with a definition of “State Executive Council”.
- Ensure all references in the Bill are to a “public body” not a “public authority”.
- Broaden the definition of “publish” in section 1(h) to ensure that when read in conjunction with section 17 (Publication Schemes) public bodies are required to widely disseminate information including, but not limited to, by making information accessible through notice boards, newspapers, public announcements, media broadcasts, the internet or any other means, including inspection of offices of public authorities.
- Narrow the definition of “personal information” in section 1(i) to reduce the possibility of abuse of the related exemption in section 23.

- *Review the drafting of the clauses in section 2(a).*

Section 2 – Purpose

9. The purposes currently included in section 2 are commendable, but there is a drafting error in the wording of clauses of section 2(a) which needs to be fixed for the clause to make sense. Additionally, consideration should be given to referring to more general purposes such as promoting public accountability, enabling more effective public participation and entrenching government transparency. While such statements are not usually enforceable, nonetheless they can be a useful guide for the judiciary if the law is ever challenged in the courts.

Recommendations

- *Review the wording of section 2(a) to ensure it makes sense.*
- *Consider including broader purposive clauses which reflect the importance of access to information for good governance.*

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

Sections 3 and 4 – Freedom of Information and the General Right of Access

10. It is not entirely clear why sections 3 and 4 are separate as both deal directly with the breadth of the right to access information. For ease of application, consideration may be given to combining the two provisions. If necessary consideration could then be given to dealing with the rights of individuals in respect of public and private bodies in separate clauses. At a minimum consideration should be given to making it explicit in section 3(1) that people can access information from private bodies, not just public bodies. For example, s.3(1) could state:

“Every person has the right to access information held by or under the control of:

- (a) public bodies; and*
- (b) private bodies where the information is necessary for the exercise or protection of a right.”*

11. In respect of the right to access information from private bodies mentioned in section 2(b) and more substantially in section 4(2), it is commendable that the Federal Constitution of Malaysia has been referred to, however the Constitution’s protection of human rights is somewhat limited in comparison to the rights Malaysia has committed to internationally. Therefore, to ensure that the provision is as broad as possible, it is suggested that the Bill refer to “information necessary for the exercise of protection of any right or liberty recognised under the Federal Constitution of Malaysia, Malaysian common law or any international treaty to which Malaysia is a signatory.

Recommendations

- *Amend section 3 to explicitly recognise the right to access information from private as well as public bodies.*
- *Consider combining sections 3 and 4 to reduce confusion and ensure clarity about people’s rights re public bodies and private bodies.*
- *Amend section 2(b) and section 4(2) to permit access to information “necessary for the exercise of protection of any right or liberty recognised under the Federal Constitution of Malaysia, Malaysian common law or any international treaty to which Malaysia is a signatory”.*

Section 5 – Legislation Prohibiting or Restricting Disclosure

12. Section 5(1) states that the Bill will apply to the exclusion of other State legislation. While it is positive that the Bill appears to attempt to place itself above other inconsistent secrecy legislation, it would be useful if that were stated more explicitly. Officials applying the law need to be clearly directed that the new openness law “overrides all other inconsistent legislation”.
13. At the very least, consideration should be given to amending the wording of section 5(1) to account for the possibility of a national law being passed and to indicate how a state law will interact with a contrary national law. Ideally, the State law should apply to the exclusion of federal legislation, where such legislation is narrower.

Recommendations

- Amend section 5(1) to:
 - Make it explicit that the law overrides all other inconsistent legislation.
 - Take account of the possibility of national access legislation and indicate how such legislation will interact with the state law.

Section 6 – Public and Private Bodies

14. The definitions of public and private bodies are well drafted and in line with best practice internationally. However, the drafting of the definition of a public body in section 6(1) creates confusion about the applicability of the definition to federal and state bodies:
- Section 1(a) – Does the state legislature have the power to apply the provisions a State law to a body constituted under the Federal Constitution and therefore, potentially funded and/or administered by the national government?
 - Section 1(b) – If the answer to the question above is yes, then 1(b) should clarify that public bodies include bodies established by both federal and local statute.
 - Section 1(c) – To the branches of which level of government does the clause refer – local, state and/or federal?
 - Section 1(e) – Does this apply to bodies carrying out a function of the federal government?

Recommendation

Reconsider the drafting of section 6(1) to ensure that the definition of public bodies is appropriate for a State Bill and does not inadvertently – and potentially unconstitutionally – attempt to cover Federal public bodies.

Section 7 – Records

15. While it is positive that the current definition of “records” is relatively broadly, it could be useful to explicitly include a reference to correspondence, file notings and electronic/computer data whether or not said data has been collated as requested. A greater problem is that the definition still potentially excludes access to information such as materials used to construct buildings/roads/etc or samples. In developing country contexts in particular, access to such information has been extremely useful in ensuring that public works have been properly undertaken (see in India where people have used the inspection power in the *Right to Information Act 2005* to scrutinise public works and expose corruption). Consideration should be given to broadening the definition of information to include access to information in the form of samples and models.

Recommendations

- *Amend section 7(1) to specifically include correspondence, file notings and electronic/computer data whether or not said data has been collated and to refer to the collection and inspection of samples.*
- *Accordingly, consider including a definition of “access” in section 1 which specifies that access includes copies of records, inspection of records and taking samples.*

Section 8 – Request for Information

16. Section 8 is a crucial provision because it sets out the actual process for the public to request access to a document. The procedures for requesting information outlined under section 8 are very strong. However, CHRI recommends a few minor amendments to further strengthen the provisions under section 8.

Oral requests

17. While it is extremely positive that section 8(3) allows for oral requests where a person is unable to make a written request due to disability or illiteracy, this provision could be strengthened to ensure that officials also provide reasonable assistance to the person free of charge. Depending on the local circumstances, it may also be appropriate for oral requests to be permitted more generally, if for example, geography may make it difficult in practice for people to make applications in writing (eg. because the post is unreliable or because telephone requests will expedite the process).

Application process

18. It is understandable that section 8(5) permits the transfer of applications from ordinary officials to Information Officers, as they will presumably be better trained on applying the law and assisting requesters, but consideration needs to be given to requiring that any such transfer be notified to the requester in writing with relevant contact details provided so that the requester can easily follow up if necessary. In practice, such information may be included in any receipt issued under section 8(7)

19. Section 8(6) permits bodies to develop application forms which must be used by requesters. While the provision requires that the forms do not “unreasonably delay requests or place an undue burden” on requesters, nonetheless, in practice this requirement will be hard to regulate. Are requesters expected to make an appeal to the Information Commissioner where they believe the form *has* placed an unfair burden on them or unreasonably delayed their application?

20. For absolute clarity, section 8(7) could usefully specify that any receipt needs to be in proper written form – to ensure that officials provide a reliable form of receipt. More importantly, the provision should impose a time limit for receipts so that they are provided within no more than five days. Otherwise, experience in other jurisdictions has shown that officials may delay issuing receipts, which then make it harder for requesters to demand timely access because they have no record of the date they made their application.

Recommendation

- *Consider amending section 8(3) to permit oral applications from any person.*
- *Where an application is transferred under section 8(5), consider requiring that the transfer should be notified to the requester and contact details of the Information Officer provided to the requester accordingly.*
- *Delete section 8(6) because in practice, it may still place an undue burden on requesters. No form should be required so long as sufficient information is provided by requesters to enable the information to be located.*
- *Amend section 8(7) to impose a time limit of five days for the provision of receipts and specify that receipts must be in proper written form.*

Section 9 – Time Limits for Responding to Requests

21. The time limits in section 9 are generally appropriate, however it is recommended that the provision under section 9(3) for extending the time limit for dealing with voluminous requests be reconsidered. In cases where a request is genuinely too large to process without unreasonably interfering with the public authority's workload, it is preferable that public and private bodies first be required to consult applicants and assist them to narrow their search, if possible. This could be done either by contacting them over the telephone or inviting them to inspect the records and identify those that are specifically required. Thereafter, if the application still can't be processed within the 20 day time limit then public or private bodies should consider extending the time limit, recording the reasons for doing so in writing. To minimise the possibility of abuse of the provision, consideration could also be given to requiring any extension of the time limits to be approved by the Information Commission.

Recommendation

Amend section 18(3) to require that a public or private body may only extend the time limit for dealing with requests:

- *Subject to the public or private body making every effort to first assist the applicant to modify his/her request if possible.*
- *Provided that the Information Commission has approved the extension.*

Section 10 – Notice of Response

22. Section 10 sets out in detail the content of notices to requesters on the outcome of their applications to either private or public bodies. However, it is confusing that section 10 has two separate sub-sections dealing with notices from public bodies and private bodies. Ideally the information to be given by both public and private bodies would be the same and could be condensed into one provision. Accordingly:

- Sections 10(1) and (2) should be combined. At the same time, this will deal with the current deficiency in section 10(2) whereby private bodies are not required to provide information on any right of appeal. This is not appropriate and should be amended.
- Sections 10(1)(b) and s.10(2)(b) – which are virtually identically – will be amended to require that any rejection notice specifies the provision of the law being relied upon and any material questions of fact.
- Section 10(1)(c) – which only applies to notices from public bodies – will be reworded as necessary.

23. Section 10(3) should clarify the time within which the communication of the information should take place, as 'forthwith' is open to abuse – the body concerned may easily argue

that 'forthwith' is subject to their time and resources and thereby delay giving access. Section 7(1) of the *Right to Information Act 2005 India* provides that access to the information must be given 'as expeditiously as possible, and in any case within thirty days'. Given that the state of Kelantan is relatively small, this could in fact be less – perhaps even 20 days.

Recommendations

- *Combine sections 10(1) and (2) into one subsection that deals with a notice of response that shall be given by both private and public bodies.*
- *Insert into section 10 a requirement that the reasons provided for a refusal to grant access to information, specify which provisions of this Act are relied on to deny access and applying any material questions of fact. .*
- *Amend section 10(3) to provide that that communication of the information must take place within 20 days of the response.*

Section 11 - Fees

Reasonable fees

24. Section 11(1) needs to make it explicit that the rates should be set with a view to ensuring that the costs imposed for access are not so high as to deter potential applicants. At the most, fees should be "limited only to cost recovery, with no additional margin for profit, and a maximum limit should be imposed".
25. Section 11(1) currently permits costs to be charged for the time taken to "prepare" the information. However, best practice supports that charges should only cover reproduction costs, not collation/compilation time. Imposing fees for this could easily result in prohibitive costs, particularly as it gives the power to bureaucrats to potentially deliberately drag their heels when collating information in order to increase fees.

Fee Waiver

26. It is positive that section 11(4) allows fees to be waived where the cost of collecting the fee exceeds the amount of the fee itself. However, there are other circumstances in which fees should be waived.

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

Fee Regulations

27. Section 11(3) should be amended to make it clear that the Minister must make rules in respect of fees in collaboration with the Information Commission. At the very least, the Bill should specify that each public body is not permitted to set their own fees. This will undoubtedly lead to inconsistencies, and resistant bodies may use fees as one way of deterring requests. In accordance with common practice, the relevant fees regulation will

set out the amounts payable for copies (depending on the size of the paper), the costs of floppies or CDs, the cost of inspection time and the cost for taking samples.

Recommendation

- *Amend section 11 (1) to make it explicit that “any fees imposed should not be prohibitively high, so as to defeat the intention of the law” and to exclude preparation time from the fee payable for access.*
- *Specify in section 11(2) that the Information Officer will have the power to waive fees, for example, where imposing a fee would cause financial hardship to an individual or where access is in the public interest.*
- *Insert a new provision requiring that fees are automatically waived where the time limits in section 9 are not complied with.*
- *Amend section 11(3) to make it explicit that only the Minister and the Information Commissioner together may prescribe fees under the law, and no public body may set their own fee schedule.*

Section 12 – Means of Communicating Information

Taking samples

28. If the definition of “records” in section 7 is amended to include the right to inspect works and to take samples of materials, then section 12 will need to be reworked to reflect that people may want to access information that is not in documentary or electronic form.

Providing information in the form requested

29. It is understandable that there may be cases where a request is genuinely too large to process without unreasonably interfering with a public authority’s workload. However, section 12(3) needs to be reworded to make it clear that in such situations, the public or private body should: (a) be required to consult the applicant and assist them to try to narrow their search and (b) should not be allowed to reject the request, but should only be allowed to provide the information in a form which is less burdensome. As the provision is currently worded, it does not make it clear that the body must still supply the information, but simply in a different form. A public or private body should not be able to reject applications simply because of the anticipated time it will take to process them. Proposed wording is suggested below:

- (1) *Where a public authority is of the opinion that processing the request would substantially and unreasonably divert the resources of the public authority from its other operations, the public authority shall assist the applicant to modify his/her request accordingly.*
- (2) *Only once an offer of assistance has been made and refused can the public authority reject the application on the ground that processing the request would substantially and unreasonably divert the resources of the public authority from its other operations”:*

Recommendation

- *Amend section 12(2) to clarify that forms of access include taking a sample of materials and inspecting public works.*
- *Amend section 12(3) to provide that where a request for information is voluminous or likely to interfere with the activities of the body, the public or private body must make every effort to assist the applicant to modify his/her request accordingly, but if that is not possible, may then provide the information in another more convenient form.*

Section 13 – If a Record is Not Held

30. Section 13(1) provides for the transfer of information from an officer of the public body to the Information Officer when they do not believe they have the information, from which point the Information Officer will deal with the request.

- To ensure that this provision does not result in unreasonable delay in practice, section 13(1) should clarify that the official should transfer the application to the Information Officer as soon as possible, but within no more than five days.
- In order to make it clear who is responsible for what activities and who can be held accountable when, it should also be specified either in section 13 or elsewhere in the Bill that the official who receives a request must either process the application themselves or transfer the application to the Information Officer who will deal with it forthwith.

31. Section 13(2) deals with transfers of requests, where the information requested is not held by the public body which received the request.

- While it is positive that section 13(2) requires officials to notify requestors where an application has been transferred, the clause should be amended to make it explicit that requestors be notified of the transfer as soon as practicable but no later than five days from the date of the transfer.
- Consideration should be given to adding another section that deals with the case where no public body is believed to hold the information requested. Ideally, to prevent abuse of the provision, a statutory declaration should be signed by the Head of the public body or the Information Officer where it is claimed that no public body holds the information. This will ensure that officials take their responsibilities more seriously and make every effort to locate the information.

32. Section 13(3) states that where an application is transferred, the time limits for processing the request start again. This provision is ripe for abuse, and could easily result in Information Officers transferring sensitive applications from one body to the next in an attempt to deliberately delay an official response. This is not justifiable.

Recommendation

- *Insert a provision to make it explicit that the official who receives a request must either deal with it themselves forthwith or transfer it to the Information Officer.*
- *Amend section 13(1) to specify that internal transfer to an Information Officer should be done “as soon as practicable, but within no more than five days”.*
- *Amend section 13(2) to specify that:*
 - *Public bodies notify requestors in writing where a request for information is transferred “as soon as practicable and no later than five days of the transfer”.*
 - *Where the Information Officer believes that no public body holds the information*

requested, the Head of the public body or the Information Officer shall sign a statutory declaration to that effect.

- *Delete section 13(3).*

Section 14– Vexatious, Repetitive or Unreasonable Requests

33. Best practice requires that no application shall be rejected unless the information requested falls under a legitimate and specifically defined exemption. Information that does not fall within an exempt category cannot be denied. Accordingly, section 14(1) which permits non-compliance with a request on the grounds that the “*request for information which is vexatious or where it has recently complied with a substantially similar request*” should be deleted. This provision could too easily be abused, particularly by resistant bureaucrats, who are used to a culture of secrecy and whom may be of the opinion that any request for information from the public is vexatious. If this clause is retained, at the very least the provision needs to be amended to clarify what constitutes the term “vexatious” and “a substantially similar request”.
34. Section 11(2) allows applications to be rejected by a public or private body because processing would “*unreasonable divert its resources*”. While it is understandable that there may be cases where a request is genuinely too large to process without unreasonably interfering with the public or private body’s workload in such cases the public or private body should be required to consult the applicant and assist them to try to narrow their search. Applications should not be summarily rejected simply because of the anticipated time it will take to process them or would unreasonably divert their resources.

Recommendations

- *Section 11(1) should be deleted.*
- *Section 11(2) should be deleted or at least amended so that where a public or private body is of the opinion that processing the request would substantially and unreasonably divert its resources from its other operations, the public authority shall assist the applicant to modify his/her request accordingly. Only once an offer of assistance has been made and refused can the public or private body reject the application on this ground.*

PART III: MEASURES TO PROMOTE OPENNESS

Section 15 – Guide to Using the Act

35. Section 15 requires the Information Commissioner to compile a guide on how to exercise one’s rights using the Act, in many languages, updated regularly, disseminated widely and made available in forms that are accessible to disabled or illiterate people. This is a very positive provision, covering all the aspects of publishing a guide, however, there is a great deal of leeway as to when the guide should be published, what it should include, what languages it should be published in at a minimum and how regularly it should be updated. Although the provisions cover these aspects to an extent – requiring them to be done as soon as practicable, in as many languages as practicable and on a regular basis – these terms are open to interpretation and again leave room for abuse. Although these phrases may be used in other legislation where there is a high degree of good faith in the government to implement the law, this good faith is at times lacking when it comes to right to information legislation. Therefore, it is recommended that these aspects are clarified. Section 10 of the South African *Promotion of Access to Information Act 2000* provides a good example of how to easily include this level of detail in the law:

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

Recommendation

Amend section 15 to:

- *Include more detail as to the contents of the guide.*
- *Provide for a minimum time frame within which the guide to using the Act will be updated and published, for example, every 2 years.*
- *Provide for which languages the guide should be published in at a minimum.*

Section 17– Publication Schemes

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

37. Section 17 requires public bodies to establish a "publication scheme" that establishes what information they will proactively publish and how the information will be made available. Although section 17 does establish a basic regime of proactive disclosure, it suffers from the fact that it largely relies on each public authority to determine its own scheme, and avoids setting any basic minimum of information which all public bodies must meet. Considering the Malaysian bureaucracy's historical reluctance to disclose information, allowing public bodies to set the limits on their own publication schemes could substantially reduce their usefulness. While the Information Commission is required to approve all publication schemes, this could be a very onerous requirement in practice if no guidelines are provided in the Bill at all. The only provision that prevents the public body publishing a scheme that provides no information is section (3) which requires the *public body itself* to have regard to the public interest in developing their scheme, but this may well be difficult to enforce.

38. It is recommended that in addition to the publication scheme mechanisms established, section 17(2) should be amended to include a minimum list of types of information that must be published by the public body. Section 4 of the new Indian *Right to Information Act 2005* and Article 7 of the Mexican *Federal Transparency and Access to Public Government Information Law 2002* provide excellent models for consideration. They require the disclosure of information such as the recipients of government subsidies, concessions and licenses, publication of all government contracts and information about proposed development works. Such provisions operate to assist the public to keep better track of what the government is doing as well as ensuring key activities of public bodies are always and automatically kept open to public scrutiny.
39. In accordance with the recommendation above, section 17(2) should also provide that all the proactively disclosed information must be regularly updated. Notably, some of the information which is being collected and published may change very often, such that it could be terribly out of date if it is not updated very regularly. Accordingly, a maximum time limit of six months should be allowed for updating and the rules should prescribe shorter time limits for specific categories of information, as appropriate (for example, new government contracts should be published weekly or monthly).
40. In line with the role the Information Commission has been given as an overseer of the proactive disclosure requirements, consideration could be given to requiring the Information Commissioner to publish a guide to assist public bodies in publishing information proactively under section 17 of the Bill. Such a guide to be published within no more than six months of the Act coming into force, and thereafter updated regularly, so that early on in the Act's implementation, public bodies have guidance on how best to meet their proactive disclosure obligations.

Recommendation:

- *Amend s.17(2) to include additional proactive disclosure obligations based on Indian & Mexican laws:*
 - “(1) Every public body shall*
 - (a) publish within 3 months the amendments coming into force:*
 - (i) the powers and duties of its officers and employees;*
 - (ii) the procedure followed in the decision making process, including channels of supervision and accountability;*
 - (iii) the norms set by it for the discharge of its functions;*
 - (iv) the rules, regulations, instructions, manuals and records, held by it or under its control or used by its employees for discharging its functions;*
 - (v) a directory of its officers and employees;*
 - (vi) the monthly remuneration received by each of its officers and employees, including the system of compensation as provided in its regulations*
 - (vii) the budget allocated to each of its agency, indicating the particulars of all plans, proposed expenditures and reports on disbursements made;*
 - (viii) the manner of execution of subsidy programmes, including the amounts allocated and the details of beneficiaries of such programmes;*
 - (ix) particulars of concessions, permits or authorisations granted by it;*
 - (x) details in respect of the information, available to or held by it, reduced in an electronic form;*
 - (xi) the names, designations and other particulars of the Public Information Officers, and appeals bodies under the Act;*
 - (xii) such other information as may be prescribed;*
and thereafter update there publications within such intervals in each year as may be prescribed;
 - (b) publish all relevant facts while formulating important policies or announcing the*

- decisions which affect public;*
- (c) *provide reasons for its administrative or quasi judicial decisions to affected persons;*
 - (d) *before initiating any project, or formulating any policy, scheme, programme or law, publish or communicate to the public in general or to the persons likely to be affected thereby in particular, the facts available to it or to which it has reasonable access which in its opinion should be known to them in the best interest of natural justice and promotion of democratic principles.*
 - (e) *Upon signing, public authorities must publish all contracts entered into, detailing at a minimum for each contract:*
 - (ii) *The public works, goods acquired or rented, and the contracted service, including any sketches, scopes of service and/or terms of reference;*
 - (iii) *The amount;*
 - (iv) *The name of the provider, contractor or individual to whom the contract has been granted,*
 - (v) *The periods within which the contract must be completed.*
- (2) *Information shall be updated at least every 6 months, while regulations may specify shorter timeframes for different types of information, taking into account how often the information changes to ensure the information is as current as possible.*
- (3) *It shall be a constant endeavour of every public authority to take steps in accordance with the requirements of 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.*
- *Insert a new provision requiring the Information Commissioner to publish a guide on proactive disclosure within six months of the law coming into force.*

Section 18 – Maintenance of Records

41. The huge volume of information in governments' hands requires that information be carefully managed so that authorities can locate and provide requested information in a timely and efficient way. In this context, it is positive that section 18(1) requires all public bodies to properly maintain their records. However, section 18(1) should more explicitly require that appropriate record keeping and management systems are in place "to ensure the effective implementation of the law". Section 6 of the *Pakistan Freedom of Information Ordinance 2002* provides useful guidance in this context, specifically requiring computerisation of records and networking of information systems:
- Computerisation of records - Each public body shall endeavour within reasonable time and subject to availability of resources that all records covered by the provisions of this Ordinance are computerised and connected through a network all over the country on different system so that authorised access to such records is facilitated.*
42. Section 18(2) requires public bodies to put in place procedures for the correction of personal information. While this is a positive step forward, consideration should be given to including more detail in the Bill as to what minimum requirements there must be for any such regime. The NGO, Privacy International (www.privacyinternational.org), may be able to provide assistance in this regard.
43. It is positive that section 18(3) empowers the Information Commissioner to develop a Code of Practice on Records Management. However, a time frame within which the first Code of Practice needs to be published is left unstated relying on the Commission to publish it when they feel the need. International best practice provisions stipulate a time frame for publishing such a Code within twelve months of the Act's commencement. An example of this is in the United Kingdom, where, under section 46 of the *Freedom of Information Act 2000*, the Lord Chancellor is responsible for developing a Code of Practice on Records Management.

Recommendations

- *Amend section 18(1) to require every public body “to maintain its records in a manner which facilitates the right to information as provided for in this Act”, including requiring bodies to computerise records and network information systems;*
- *Clarify the content of the requirements under section 18(2).*
- *Amend section 18(3) to include a time frame within which the Commission must publish the initial Code of Practice.*

PART IV: EXCEPTIONS

Section 20 – Public Interest Override

44. It is extremely positive that all exemptions outlined in the Act are subject to the blanket “public interest override” in section 20, whereby a document which falls within the terms of a *general* exemption provision should still be disclosed if the public interest in the *specific* case requires it. This ensures that every case is considered on its individual merits and public officials do not just assume that certain documents will always be exempt. It ensures that the “public interest” is always at the core of a right to information regime. However, to ensure that the provision is properly applied, it is recommended that section 20 make it explicit that the provision applies to both public and private bodies.
45. In addition, the word “may” should be changed to “must” so that there is no confusion that the body is obliged to disclose the information if disclosure is in the public interest.
46. The meaning of “public interest” is variable according to the facts of each case. However, consideration may be given to including a *non-exhaustive* list of factors which may be taken into consideration when weighing the public interest, to give officials some guidance on what they should be taking into account when weighing the public interest.

Recommendation

- *Amend section 20 to clarify that both public and private bodies must to disclose information in the public interest.*
- *Consider inserting an additional clause giving some – non-exhaustive – guidance on what can be considered when weighing the public interest:*

In determining whether disclosure is justified in the public interest, the public authority shall have regard to considerations, including but not limited to, obligations to comply with legal requirements, the prevention of the commission of offences or other unlawful acts, miscarriage of justice, abuse of authority or neglect in the performance of an official duty, unauthorised use of public funds, the avoidance of wasteful expenditure of public funds or danger to the health or safety of an individual or the public, or the need to prepare and protect the environment, and the need to improve public participation in, and understanding of, public policy making.

Sections 21 – 30 – Exceptions

47. Exceptions to the rule of maximum disclosure should be kept to an absolutely minimum and should be narrowly drawn. The exceptions in the Bill are mostly appropriate, but in order to fulfill the right to information effectively, certain provisions should be reviewed and/or deleted. Specifically:
- Section 27 is a legitimate provision, but to ensure that wrongful conduct is not protected, consideration should be given to including in section 27(a) a reference to the “lawful” prevention or detection of crime.

- Section 29(1)(c) is not appropriate because it could too easily be abused by secretive officials who believe that all their decision making processes are sensitive and should not be open to the scrutiny of the public. This is a very common reaction within the bureaucracy and needs to be broken down by an access law – not protected. Ironically, information which discloses advice given to the government during the policy and decision-making process is exactly the kind of information that the public *should* be able to access, unless it is particularly sensitive. The public has the right to know what advice and information the government bases its decisions on and how the government reaches its conclusions. It is not enough to argue that disclosure would inhibit internal discussions. Officials should be able – and be required – to ensure that their advice can withstand public scrutiny. To fear such transparency raises questions about the soundness of the entire decision-making process.
- Section 30(2) provides a 30 year time period after the record was made after which the exceptions no longer apply. Although this provision is a positive inclusion, 30 years is a very long time and best practice provides for a shorter time frame (10-20 years). In addition, the list of sections to which section 30(2) applies do not seem accurate, it even includes a reference to section 31 which is about the appointment of the Information Commission, not an exception.

Recommendation

- Amend section 27(a) to refer to the “lawful” prevention or detection of crime.
- Delete section 29(1)(c).
- Amend section 30(2) to provide that the exceptions do not apply to a record which is more than 10 years old.
- Review the sections to which section 30(2) refers to in order to ensure the list is accurate.

PART V: THE INFORMATION COMMISSION

Sections 31 – 34 – Establishing the State Information Commission

48. The provisions contained in this part of the Bill are generally in accordance with best practice, including establishing a Commission of five members to oversee the implementation of the Act. However, some refinements could be made.

Appointment and removal of Commissioners

49. It is essential to appoint Commissioners who have the integrity and experience to be champions of the move to open government and transparency, lead by example and implement the law effectively. Therefore, in addition to the technical requirements for appointment under section 31(2) it would be ideal to also include a subsection that requires broader experience and skills as it is essential that the Commissioners are utterly impartial and well-respected by the public as an upstanding citizen who is pro-transparency and accountability. For example, s.12(5) of India’s *Right to Information Act 2005* requires that “...the Information Commissioners shall be persons of eminence in public life with wide knowledge and experience in law, science and technology, social service, management, journalism, mass media or administration and governance.” Minimum requirements could be:

The person to be appointed as the Information Commission shall –

- (a) be publicly regarded as a person who can make impartial judgments;*
- (b) have a demonstrated commitment to open government*
- (c) have sufficient knowledge of the workings of Government;*
- (d) have not been declared a bankrupt;*
- (e) be otherwise competent and capable of performing the duties of his or her office.*

50. Consideration should also be given to inserting an age limit for the Commissioners into section 31(3) to ensure that they are not considered suitable positions for government retirees.

51. With regard to removing a Commissioner under section 31(3) – although a two-thirds majority needs to be passed, there should still be a transparent underlying reasoning for why a Commissioner can be dismissed so that they can be confident of their position and its independence from politics. Many laws around the world place their Information Commissioner's on par with a Justice of the High Court and therefore require that a Commissioner can only be removed for under the provisions (usually constitutionally enshrined) for removal of a High Court Justice. The Malaysian Constitution provides for such removal under section 125(3). If any other reasons are contemplated, then these should be listed in the law. The India *Right to information Act 2005* lists a number of specific reasons for removal in section 14(3):

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

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

Independence and Powers

52. It is extremely positive that the Information Commissioner has been given operational and administrative autonomy to effectively discharge his/her functions in office. However, section 32(1) should clarify specifically that the Information Commissioner also has budget making autonomy and that it is completely independent of the interference of any other person or authority other than the courts.

53. In addition to this a new section could be inserted into section 32 requiring the Information Commissioner to be properly resourced to handles appeals and undertake training and public awareness activities.

Staff

54. For the Information Commission to be truly independent, it is integral that it is able to employ its staff and define their job descriptions, etc. As Commissions in other jurisdictions have shown, it can undermine the effectiveness of a Commission if staff are only engaged by seconding public servants. Many may not have the specific skills needed to do the relevant job and/or the necessary commitment. Additionally, in a position where it is of crucial importance that staff are impartial and not biased towards the bureaucracy, it is essential for the Information Commission to have the power to employ staff who are not members of the public service, if they have relevant skills.

Recommendations

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

- (i) *have not been declared a bankrupt;*
 - (j) *be otherwise competent and capable of performing the duties of his or her office.*
- *Consider inserting a new provision setting an age limit beyond which an Information Commissioner shall not hold office.*
 - *Insert the reasons for which an Information Commissioner can be removed.*
 - *Amend section 32(1) to clarify that the Information Commissioner will have budgetary autonomy and is independent from the interference of any other person or authority other than the courts.*
 - *Amend section 34 to clarify that the Information Commissioner can recruit staff from outside the public service to ensure that they can get the people with the best expertise*

Sections 31 – 34 – Activities of the State Information Commission

General Activities

55. In addition to the list of activities of the Commission already mentioned in section 35, two additional activities could be included:
- Section 35(b) should require the Commission to also identify and make recommendations for reform of other Acts, laws and administrative systems that affect the implementation of right to information.
 - Section 35(e) should specify that the Commission should conduct educational programmes to increase the understanding of the public of the Act, especially in under-resourced or disadvantaged communities.

Reports

56. It is very positive that the Bill gives the Information Commissioner broad powers to make reports and recommendations to Parliament. To give these provisions more importance within the legislative framework of the Bill however, it would be useful to separate them out into a separate part on monitoring and reporting, rather than embedding them amongst the provisions dealing with appointment and removal of the Commissioner.
57. In order to ensure that reports are comprehensive, section 36(1) should be amended to clarify the required content of the report. International best practice laws set out the minimum standards that such a report should contain to ensure that it is made public. For example, section 40 of the Trinidad & Tobago *Freedom of Information Act 1999* and sections 48 and 49 of the United Kingdom *Freedom of Information Act 2000* provide useful models of potential monitoring approaches.
58. Consideration should also be given to specifically requiring that the report be sent to a Parliamentary Committee for consideration and review. The Committee could then call on the Government to take action on key issues as necessary. This is the practice in Canada, where Information Commissioner reports are sent to a Parliamentary Committee designated or established to review the administration of the Act.

Recommendations

- *Include in the Information Commission's general activities in section 35(b) that the Commission identify and make recommendations for reform of other Acts, laws and administrative systems that affect the implementation of right to information.*

- *Include in the Information Commission's general activities in section 35 (e) that the Commission should conduct educational programmes to increase the understanding of the public of the Act, and their rights under it, especially in under-resources or disadvantaged communities.*
- *Move section 36 (along with other key sections throughout the Bill) into a new part titled "Monitoring and Reporting".*
- *Amend section 36(1) to set out the minimum requirements that the Information Commission's report should contain, namely:*
 - (1) Each report shall, at a minimum, state in respect of the year to which the report relates:*
 - (ii) the number of requests made to each public authority;*
 - (iii) the number of decisions that an applicant was not entitled to access to a document pursuant to a request, the provisions of this Act under which these decisions were made and the number of times each provision was invoked;*
 - (iv) the number of appeals sent to the Information Commissioners for review, the nature of the complaints and the outcome of the appeals;.*
 - (v) particulars of any disciplinary action taken against any officer in respect of the administration of this Act;*
 - (vi) the amount of charges collected by each public authority under this Act;*
 - (vii) any facts which indicate an effort by public authorities to administer and implement the spirit and intention of this Act;*
 - *recommendations for reform, including recommendations in respect of particular public authorities, for the development, improvement, modernisation, reform or amendment of this Act or other legislation or common law or any other matter relevant to operationalising the right to access information, as appropriate.*
- *Amend section 36 to specify that reports under both subsections (1) and (2) will be submitted to Parliament and must be referred to a parliamentary committee for consideration and comment.*

PART VI: ENFORCEMENT BY THE COMMISSION

59. Part VII has been drafted very comprehensively, which is encouraging because a strong, independent enforcement mechanism is essential to any effective access regime. It is positive that the remit of the Information Commission is broad. In that context, it is also positive that the Commission's decision-making powers enable the Commission to compel disclosure, but also to require compliance with other provisions of the Act, such as appointment of Information Officers and implementation of proactive disclosure provisions. However, some refinements could still be considered to make the Information Commission even stronger.

Sections 38-39 – Complaints relating to Part II

60. It is positive that section 38 includes a relatively comprehensive list of grounds of complaint, and is worded to indicate that any complaint in respect of non-compliance with Part II will be permitted. However, consideration should be given to reworking the opening clause of section 38 because as it is currently worded, it restricts complaints only to people who have "made a request for information", which means that people will be barred from bringing complaints to the Information Commissioner regarding patterns of non-compliance. This would be a disappointing, and perhaps unintended, consequence.

61. It is of concern that section 39(2) allows for summary rejection of appeals, particularly on the grounds specified. Best practice requires that no application shall be rejected unless the information requested falls under a legitimate and specifically defined exemption.

This principle applies to complaints as well as applications. What is the meaning of “frivolous, vexatious or unwarranted” for the purposes of section 39(2)(a)? These terms could easily be abused. If this clause is retained, at the very least the provision needs to be amended to clarify what constitutes a ‘frivolous, vexatious or clearly unwarranted request’.

62. It is very problematic that section 39(2)(b) makes only a passing reference to the possibility of an internal appeals mechanism but nowhere else in the Bill is such a mechanism referred to. Who is responsible for deciding whether an internal appeal mechanism will be developed? Will each department develop their own model? If so, how will the public easily find out what their appeal rights are (presumably via the rejection notice in section 10?) An effective and internally consistent appeals framework is essential to a proper functioning of the entire access regime. The legislation itself should set out such important details. To ensure clarity and ease of implementation, the entire procedure for applying for information, determining applications and submitting and handling appeals should be developed holistically and captured in a single legislative instrument. Either an internal appeal process should be described in the Bill or section 39(2)(b) should be deleted.
63. It is extremely positive that section 39(4)(d) empowers the Commissioner to impose fines on public and private bodies for egregious failures to comply with the provisions of the law. However, it is recommended that section 39(4)(d) be amended to specifically cross-reference the offences in section 46 – if that section is amended in accordance with the recommendations in paragraphs 68 onward below – and the Information Commission then be empowered to impose relevant fines on individual officials or departments and refer relevant cases for disciplinary hearings.
64. Section 39 should provide that where the Commissioner fails to decide on a complaint within the 30 day time limit, it shall be deemed as a rejection and the complainant will have the right to appeal to a higher court.

Recommendation

- *Delete the reference in section 38 to “a person who has made a request for information” to enable anyone to make a complaint.*
- *Insert a new section in section 39 to provide that failure to comply with section 39(1) is deemed to be a rejection and the applicant has the right to appeal to a higher court.*
- *Delete section 39(2)(a) allowing for the summary rejection of frivolous, vexatious or unwarranted requests.*
- *Delete section 39(2)(b) regarding internal appeals or alternatively, describe in the Bill the internal appeals mechanism*
- *Amend section 39(4)(d) to specifically cross-reference the offences in section 46 (as amended in accordance with paragraphs 68 onward below – and empower the Information Commission to impose relevant fines on individual officials or departments and refer relevant cases for disciplinary hearings.*
- *Either an internal appeal process should be described in the Bill or section 39(2)(b) should be deleted.*

Sections 40 – Direct Implementation of Decision

65. It is not clear from section 40(1) how actions for non-compliance with Part II are likely to be initiated. In practice, it is increasingly common for NGOs to survey compliance in and across government departments and identify problems implementation. In recognition of that fact, section 40(1) should be amended to recognise that the Information Commission may initiate a complaint itself or respond to a complaint from a member of the public.

Recommendation

Amend section 40(1) to recognise that the Information Commission may initiate a complaint itself or respond to a complaint from a member of the public.

Sections 41 – Commission’s powers to investigate

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

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

- (a) to summon and enforce the appearance of persons before the Information Commissioner and compel them to give oral or written evidence on oath and to produce such documents and things as the Commissioner deems requisite to the full investigation and consideration of the complaint, in the same manner and to the same extent as a superior court of record;*
- (b) to administer oaths;*
- (c) to receive and accept such evidence and other information, whether on oath or by affidavit or otherwise, as the Information Commissioner sees fit, whether or not the evidence or information is or would be admissible in a court of law;*
- (d) to enter any premises occupied by any government institution on satisfying any security requirements of the institution relating to the premises;*
- (e) to converse in private with any person in any premises entered pursuant to paragraph (d) and otherwise carry out therein such inquiries within the authority of the Information Commissioner under this Act as the Commissioner sees fit; and*
- (f) to examine or obtain copies of or extracts from books or other records found in any premises entered pursuant to paragraph (d) containing any matter relevant to the investigation.*

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

Recommendation

Set out the Commission’s investigative powers in more detail.

Section 43 - Binding nature of decisions

67. Although section 43 is headed “binding nature of decisions” it does not actually make that fact explicit. Section 43 needs to make it clear that the Commissioner’s decisions are binding unless they are being appealed.

Recommendation

Reword section 43 to state explicitly that decisions of the Information Commission are binding.

PART VIII: CRIMINAL AND CIVIL RESPONSIBILITY

Section 46 – Criminal Offences

68. It is positive that section 16 sets out a basic set of offences and penalties for various acts of willful misconduct by officials. Sanctions for non-compliance are particularly important incentives for timely disclosure in jurisdictions where the bureaucracy is unused to hurrying at the request of public. While the provisions of the current Act are a good start, they could be substantially extended to cover more instances of non-compliance. Section 20 of the Indian *Right to Information Act 2006*; section 54 of the UK *Freedom of Information Act 2000*; section 34 of the Jamaican *Access to Information Act 2002*; and section 42 of the Trinidad & Tobago *Freedom of Information Act 1999* all provide useful models.

69. In the first instance, it is important to clearly detail what activities will be considered offences under the Act. Section 46(1) should be broadened to clearly specify the kinds of actions which are punishable under the law. Not only egregious criminal acts, but also negligent disregard for the law should be punished. This is important in a bureaucracy which is likely to be resistant to openness and may stop short of criminal acts, but may still delay and undermine the law in practice. Additional offences need to be created, for example:

- unreasonable refusal to accept an application,
- unreasonable delay, which in India incurs a fine of Rs250 per day,
- unreasonable withholding of information,
- knowingly providing incorrect information,
- concealment or falsification of records,
- non-compliance with the Information Commissioner's orders, which in the UK is treated as a contempt of court.

70. Once the offences are detailed, sanctions need to be available to punish the commission of offences. Notably, any fines need to be sufficiently large to act as a serious disincentive to bad behaviour. Corruption – the scourge that access laws assist to tackle – can result in huge windfalls for bureaucrats. The threat of fines and imprisonment can be an important deterrent, but must be large enough to balance out the gains from corrupt practices. In this context, section 46 (2) should provide for the imposition of a minimum fine as opposed to (or in addition to) a maximum fine.

71. When developing penalties provisions, lessons learned from India are illuminating. In India, penalties can be imposed on individual officers, rather than just their department. In reality, without personalised penalty provisions, many public officials may be content to shirk their duties, safe in the knowledge that it is their employer that will suffer the consequences. The relevant provisions need to be carefully drafted though, to ensure that defaulting officers, at whatever level of seniority, are penalised. It is not appropriate for penalty provisions to assume that penalties will always be imposed on Information Officers. Instead, the official responsible for the non-compliance should be punished.

72. In addition to the possibility of fines and/or imprisonment, the Bill should also require that where a penalty is imposed on any officer under the Bill, *“the officer shall also be liable to appropriate disciplinary action under the service rules applicable to him”*. This possibility

of imposing additional disciplinary sanctions is permitted under the Indian *Right To Information Act 2006*.

73. In order to ensure that public authorities properly implement the law, they too should be liable for sanction for non-compliance. This would ensure that heads of department take a strong lead in bedding down the law and ensuring that staff across their authority undertake their duties properly. An additional provision should be included in the Bill to penalise public authorities for persistent non-compliance with the law. A fine could be imposed for example, where a public authority fails to implement the proactive disclosure provisions in a timely manner, does not appoint PIOs or appellate authorities, consistently fails to process applications promptly and/or is found on appeal to consistently misapply the provisions of the law to withhold information. The minimum fine should be sufficiently large to act as a deterrent.

Recommendation

- *Insert a more comprehensive offences provision at section 46, for example:*
- (1) *Subject to sub-section (3), where any Information Officer has, without any reasonable cause, failed to supply the information sought within the period specified under section 9, the Information Commissioner or the Courts shall, on appeal, impose a penalty of [XXX], which amount must be increased by regulation at least once every five years, for each day's delay in furnishing the information, after giving such Information Officer a reasonable opportunity of being heard.*
 - (2) *Subject to sub-section (3), where it is found in appeal that any Information Officer has:*
 - *Refused to receive an application for information*
 - *Mala fide denied a request for information;*
 - *Knowingly given incomplete or misleading information,*
 - *Knowingly given wrong information, or*
 - *Destroyed information, without lawful authority;*
 - *Obstructed access to any record contrary to the Act;*
 - *Obstructed the performance of a public body of a duty under the Act;*
 - *Interfered with or obstructed the work of an Information Officer, the Information Commissioner or the Courts; or*
 - *Failed to comply with the decision of the Information Commissioner or Courts;**the Information Officer commits an offence and the Information Commissioner or the Courts shall impose a fine of not less than [XXXX] and the Courts can also impose a penalty of imprisonment of up to two years or both.*
 - (3) *An officer whose assistance has been sought by the Information Officer for the performance of his/her duties under this Act shall be liable for penalty as prescribed in sub-sections (1) and (2) jointly with the Information Officer or severally as may be decided by the Information Commissioner or the Courts.*
 - (4) *Any fines imposed under sub-sections (1), (2) and (3) shall be recoverable from the salary of the concerned officer, including the Information Officer, or if no salary is drawn, as an arrears of land revenue.*
 - (5) *The Information Officer or any other officer on whom the penalty under sub-sections (1), (2) and (3) is imposed shall also be liable to appropriate disciplinary action under the service rules applicable to him and the Information Commissioner or Courts will refer the case to the appropriate authority for action accordingly.*
 - (6) *Where the Information Commission finds a public or private body guilty of persistent non-compliance it may impose a fine of not less than [XXX] on the body.*

PART IX: MISCELLANEOUS

Section 47 – Regulations

74. In accordance with the recommendations made above, it should be clarified that the State Assembly has the power to make fee rules, in collaboration with the Information Commission. Certainly, it is not appropriate for different public bodies to make their own fee rules.

Recommendation

Insert an additional sub-clause clarifying that the State Assembly has the power to make fee rules.

Section 49 – Commencement

75. It is recommended that section 49 clearly specify a date on which the Act will come into force. Failure to specify a commencement date in the legislation itself can otherwise undermine the use of the law in practice. In India for example, the *Freedom of Information Act 2002* was passed by Parliament and even assented to by the President but it never came into force because no date for commencement was ever notified in the Official Gazette. Although it is understandable that the Government may wish to allow for time to prepare for implementation, best practice has shown that the Act itself should specify a maximum time limit for implementation, to ensure there is no room for the provision to be abused and implementation to be stalled indefinitely. Experience suggests a maximum limit of one year between passage of the law and implementation is sufficient (see Mexico for example). CHRI is not aware of whether local regulations require the Sultan to proclaim a date in the near future, but if it does not then there should be a maximum time frame provided for in the case that he provides a date very far into the future.

Recommendation

Amend section 49(2) to include a maximum time limit for the Act coming into force in, ideally immediately but not later than 1 year from the date the Act receives Presidential assent.

Insert new section – Regular Parliamentary Review of the Act

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

Recommendation

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