

Detailed Analysis of Maldives Draft Freedom of Information Bill & 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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Analysis of the Maldives draft Freedom of Information Bill

1. As a step towards implementing the Roadmap for the Reform Agenda, the Maldives Government has produced a draft Freedom of Information Bill. It is understood that the Bill will soon be tabled in Parliament for debate. CHRI has now analysed the Bill, drawing on international best practice standards, in particular, good legislative models from the Commonwealth. This paper suggests areas which could be reconsidered and reworked, as well as providing examples of legislative provisions from other jurisdictions, which could be incorporated into a revised version of the Bill.
2. At the outset, CHRI would note that it is important that the Government publish and circulate the Bill widely for public comment. Experience has shown that for any right to information legislation to be effective, it needs to be respected and 'owned' by both the government and the public. Participation in the legislative development process requires that policy-makers proactively encourage the involvement of civil society groups and the public broadly. This can be done in a variety of ways, for example, by: convening public meetings to discuss the law; strategically and consistently using the media to raise awareness and keep the public up to date on progress; setting up a committee of stakeholders (including officials and public representatives) to consider and provide recommendations on the development of legislation; and inviting submissions from the public at all stages of legislative drafting.

ANALYSIS OF DRAFT BILL AND SUGGESTIONS FOR IMPROVEMENT

3. While it is necessary to ensure that the public participates in the drafting process to ensure that the final legislation developed is appropriate for the national context, it is generally well-accepted that there are basic minimum standards which all RTI legislation should meet. Chapter 2 of CHRI's Report, *Open Sesame: Looking for the Right to Information in the Commonwealth*¹, provides more detailed discussion of these standards. The critique below draws on this work.²
4. Overall, CHRI's assessment is that the Bill in its current form contains some useful provisions. Nonetheless, this analysis suggests a number of amendments, modelled on recent right to information legislation, in particular the Indian *Right to Information Act 2005*. At all times, the recommendations proposed attempt to promote the fundamental principles of: maximum disclosure; minimum exceptions; simple, cheap and user-friendly access procedures; independent appeals; strong penalties; and effective monitoring and promotion of access.
5. Generally, one way in which the Bill could be made more user-friendly is by reorganizing the various provisions into separate parts, with similar provisions being grouped together. In addition to assisting the public to utilise the law, this will also make it easier for officials to understand and apply the law. Throughout this critique, suggested Part headings have been included and the critique of the various provisions has been rearranged accordingly.

New Part 1: Introductory Provisions

New provision – Commencement Date

6. The introductory sections of the Bill currently make no mention of when the Act will come into force. CHRI has been unable to determine whether an Act's Interpretation Act currently exists in the Maldives which clarifies this issue. To promote the swift and effective implementation of the law, CHRI recommends the inclusion of a clause which specifies the commencement date of the Act. In this context, while the Maldivian Government may wish to allow for time to prepare for implementation, best practice requires that the Act itself should nonetheless specify a maximum time limit for implementation, to ensure there is no room for the implementation to be stalled indefinitely. Otherwise, as experience in India demonstrated (in respect of the *Freedom of Information Act 2002*), without a commencement date included in the Act, the law sat on the books for more than 2 years without being operationalised, despite receiving Presidential assent.

¹ http://www.humanrightsinitiative.org/publications/chogm/chogm_2003/default.htm

² All references to legislation can be found on CHRI's website at http://www.humanrightsinitiative.org/programs/ai/rti/international/laws_&_papers.htm

International experience suggests a maximum limit of 1 year between passage of the law and implementation is sufficient (see Mexico for example). Alternatively, as has happened in Jamaica, a phased approach can be adopted, but any timetable for implementation should be specified in the Act itself.

Recommendation:

Insert a new provision which imposes 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.

Section 2 – Object

7. It is very positive that the Bill has such a comprehensive objects provision. However, to ensure that the Bill is interpreted and applied in the most fulsome spirit it would be useful to make it explicit that “the right to information is a fundamental human right” which 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 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.

Recommendation:

Amend s.2 to clarify that:

The objects of this Law are to:

- (i) give effect to the fundamental Right to Information, which will contribute to strengthening democracy, improving governance, increasing public participation, promoting transparency and accountability, promoting and protecting human rights and reducing corruption*
- (ii) establish voluntary and mandatory mechanisms or 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.*

Section 3 - Interpretation

8. Although s.2 of the Bill currently provides access to “information”, s.3 refers only to the narrower term, “document”, which is used throughout the rest of the Bill. Providing access only to “documents” is very limiting; the current formulation excludes access to things like scale models, samples of materials used in public works and information not yet recorded by an official but which should have been. Conversely, India and New Zealand allow a broad right to access “information” or “official information”. Allowing access to “information” will mean that applicants will not be restricted to accessing only information which is already in the form of a paper or electronic record at the time of the application. It is recommended that the term “document” be replaced with the term “information” in the definitions section and then used in the Bill throughout.

9. The Bill currently permits access to information held or maintained by an “office”, and this term is then defined. There are two shortcomings in this definition:

- The current definition of “office” is relatively broad, but could be elaborated upon to ensure that no body which deals with public monies or public functions is outside the purview of the law. It should be made clear that all arms of government – the Executive, President, legislature and judiciary – and the bodies which operate underneath them are covered. Additionally, to ensure that all bodies funded by public money can be scrutinised using this law, consideration should be given to replicating the definition at s.2(h) of the new Indian *Right to Information Act 2005* which covers “any...body owned, controlled or substantially financed...directly or indirectly by funds provided by the appropriate Government”. Otherwise, as has happened in Canada at the

federal level, resistant bureaucrats may set up other forms of legal entity to avoid the application of the Act.

- It is not appropriate that the definition limits access to information “held or maintained by” an office. With the rise of outsourcing of government activities, it is conceivable that some private bodies will hold information on behalf of the government. Under the current definition, this information may not be covered. To address this problem, the public should be able to access information “held by, maintained or *under the control of*” an office. This definitional problem could be addressed by rewording the definition of “office” or alternatively, by reworking the provision setting out the right to information, in s.7 (see paragraph 20 below for more).

10. To assist interpretation, section 3 should be amended to insert a definition of the term “access” to clarify the content of the right to “access” information. This will promote maximum accessibility by the public. In this context, the law should be drafted to permit access not only to documents and other materials via copying or inspection. It should also permit the inspection of public works and taking of samples from public works. Such an approach has been incorporated into the India *Right to Information Act 2005* in recognition of the fact that corruption in public works is a major problem in many countries, which could be tackled by facilitating greater public oversight through openness legislation.

Recommendation:

- *Add a definition of the term ‘information’, which should subsume the current definition of document. A model definition could be:*
“information” includes any material in any form, including records, documents, file notings, memos, emails, opinions, advices, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models, data, material held in any electronic form and any information relating to a private body which can be accessed by a public authority under any law.
- *Broaden the definition of “office” to clarify that the law covers all arms of government for example:*
“office” means the Office of the President, Parliament and its committees, the courts, Cabinet, a Ministry, Department, Executive agency, statutory body, municipal corporation, government corporation, any government commission or any other agency of Government, whether part of the executive, legislature or judiciary and includes any authority or body established or constituted: (i) by or under the Constitution; (ii) by any other law, bodies which appear to exercise functions of a public nature, or are providing under a contract made with a public authority any service whose provision is a function of that authority, a publicly owned company and any other body owned, controlled or substantially financed by funds provided directly or indirectly by the Government”
- *Add a definition of the term “access”. A model definition could be:*
“access” to information includes the inspection of works and information, taking notes and extracts and obtaining certified copies of information, or taking samples of material.

Section 4 – Certain documents on which the this Act may not be applicable

11. It is not uncommon to protect the non-administrative aspects of the judiciary from public disclosure. Nonetheless, section 4 could be deleted because harmful disclosures are already protected by s. 29 which prevents the release of information which could affect a person’s trial or the adjudication of a case. If s.4 is retained, it should be reworked to focus on whether harm would be caused by disclosure, rather than by simply providing blanket exemptions. Specifically:

- Sections 4(a) and (b) should be combined and then reworded to clarify that documents in an ongoing trial can only be released in accordance with court rules, but may be released in accordance with the FOI Act at the conclusion of the case.
- Section 4(c) should be deleted because it is much too broad, particularly because it does not protect information only during the process of an inquiry/investigation, but actually states that they will not be considered documents at any time, for the purposes of the Act. This is not appropriate. While investigations often *do* need to be protected in the initial stages, this issue is already addressed by the exemption in s.29. Conversely, the current wording of s.4(c) could be used to put commissions of inquiry beyond public scrutiny which is contrary to best practice

which requires that such inquiries are open to the public because their purpose is to scrutinise government and promote accountability.

Recommendation:

Delete section 4 because blanket exemptions for the Courts are unjustifiable as s.29 of the Bill already contains sufficient exemptions. Alternatively, rework s.4 by combining and narrowing ss.4(a) and (b) and deleting s.4(c).

New Part 2: Proactive Disclosure

12. The Bill currently lacks a fundamental requirement and feature of best practice right to information laws which is a section 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.
13. 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.
14. Article 7 of the Mexican *Federal Transparency and Access to Public Government Information Law 2002* and *s.4 of the Indian Right to Information Bill 2004* provide excellent models for consideration. They require disclosure of information such as the recipients of government subsidies, concessions and licenses, publication of all government contracts and information about proposed development works. Such provisions operate to assist the public to keep better track of what the government is doing as well as ensuring key activities of public bodies are always and automatically kept open to public scrutiny. Notably, although the initial effort of collecting, collating and disseminating the information may be a large undertaking, 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.

Section 6 – Disclosure of certain documents to the public

15. It appears that s.6 is an attempt to provide *some* level of proactive disclosure, but the current provision is confusingly worded and unnecessarily restrictive. It is not clear why the provision refers only to “details of work carried out by an office”, “summary of work carried out by an office” and “policy documents of an office or any document of an office for which its policies can be ascertained” nor how exactly these items are differentiated. The provision should be substantially extended.
16. Sub-section 6(a) also requires that offices will only provide access to information to the public “upon payment of a charge”. This defeats the purpose of the provision as a means of “proactive disclosure”. Notably in this context, s.7 already deals with information that can be requested and accessed for a fee, whereas s.6 – if it were a real proactive disclosure provision - should have been used to require the proactive disclosure and publication of information (for example, on the internet, office noticeboards or in manuals held at an office for free inspection) which can then be accessed for free.
17. Sub-section 6(b) is unnecessary because section 14(b) already stipulates that offices shall not refuse a request where exempted information in a document can be deleted from the copy of the document provided to the requestor. Accordingly, s.6(b) can be deleted.

Recommendation:

- Replace s.6 with more comprehensive proactive disclosure provisions and/or simplified to facilitate easier implementation by public officials, as follows:

“(1) Every office shall

(a) publish within 6 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 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:

- (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 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 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 noticeboards, newspapers, public announcements, media broadcasts, the internet or any other means, including inspection at the offices of a public authority.

- Section 6(b) should be deleted

New Part 3: The Right to Information

18. The most important sections in a right to information law are those which set the limits on the extent of the right. In this context, s.7 of the current Bill, which specifies the content of the right to

information, coupled with the exemptions provisions (see the new Part 5 of the Bill) are key provisions.

Section 7(a) – Right to a document of an office

19. Section 7(a), which sets out the right to information, is poorly drafted and should be amended as a priority because it is the most important provision in the entire law. Taking into account the recommendations made in paragraphs 8-10 above regarding the redrafting of key definitional provisions, s.7(a) should be simplified to make it clear that “every person has a right to access information held by or under the control of any office”, where the terms “access”, “information” and “office” have already been defined.

20. 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. Private bodies are increasingly exerting significant influence on public policy. Many private bodies – in the same way as public bodies – are institutions of social and political power which have a huge influence on people’s rights, security and health. This is only increased by the rise in outsourcing of important government functions and the country is likely to see further outsourcing/privatisation of important services as part of its economic development strategy. It is unacceptable that private bodies, which have such a huge effect on the rights of the public, should be exempt from public scrutiny simply because of their private status. Notably, a number of countries around the world have already brought private bodies within the ambit of their right to information regimes. South Africa’s law is the most progressive, but a number of other formulations could also be considered:

- *South Africa s.50: Information held by or under the control of a private body where access to that information is necessary for the exercise or protection of any right.* [NB: if this formulation is too broad, consideration could be given to limiting the application of the law to private bodies over a certain size, determined according to turnover or employee numbers]
- *India (FOI Act 2002) s.2(f): Any other body owned, controlled or substantially financed by funds provided directly or indirectly by the appropriate Government.*
- *Jamaica s.5(3): Bodies which provide services of a public nature which are essential to the welfare of society can be covered by the Act by Order.*
- *Maharashtra, India s.2(6): Any body which receives any aid directly or indirectly by the Government and shall include the bodies whose composition and administration are predominantly controlled by the Government or the functions of such body are of public nature or interest or on which office bearers are appointed by the Government.*
- *United Kingdom s.5(1): Bodies which appear to exercise functions of a public nature, or are providing any service whose provision is a function of an authority under a contract made with that public authority can be covered, by Order of the Secretary of State*

Recommendations:

- *Reword s.7(a) into a stand-alone provision which states that: “Every person has the right to access information held by, maintained by or under the control of any office”.*
- *Consider inserting an additional sub-clause extending the right to access information from private bodies where it is necessary for the exercise or protection of a right recognised as national or international law, or at the very least, to private bodies which receive public funds and/or perform public functions.*

Sections 7(b) and 8 – Request for document of an office

21. Sections 7(b) and 8 are crucial provisions because they set out the process for the public to request access to a document. The provisions currently still need considerable reworking to make them capable of implementation in practice. In particular, it is a problem that the provisions do not properly identify who will be responsible within each office for receiving and processing applications.

Person to whom requests are submitted

22. Currently, s.7(b) gives a right to request information through a “judicial authority”. However, it is unclear why a requestor would require recourse to judicial processes to access information in the first instance. Recourse to the courts via a judicial authority may be required when a request is refused as a means of appealing a refusal (see paragraph 62 for more), but a simpler, more cost-effective procedure should be developed to enable people to more easily make requests for information.

23. In accordance with common practice in other countries, consideration should be given to requiring that a specific officer or officers be designated within each office who will be responsible for receiving and processing requests. This can be a useful way of raising awareness of a new access law within a public body and ensuring that the law is effectively implemented by properly-trained officials. It is also important in terms of ensuring easier access for the public because instead of requiring applications to be handled by a judicial authority, people can simply send applications to government offices. Notably, sub-offices of a public authority should also be required to identify an officer who is responsible for receiving applications so that people from all over the country wanting to submit their application in person will not have to travel to the head office of the authority.

24. Taking this into account, consideration should be given to revising ss.7(b) and 8 either to:

- Make it clear that all applications shall be sent to the “head of the relevant office” in all cases. If this approach is adopted, the Bill should make it clear that applications will be accepted at all sub-offices of the public authority and officials in those sub-offices will be required to forward them to the relevant officer(s) responsible within the public authority for processing requests. This process is simpler for the public who will know that all applications to all public authorities simply need to be addressed to the “department head”. They will not have to worry about who within the organisation has had responsibility for FOI delegated to them. However, it could still be confusing for officials, because it may not be clear who within the organisation is responsible in practice for processing requests. As such, consideration should be given in addition to:

AND/OR

- Establish new positions within each public authority known as “Public Information Officers” (PIOs). All applications for information can be sent to PIOs who will then be responsible for handling them. This formulation is preferable because it means that the public can very easily identify who they need to address their application to – the PIO in all cases – and all officers within a department will automatically know who applications need to be referred to if they happen to receive an information request. The PIO can then also be targeted for special training on the law and can take the lead in ensuring proper implementation.

No Compulsory Format for Requests

25. Best practice requires that access procedures should be as simple as possible and designed to be easily availed by all members of the community, whether illiterate, disabled or geographically distant from centres of power. To ensure that the Bill’s application procedures are user-friendly, the following issues should be reconsidered:

- Section 8(b) requires that the application specify that the request is made under the Act. This is not appropriate because it means that if members of the public are unaware of the law but nonetheless want to ask for information from the government, they could actually be refused for a simple, minor technicality. The right to access information should not turn upon such a procedural issue. The public service should instead entrench the principles of transparency and public accountability and should be keen to facilitate openness by responding to all requests, so long as they are comprehensible and not covered by an exemption.
- Section (8)(c), which requires applications to include a fee that will be set out under rules, should be deleted. Best practice requires that no fees should be imposed for accessing information, particularly government information, as costs should already be covered by public taxes (see paragraphs 41-42 below for further discussion on fees). At the very least, no application fee should be levied because the initial work required to locate information and determine its sensitivity to disclosure is a routine and expected task of government. This is the case in Trinidad & Tobago where s. 17(1) of the *Freedom of Information Act 1999* specifically states that no fees shall be imposed for applications. At the very least, the Bill should make it

explicit that any fees should be set with a view to ensuring that the costs imposed for access are not so high as to deter potential applicants.

26. Consideration should be given to including specific wording in s.8 which makes it clear that the *“internal processes for receiving and processing applications should be designed to promote easy, simple, quick and cheap access to information for the public”*. It should also be clarified that applications can be received in hard copy and electronically (eg. by fax, email or telephone).
27. An additional clause should be inserted into s.8 which clarifies that applications can be made either in the official language or Maldivian local language(s). It should be the duty of the relevant PIO of the public authority to translate the request into the official language.

No Purpose Needs to be Stated to Justify the Request

28. Section 8 should also make it explicit that applications shall not require requestors to state a reason for their request. There should be no room for officials to deny requests simply because they are not satisfied with the requestor’s reasons for wanting the information. Access to information is a fundamental right and it is only denials of that right which must be justified. Openness should be seen as the norm. Most Acts in the Commonwealth specifically provide that no reasons need to be provided by an applicant.

Written Receipts for Applications

29. Information Officers should be required to provide written receipts on the spot or no later than 5 days from an application being received. This will ensure that requesters have written proof of the date on which they submitted the application, which can then be used when calculating whether the time limits for providing information have been complied with. The receipt should also acknowledge the payment of fees, if any (see paragraphs 41-42 below for further discussion re fees).

Recommendation:

- *Combine ss.7(b) and (8) into a single provision dealing with submitting requests.*
- *Amend current s.8 to remove the requirement for an application to specify that it is made under the Act and deleting the requirement that an application fee be paid.*
- *Include a clause specifying that “internal processes for receiving and processing applications should be designed to promote easy, simple, quick and cheap access to information for the public”.*
- *Clarify that requests can be made electronically as well as in writing or in person.*
- *Insert a new clause requiring the appointment of Public Information Officers within each public authority, who will be responsible for receiving, assisting with and processing applications.*
 - (1) *Every public authority must designate as many officers as PIOs in all administrative units or offices under it as may be necessary to provide information to persons requesting for the information under this Act.*
 - (2) *Public Information Officers will be the central contact within the public body for receiving requests for information, for assisting individuals seeking to obtain information, for processing requests for information, for providing information to requesters, for receiving individual complaints regarding the performance of the public body relating to information disclosure and for monitoring implementation and collecting statistics for reporting purposes.*
- *Insert a new clause stating that: “A requester cannot be asked the purpose for their request and a PIO cannot refuse to receive or process a request or reject a request to an office because of the actual or assumed purpose of the request”.*
- *Insert a new clause stating that: “PIOs must provide written receipts on the spot or no later than 5 days from an application being received.”*

New Part 4: Processing Requests for Information

Section 9 – Time for processing a request

30. The time limit in s.9 is appropriate. However, consideration should be given to including an additional provision requiring information to be provided with 48 hours where it relates to the life and liberty of a person. This is consistent with s.7(1) of the Indian *Right to Information Act 2005*.
31. In accordance with the recommendations in paragraphs 23-25 above, s.9 and all subsequent sections should be amended to specify that applications will be handled by Public Information Officers appointed for each office.

Recommendations:

- *Amend s.9 to insert a new sub-clause providing that “information will be provided within 48 hours where it relates to the life and liberty of a person”*
- *Clarify that applications will be handled by Public Information Officers.*

Sections 10(b) and 11 – Transfer of request from one officer to the other

32. Section 10(b) deals with transfers of applications that are improperly made to the wrong office and therefore should be combined with the other transfer provisions in s.11. Notably, whether or not the provision is moved, s.10(b) should be amended to require that the office which receives the request transfers it to the correct office, because it is not cost or time effective to require a member of the public to follow up with another office, particularly if there is the possibility that a second application fee is charged. Public officials have access to the internal workings of government and can much more easily ensure effective transfers of requests.
33. Section 11 is a relatively well-considered provision, and correctly puts the onus on offices to handle transfers. However, a number of amendments should still be considered:
- Sub-section 11(i) requires transfers in cases where the public authority is not in the possession of the information but it is “to the knowledge of that office” with another office. But what constitutes “knowledge”? Is this issue only considered on the basis of the state of the knowledge of the particular person processing the application, or is it to be expected that the public authority, even if it does not hold the information, will at least actively try to find out who does? CHRI considers that the latter should be the minimum test. Public authorities should make “every endeavour” to find out who holds the information, and only if they certify that they cannot locate the information within the entirety of the bureaucracy should they have the right to reject an application.
 - Sub-section 11(ii) allows the transfer of a request when “disclosure may be best be made by another office” even though the public authority holds the requested information. This is an unnecessary provision which could easily be exploited by a resistant bureaucracy as a means to delay requests and should be deleted accordingly. If an office holds information, then it should be responsible for processing any request for the information, although it may consult any and all relevant offices as necessary prior to making any decision.
 - Sub-section 11(iii) requires that where “another office consents to the transfer of a request to that office” a transfer can be made. However, this provision could also be used to delay processing of requests and/or to politicise decision-making by enabling politically sensitive requests to be unnecessarily transferred. This provision should be deleted
 - It is positive that s.11(c) sets a time limit for transfers, but it should be amended to clarify that the second office to which the application is transferred must still dispose of the application within the original 21 days time limit in s.9. Otherwise, if the time limits restart at the date of transfer, offices may simply delay release of information by endlessly transferring an application.

Recommendation:

- Section 11(a) should be replaced with the following:

Where an application is made to a public authority for an official document which is held by another public authority, the first mentioned public authority shall transfer the application or such part of it as may be appropriate to that other public authority and shall inform the applicant immediately of the transfer.

- A new clause should be inserted which specifies that the original time limits in s.9 will still apply, even where an application is transferred.

Section 13 – Decision on access

34. It is standard practice that a decision notice will be sent to a requester advising whether an application has been accepted or rejected. While s.13 refers to some of the information which must be contained in such a decision notice, it is awkwardly drafted and should be reworked to make it explicit that a decision notice must be sent in all cases (see the recommendation below for suggested wording). At the very least, the following key issues need to be reconsidered:

- Sub-section 13(i) implies that information can be given “at a later date” but there is no guidance elsewhere in the Bill as to how such a later date would be determined. This provision could therefore very easily be abused to delay responses. Accordingly, it should be deleted.
- Sub-section 13(i) also states that an official must decide “if it is lawful or not to give such information”. Again though, it is unclear what constitutes lawfulness. It would be of more help to officials to cross-reference the sub-clause to the exemptions in Part 5, which are the ONLY grounds on which information can lawfully be refused. Lawfulness is not something to be determined at the discretion of the official – it is a term with specific meaning in the Bill, namely those grounds which are covered by the exemptions, and should be drafted in those terms.
- Sub-sections (ii) and (iii) both deal with the imposition of fees and should be combined and reworked to avoid duplication and make implementation easier for officials.

Recommendation:

- Rework sub-sections (i)-(iii) as discussed in paragraph 35 above or alternatively, replace s.13 with a new clause specifying the content of decision notices:

- Disclosure notice: Where access is approved, the PIO shall give a notice to the applicant informing:
 - (a) that access has been approved;
 - (b) the details of further fees [see paragraphs 41-42 below re fees] together with the calculations made to arrive at the amount and requesting the applicant to deposit the fees;
 - (c) the form of access provided, including how the applicant can access the information once fees are paid;
 - (d) information concerning the applicant’s right with respect to review the decision as to the amount of fees charged or the form of access provided, including the particulars of the appellate authority, time limit, process and any other forms
- Non-disclosure notice: Where access is refused or partially refused, the PIO shall give a notice to the applicant informing:
 - (a) that access has been refused or partially refused;
 - (b) the reasons for the decision, including the section of the Act which is relied upon to reject the application and any findings on any material question of fact, referring to the material on which those findings were based;
 - (c) the name and designation of the person giving the decision;
 - (d) the amount of any fee which the applicant is required to deposit, including how the fee was calculated;
 - (e) the applicant’s rights with respect to review of the decision regarding nondisclosure of the information, the amount of fee charged or the form of access provided, including the particulars of the appellate authority, time limit, process and any other forms.

Section 14 – Refusal of access and partial disclosure

35. Sub-section 14(a)(i) may inadvertently operate to restrict access to information as a result of poor drafting. As the clause is currently worded (in English), it permits access to be refused if a request

“relates” to information that is exempt. However, this is a very low threshold test. The release of information must be shown to be likely to cause *harm* to an interest protected by an exemption, before the exemption can be relied upon. For example, it is not enough for the information to simply relate to business affairs; release must actually be likely to harm the conduct of said business affairs.

36. Sub-sections 14(a)(ii),(iii) and (iv) are commonly found in access legislation. However, they should be amended to require that even where information is already publicly available, if an application is made for it, then the public authority should at least respond and advise the requester of the alternate procedure that needs to be followed. This will contribute to the objective of promoting user-friendly systems to facilitate public participation in governance.
37. Section 14(b) is a common provision which allows for partial disclosure of information where some of it is covered by an exemption but the remainder is not sensitive and can be released. While the provision is mostly suitably drafted, the cross-reference to s.14(a) is inappropriate because the option for partial disclosure should apply to ALL requested information not just information that is already publicly available. All non-sensitive information which is requested should be released if possible, and only information covered by an exemption should be withheld.

Recommendations:

- *Reword s.14(a)(i) to permit applications to be refused only where they are covered by an exemption in Part 5.*
- *Amend sections 14(a)(ii), (iii) and (iv) to clarify that even where information is publicly available, if an application is made, an official must direct the requester to where the information is held and the process for accessing it, rather than rejecting the application outright*
- *Separate s.14(b) into a separate provision on partial disclosure, and reword it to clarify that the option for partial disclosure applies to all requested information not just information that is publicly available already.*

Section 15 – Deferment of access to information

38. Although it is understandable that in some cases a public authority may genuinely need to defer access because premature disclosure of the information could cause harm to legitimate interests, the provisions in s.15 are unnecessarily complicated in guarding against this possibility. Sections 15.(a), (b) and (c) appear largely legitimate, but there should be some maximum time limit for deferral on these grounds, after which the public authority should be required to reconsider release. Otherwise, publication could be delayed *ad infinitum* with no recourse for the applicant. At the very least, if an additional extension is needed, the independent body responsible for handling appeals (see Part 7 below) it should be a requirement that the office consult the independent appeal body and get their permission for the extension. This will prevent abuse.

Recommendation:

Reword sub-sections 15(a)(b)and (c) to make them subject to a requirement that the information must be published, conveyed to Parliament or to a certain authority within 1 month, after which time, either it will be released or any further extension shall be approved by the independent appeal body and/or the requester shall be notified in writing of the extension.

Section 16 – Ways in which access may be granted

39. As discussed in paragraph 8 above, the right to information provided by the Bill should be broadened to allow, not only access to documents, but access to information more broadly, which will include the right to inspect public works, the right to take samples of public works and the right to access information which is held in a database in any form that is reasonably requested. This approach has been incorporated into the Indian *Right to Information Act 2005*, one of the newest access laws in the world and one of those which enshrines the latest standards in openness. The forms of access permitted under s.16(a) should be amended to take into account this broader right of access.

40. A new provision should also be included to provide assistance to disabled people who are attempting to access information. The new Indian Act specifically provides that Information Officers must provide assistance to sensorily disabled people, for example by helping with inspection.

Recommendations:

- *Amend s.16(a) to clarify that access can be granted via inspection of public works and taking samples from public works as well as by collating information in electronic and paper databases as requested.*
- *Insert a new section requiring Information Officers to assist disabled people to effectively access information.*

Section 27 – Fees and Charges

41. As set out in paragraph 25, best practice requires that no fees should be imposed for accessing information, particularly government information, as costs should already be covered by public taxes. If any fees are imposed, the rates should be set with a view to ensuring that the costs imposed for access are not so high as to deter potential applicants. At the most, fees should be limited only to cost recovery, with no additional margin for profit, and a maximum limit should be imposed. Charges should only cover reproduction costs, not search or collation/compilation time. Imposing fees in respect of the latter could easily result in prohibitive costs, particularly if bureaucrats deliberately drag their heels when collating information in order to increase fees. Furthermore, a provision should be included in the Bill allowing for fees to be waived in certain circumstances. Section 29(5) of the Australian *Freedom of Information Act* actually provides a good model.

42. The current fees provisions should be revised to ensure they make it clear that fees will not be imposed which would practically undermine the objectives of the law. In this context, it is essential that s.27(a) be amended to require that the Minister make ALL regulations dealing with fees, rather than the heads of each individual office. Otherwise, the current formulation could result in a confusing variety of different fee regimes being developed which will be confusing for the public and could result in unfair and unjustifiable differentials to access the same information.

Recommendation:

- *Clarify that no fees shall be imposed for applications, both because the public already pay for information via their taxes and because in practice it will be difficult to collect fees if applications can be emailed or posted;*
- *Amend s.27(a) to clarify that the fee regime for all public authorities will be prescribed in rules by the Minister.*
- *Insert a new clause clarifying that:*
“any fees charged for provision of information shall be reasonable, shall in no case exceed the actual cost of providing the information such as making photocopies or taking print outs and shall be set via regulations at a maximum limit taking account of the general principle that fees should not be set so high that they undermine the objectives of the Act in practice and deter applications”.
- *Insert a new clause which states that “where the cost of paying or collecting the fee is greater than the fee itself, no fee will be charged”.*
- *Insert a new clause that: “Notwithstanding the imposition of fees, applicants shall be provided the information free of charge where a public authority fails to comply with the time limits specified in sub-section 10(5)”;*
- *Insert a new clause which allows for the waiver or reduction of any fees “where:*
 - (i) the payment of a fee would cause financial hardship to the applicant or the person on whose behalf the application was made or*
 - (ii) the giving of access is in the general public interest or in the interest of a substantial section of the public”*

New Part 5: Exemptions

43. One of the key principles of access to information is minimum exemptions. The key principle underlying any exemption is that its purpose must be to genuinely protect and promote the public interest. All exemptions should therefore be concerned with whether disclosure would actually cause or be likely to cause harm. Blanket exemptions should not be provided simply because a document is of a certain type – for example, a Cabinet document, or a document belonging to an intelligence agency. The key issue should be whether disclosure would actually cause serious damage to a legitimate interest, which deserves to be protected.
44. Every test for exemptions (articulated by Article 19) should therefore be considered in 3 parts:
- (i) Is the information covered by a legitimate exemption?
 - (ii) Will disclosure cause substantial harm?
 - (iii) Is the likely harm greater than the public interest in disclosure?
45. Currently, the exemptions provisions are scattered throughout the Bill, which may well make implementation much more complicated for the officials who will be called on to apply them. To aid interpretation, it is strongly recommended that all of the exemptions are captured in a single part. This will require some of the provisions to then be reconsidered, combined and reworded, because the lack of organisation in the Bill has resulted in some duplication as well as some confusion between provisions. The analysis below makes suggestions regarding which provisions could be grouped together and/or reworked.

Sections 23 and 30 –Weighing up the public interest

46. ALL exemptions should be subject to a blanket “public interest override”, whereby a document which falls within the terms of a *general* exemption provision should still be disclosed if the public interest in the *specific* case requires it. This ensures that every case is considered on its individual merits and public officials do not just assume that certain documents will always be exempt. It ensures that the “public interest” is always at the core of a right to information regime. Although section 30(a)(v) states that a document whose disclosure involves a matter of public interest should not be exempt, a public interest test should be given a much higher profile as a stand alone section covering all exemptions set out in the Bill. Section 8(3) of the Indian *Right to Information Bill 2004* and s.32 of the Ugandan *Access to Information 2004* provide examples of such clauses.
47. In a positive step, sections 23 and 30 set out a number of circumstances which will never be considered public interest reasons for withholding information. These clauses are a good aid to interpretation for officials. However, it is recommended that they moved to sit with the public interest override to aid clarity, and that they be elaborated upon to include issues which will likely weigh in favour of the public interest.

Recommendation:

- *Insert a public interest override provision in the following general terms:*
“A public authority may, notwithstanding the exemptions specified in Part 5 of this Act or anything in the Official Secrets Act or any other statute or common law provision, allow access to information if public interest in disclosure of the information outweighs the harm to the public authority”
- *Sections 23 and 30 should be reworked to support the public interest override suggested above, by listing out those areas which will never be a public interest reason for withholding information. Consideration should be given to providing some additional – 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.

Section 17 – Documents on a person’s health

48. CHRI has not commented on this section as CHRI does not specialise in privacy rights issues. The Maldives Government may wish to consult Privacy International for advice on legislation to protect patient’s medical rights.

Sections 18 and 31 – Documents on business affairs

49. Both sections 18 and 31 attempt to protect commercially sensitive information from disclosure. These provisions should therefore be combined and reworked as there is currently some duplication between them which may lead to confusion when officials try to apply the law.

50. Section 30 currently contains the bulk of the exemption provisions. In that context, the following issues need to be reconsidered:

- Sub-section (b) is too broadly worded. It is not enough that a request would disclose information of commercial value; there must also be some element of harm caused by the disclosure before withholding the information can be justified.
- Sub-section (c) should require a higher threshold of harm before information could be withheld because business people will too often and too easily claim that disclosure could cause them “prejudice”. A test of “substantial harm” or serious prejudice would be more appropriate.
- Sub-section (d) is much too broad and ripe for abuse. Just because information relates to the business affairs of a person does not justify non-disclosure. There must be some element of harm required to justify withholding information.
- All of the sub-sections should be made subject to an overriding clause whereby commercially sensitive information will nonetheless be released “where it is relates to a risk to public health or safety, the environment or an alleged or actual human rights violation”.

51. Section 18 is commonly referred to as third party consultation provisions, which requires that where a third party (in this case, a company or business) has provided confidential information to an office which is requested, the third party has the right to make representations to the office explaining why they think the information should not be disclosed, before a decision is made. While it is common in an FOI Bill that there be some consultation with third parties regarding the possible disclosure of information a third party has supplied in confidence, it is not appropriate that s.18 currently requires the third party’s consent. When a third party interacts with government – for example, for the purpose of lobbying or providing or received public services – the third party should be on notice that the government is subject to public scrutiny and that information may need to be disclosed accordingly. Based on the current wording of s.18 however, even a third party who has entered into a contract with a government office could withhold consent for that contact to be released. This undermines the objectives of the Bill in terms of promoting transparency and accountability.

Recommendations:

- *Combine ss.18 and 31 into a single provision protecting commercially sensitive business information.*
- *Rework s.30 by ensuring that ss.31(b) and (c) include appropriate harm tests (whereby information can only be withheld if it would cause serious harm and substantial prejudice to the protected business interests) and by deleting s.31(d).*
- *Make s.31 subject to a requirement that information will nonetheless be released “where it is relates to a risk to public health or safety, the environment or an alleged or actual human rights violation”.*
- *Rework s.18 to require that third parties will be consulted where a request relates to their trade secrets or information which has been treated as legally confidential information to an office which the office is considering for disclosure and have the right to make a representation to the office as to why the information should not be disclosed. Make it explicit however, that the office still retains the final decision-making power regarding release.*

Section 19 – Documents of research

52. Section 19 effectively acts as an exemption for research information and is much too broad. If the research has any commercial value it will be protected by s.31(c). In all other circumstances there is little justification for protecting against premature publication of research. Conversely, there is ample scope for abuse via such a provision – key government statistics (on health care, education, crime) could be withheld on the basis that they constitute part of a bigger research activity. At the very least, the harm test is too low – “substantial damage” or “serious prejudice” to the researcher’s results or ability to gain value from the research should be required to justify non-disclosure.

Recommendation:

Delete s.19 entirely or at the very least, amend s.19 to require that information may only be withheld where disclosure would be reasonably likely to undermine or substantially commercially devalue the research outputs.

Section 28 – Cabinet documents

53. Section 28 exempts Cabinet documents from the purview of the Act. Although it has historically been very common to include exemptions for Cabinet documents in right to information laws, in a contemporary context where governments are committing themselves to more openness it is less clear why the status of a document as a Cabinet document should, in and of itself, be enough to warrant non-disclosure. Considering all of the exemptions already contained in the law, it is not clear in addition why such a broad Cabinet exemption needs to be included. One of the primary objectives of a right to information law is to open up government so that the public can see how decisions are made and make sure that they are made right! The public has the right to know what advice and information the Government bases its decisions on and how the Government reaches its conclusions.

54. In this context, it is recommended that the Cabinet exemption be deleted and Cabinet documents protected under other exemptions clauses as necessary – for example, national security or management of the national economy. At the very least, all of the Cabinet exemptions need to be reviewed to ensure that they are very tightly drafted and cannot be abused. For example, s.28(a)(i) to (iii) protects documents that have been prepared, drafted or submitted to the Cabinet. However, it is notable that in some other jurisdictions, this type of provision has been abused because Cabinet members simply take documents into Cabinet and then out again and claim an exemption.

55. It is also not clear why s.28(iv) protects “an official record of Cabinet”. These records are presumably vetted by Cabinet before they are finalised – and if Cabinet members sign off on them as a legitimate record of discussions then why should they be worried about their release? So long as they capture Cabinet discussion accurately, they should be open to public scrutiny (unless some other exemption applies). The same argument applies to the exemption in s.28(v) – which protects documents whose disclosure would involve the disclosure of a Cabinet decision or cause prejudice the confidentiality of Cabinet deliberations. In this respect, Cabinet decision-making processes and debates should be able to stand up to public scrutiny – unless openness would harm another legitimate interest, such as international relations or law enforcement.

Recommendation:

Delete s.28 entirely and rely on the other exemptions in Part 5 to protect against harmful disclosures. Alternatively, at least redraft s.28 to protect only against disclosure of Cabinet documents where disclosure would cause substantial harm to key interests such as national security, the national economy, legal law enforcement operations, or international relations.

Section 29 – Documents relevant to enforcement agencies

56. While it is common to provide exemption provisions to protect sensitive law enforcement and judicial information, the provisions at s.29(a)(vii)-(ix) which attempt to go further and deal with “public safety” issues could be more problematic in practice. The provisions are quite broad, covering information which could “endanger the security of any building, structure or vehicle” or

“prejudice a set of rules or procedure for the protection of persons or property”. At the very least, both sub-sections need to be restricted to “lawful” security, systems or procedures.

57. In addition, section 29(a)(iii) which exempts a document that exposes information required to be kept confidential in enforcement or administration of a specific piece of legislation is the equivalent to giving officials a carte blanche to withhold any document they do not wish to make public. What is intended to be legitimately covered by this provision? This provision should be deleted.
58. All of the provisions should be tightened to protect against disclosures which could be “reasonably likely” to cause “serious prejudice” because these phrases are recognised legal terms which can therefore be interpreted and applies more easily by officials and oversight bodies. Additionally, all of them should be made subject to a broad public interest override as set out above.

Recommendation:

- *Reconsider ss.29(a)(vii)-(ix) and consider deleting the provisions or at least restricting them to “lawful” procedures.*
- *Delete section 29(a)(iii) because it is too broad and ripe for abuse.*
- *Reword all the provisions so that they only protect against disclosures which would be “reasonably likely” to cause “serious prejudice” to the protected interests.*

Section 34 – Act to override conflicting laws

59. Section 34 is a poorly drafted provision which operates so that all other laws, especially any outdated colonial-era Official Secrets Act, can override the Bill. This could significantly undermine the objectives of the Bill to bolster government transparency. International best practice recognises that any right to information law should be comprehensive, both in the right it extends and the restrictions it recognises. The list of exemptions included in the law should be exhaustive and other laws should not be permitted to extend them. Otherwise, public officials could be very confused when trying to apply the law, and the law could be inadvertently undercut by unrelated legislation which imposes contrary secrecy obligations. The whole point of the law is to reassess old secrecy laws and update them. The new law should override all other statutory or common law prohibitions on access to information. Section 22 of the Indian *Right to Information Act 2005* provides a good model.

Recommendation:

- *Replace s.34 entirely with a provision that makes it clear that the law overrides all other statutory or common law prohibitions on access to information along the following lines:
“The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in the Official Secrets Act 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.”*

Section 37 – Information that infringes upon privileges

60. This section exempts information that would prejudice the privilege of a judicial court or that of Parliament is unnecessary. In the first instance, s.29(a)(v) already protects against disclosures which could affect a person’s trial or the adjudication of a case. This sort of harm test is much more appropriate. Secondly, exempting Parliament is completely contrary to the principles of accountability and public participation which are at the core of effective representative democracy. As the Commonwealth Parliamentary Association Right to Information Study Group of MPs which met in July 2004 agreed, “Parliament should play a leadership role in promoting open government by opening up its own practices and procedures to the widest possible extent.” It goes directly against best practice to actually put Parliament beyond the scrutiny of the public, rather than using this new law as an opportunity to draw the public in and make them more aware of the work of Parliament.

Recommendation:

Delete s.37 because the sensitive judicial information is already protected by s.29(a)(v) and the protection in relation to parliamentary privilege is unnecessary.

New Part 6: Amending and Annotating Personal RecordsSections 20-22 – Right to apply to amend records of an office

61. CHRI has not commented on this section as CHRI does not specialise in privacy rights issues.

New Part 7: Independent and impartial appeals process

62. In its current form, the Bill lacks an independent and impartial appeals mechanism for rejected requests - another fundamental requirement of a best practice right to information law. While internal appeals provide an inexpensive first opportunity for review of its decision, oversight by an umpire independent of government pressure is a major safeguard against administrative lethargy, and ensures that exemption clauses are interpreted responsibly and citizens' requests are not unnecessarily obstructed. Special independent oversight bodies that review or decide complaints of non-disclosure are a cheaper, more efficient alternative to courts and enjoy public confidence when they are robustly independent, well-funded and procedurally simple.

63. All laws provide for some form of appeal from a decision to reject a request for information. Most use a tiered method that first allows for an internal review, and then goes on to adjudication by an independent specialist tribunal and/or court. Internationally, RTI laws variously provide for: quick, time-bound internal reviews; specialist external review mechanisms like Information Commissioners, Ombudsmen and Information Tribunals, which may have a mix of powers and duties to promote the law, review its working and deal with individual complaints of non-disclosure; or court-based appeals. Best practice supports the establishment of a dedicated Information Commission with a mandate to review refusals to disclose information, compel release and impose sanctions for non-compliance.

64. Consideration needs to be given to developing an appeals system that is appropriate for the Maldives. Taking into account the size of the Maldivian bureaucracy and the population, it may well be that there is little value in developing an internal appeal mechanism, because it is likely that there will be few enough appeals for a single appeal body to handle them all. Usually an internal appeal mechanism is a means of handling the simpler complaints to avoid over-burdening an independent appeal body, but that may not be necessary in the Maldives context. In terms of establishing an independent appeal mechanism, consideration may be given to tasking an existing oversight body – such as the National Human Rights Commission or an Ombudsman – with the job, in an effort to reduce costs and unnecessary bureaucracy. This option is often preferred in smaller jurisdictions. Nonetheless, an Information Commissioner is the best option, as Commissioners operate as strong champions of openness who can dedicate all their energies to promoting transparency and accountability. Notably, the island state of Antigua and the Northern Territory of Australia, which have only small populations, have both established Information Commissioners.

Recommendations:

- *Develop on an appropriate appeals process, which at a minimum identifies or establishes an independent appeal body – for example, an existing Ombudsman or NHRI or a new Information Commissioner - with responsibility for handling complaints regarding non-compliance with the law.*
- *Ensure that the independent appeal body is impartial and autonomous from Government, in particular by*
 - *Requiring that the selection process (for the new Information Commissioner or for existing members of an NHRI or the position of Ombudsman) is bipartisan, transparent and involves the public as much as possible;*
 - *Including a new provision clarifying that “the [insert the name of the independent appeal body] shall have budgetary, operational and decision-making autonomy and should be completely independent of the interference or direction of any other person or authority, other than the*

New provision – Appeals Remit

65. It is essential to make it very clear exactly what the appeals remit of any independent appeal body is, so that there is no ambiguity regarding the extent of the body’s review powers. It is important that the provision is broadly drafted to ensure that appeal bodies have a wide remit to review non-compliance with the law. Notably, the independent appeal body should not be limited merely to considering decisions on disclosure, but should be empowered to consider any complaint regarding non-compliance with the law. At the very least, a general provision should make it clear that appeals can be made on “any issue related to disclosure”. This will ensure that the types of appeals are not inadvertently limited. Section 88 of the Queensland (a State of Australia) *Freedom of Information Act 1992* and s.31 of the Canadian *Access to Information Act 1982* provide good models.

Recommendations:

Insert a new provision specifying that:

“Subject to this Act, an appeal may be made, [first to any internal appeal mechanism available and then] to the [insert the name of the independent appeal body], by or on behalf of any persons:

- (a) who have been unable to submit a request, either because no official has been appointed to receive requests or the relevant officer has refused to accept their application;*
- (b) who have been refused access to information requested under this Act;*
- (c) who have not been given access to information within the time limits required under this Act;*
- (d) who have been required to pay an amount under the fees provisions that they consider unreasonable, including a person whose wishes to appeal a decision in relation to their application for a fee reduction or waiver;*
- (e) who believe that they have been given incomplete, misleading or false information under this act;*
- (f) in respect of any other matter relating to requesting or obtaining access to records under this Act.”*

New provision – Power to Investigate

66. In order to ensure that the independent appeal body can perform its appeal functions effectively, it is imperative that the independent appeal body is explicitly granted the powers necessary to undertake a complete investigation and ensure enforcement of their orders. The powers granted to the Canadian Information Commissioner under s.36 of the Canadian *Access to Information Act 1982* provides a better model.

Recommendations:

Insert a new provision clarifying the investigations powers of the independent appeals body in relation to handling complaints of non-compliance with the new law:

(1) The [insert the name of the independent appeal body] has, in relation to the carrying out of the investigation of any complaint under this Act, power:

- (a) to summon and enforce the appearance of persons and compel them to give oral or written evidence on oath and to produce such documents and things as the [insert the name of the independent appeal body] 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 [insert the name of the independent appeal body] 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 [insert the name of the independent appeal body] under this Act as the [insert the name of the independent appeal body] 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 [insert

the name of the independent appeal body] 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 [insert the name of the independent appeal body] on any grounds.

New provision – Decision-making power

67. In light of the fact that any independent appeal body handling complaints under the new law will have to carve out a strong niche for itself within the bureaucracy, it is very important that there is complete clarity about what they have the power to do. This will also ensure that bureaucrats cannot sideline the independent appeal body as only a mediator or arbitrator and that independent appeal body will feel confident in exercising their powers to capacity.
68. In accordance with best practice evidenced in a number of jurisdictions (eg. the State of Queensland in Australia, Mexico), the independent appeal body should have the power to make binding determinations, compel parties to take action, enforce compliance with orders and impose penalties as appropriate. The law should also make it explicit that the independent appeal body can see any document which is subject to an appeal, regardless of whether or not an exemption is claimed. This is a standard provision in any access law and recognises that the appeal body's powers will be very limited if they are not permitted to review all documents which are in dispute. Without strong powers, the independent appeal body could easily be ignored and sidelined by a bureaucratic establishment which is determined to remain closed. Section 88 of the Queensland *Freedom of Information Act 1992* (which is replicated in paragraph 55 above), as well as s.82 of the South African *Promotion of Access to Information Act* and ss.42-43 of the Article 19 Model FOI Law provide very useful examples.
69. Notably, even if a Part 5 exemption is found to apply to certain information, the independent appeal body should have the power to look at whether the public interest in disclosing the information outweighs the public interest in withholding the information and to decide to release information on that basis. This will ensure that an impartial judge is responsible for deciding what is in the public interest – which is preferable when one considers that officials can sometimes confuse the general national public interest with the Government's interests.
70. Procedurally, it should be made explicit that written notice is given to all requesters of the outcome of their appeal. The content of such notices should be prescribed in the Bill. A time limit should also be specified in the Bill requiring a decision from the independent appeal body within 30 days. Without such a time limit, the usefulness of the independent appeal body as a cheap and *timely* alternative to the courts could be undermined, as decisions could be delayed *ad infinitum*.

Recommendations:

Insert a new provision to clarify exactly what decision making powers the independent appeal body has, specifically:

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

- including any rights of appeal, on both the complainant and the public authority.*
- (3) *Decisions of the [insert the name of the independent appeal body] shall be notified within 30 days of the receipt of the appeal notice.*
- (4) *Decisions of the [insert the name of the independent appeal body] shall be binding on all parties.*
- *Insert a new clause giving the independent appeal body has the power to “disclose document even where they are exempt, where the public interest in disclosure outweighs the public interest in withholding the information”*
 - *Insert a new clause requiring that the independent appeal body must make decisions within 30 days of receipt of a notice of appeal.*
 - *Insert a new clause requiring written notice to be provided to all parties of the independent appeal body’s decision.*

New provision - Burden of proof in appeals

71. Consideration should be given to including an additional provision in the Bill, which sets out the burden of proof in any appeal under the law. In accordance with best practice, the burden of proof should be placed on the body refusing disclosure and/or otherwise applying the law to justify their decision. This is justified because it will be unfair and extremely difficult for members of the public – who will never have seen the document they are requesting – to be forced to carry the burden of proof. Section 61 of the Australian *Freedom of Information Act 1982* provides a useful model.

Recommendation:

Insert a new provision specifying that:

“In any appeal proceedings, the office to which the request was made has the onus of establishing that a decision given in respect of the request was justified.”

New provision – Investigations for persistent non-compliance

72. An additional provision should be included replicating s.30(3) of the Canadian *Access to Information Act 1982*, which gives the independent appeal body the power to initiate its own investigations *even in the absence of a specific complaint by an aggrieved applicant*. In practice, this provision could be used to allow the independent appeal body to investigate patterns of non-compliance, either across government or within a department and produce reports and recommendations for general improvements rather than in response to specific individual complaints. In the State of Victoria in Australia, the Ombudsman (who acts as an independent appeal mechanism) was recently given a similar power because it was recognised that, as a champion of openness within government, he needed to be able to investigate and take public authorities to task for persistent non-compliance.

Recommendation:

Insert a new provision permitting the independent appeal body to initiate its own investigations in relation to any matter, whether or not it has received a specific complaint, eg. persistent cases of departmental non-compliance.

“Where the [insert the name of the independent appeal body] is satisfied that there are reasonable grounds to investigate a matter relating to requesting or obtaining access to records under this Act, the [insert the name of the independent appeal body] may initiate its own complaint in respect thereof.”

New Part 8: Penalties and Protection against Liability

73. Officials responsible for making decisions regarding disclosure of information may legitimately be concerned that wrong decisions on their parts, that is, decisions which result in the disclosure of information that their superiors believe should not have been released, could result in action being taken against them. It is positive therefore, that the Bill contains comprehensive provisions which protect officials from liability for actions done under the law in good faith. Nonetheless however, where an official does NOT act in good faith and fails to comply with the law, the Bill should ensure that an appropriate penalty is imposed on the official responsible for the breach.

New provision: Penalties for non-compliance with the Act

74. The Act is seriously weakened by the absence of comprehensive offences and penalties provisions, a shortcoming which should be rectified as a priority. Sanctions for non-compliance are particularly important incentives for timely disclosure in jurisdictions where the bureaucracy is unused to hurrying at the request of public. Most Acts contain combined offences and penalty provisions. Section 12 of the Maharashtra *Right to Information Act 2002*; s.49 of the Article 19 Model Law; s.54 of the UK *Freedom of Information Act 2000*; s.34 of the Jamaican *Access to Information Act 2002*; and s42 of the Trinidad & Tobago *Freedom of Information Act 1999* all provide useful models.
75. In the first instance, it is important to clearly detail what activities will be considered offences under the Act. It is important that these provisions are comprehensive and identify all possible offences committed at all stages of the request process – for example, unreasonable delay or withholding of information, knowingly providing incorrect information, concealment or falsification of records, wilful destruction of records without lawful authority, obstruction of the work of any public body under the Act and/or non-compliance with the Information Commissioner's orders.
76. 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.
77. When developing penalties provisions, lessons learned from the Indian states with right to information laws are illuminating. In some Indian states for example, penalties are able to impose on individual officers, rather than just their department. In reality, without personalised penalty provisions, many public officials may be content to shirk their duties, safe in the knowledge that it is their employer that will suffer the consequences. It is therefore important in combating entrenched cultures of secrecy that individual officers are faced with the threat of personal sanctions if they are non-compliant. The relevant provisions need to be carefully drafted though, to ensure that defaulting officers, at whatever level of seniority, are penalised. It is not appropriate for penalty provisions to assume that penalties will always be imposed on PIOs. If the PIO has genuinely attempted to discharge their duties but has been hindered by the actions of another official, the PIO should not be made a scapegoat. Instead, the official responsible for the non-compliance should be punished.

Recommendations:

- *Insert a new provision to provide a comprehensive list of offences which can attract a fine, for example, permitting sanctions for refusing to accept an application, unreasonable delay or withholding of information, knowing provision of incorrect information, concealment or falsification of records, and/or persistent non-compliance with the Act by a public authority.*
 - (1) *Where any official has, without any reasonable cause, failed to supply the information sought, within the period specified under section X, the appellate authorities and/or the courts shall have the power to impose a penalty of [X], which amount must be reviewed and, if appropriate, increased by regulation at least once every five years, for each day/s delay in furnishing the information, after giving the official a reasonable opportunity of being heard.*
 - (2) *Where it is found in appeal that any official has .*
 - (i) *Mala fide denied or refused to accept a request for information;*
 - (ii) *Knowingly given incorrect or misleading information,*
 - (iii) *Knowingly given wrong or incomplete information,*
 - (iv) *Destroyed information subject to a request;*
 - (v) *Obstructed the activities in relation to any application or of a Public Information Officer, any appellate authority or the courts;**commits an offence and the [insert name of independent appeal body] shall impose a fine of not less than [XXXXX] and may refer the case to the [insert name of relevant Court] for hearing as to whether a term of imprisonment of up to two years shall be imposed in addition or alternatively..*
 - (3) *Any officer whose assistance has been sought by the Public Information Officer for the performance of his/her duties under this Act shall be liable for penalty as prescribed in sub-*

sections (1) and (2) jointly with the Public Information Officer or severally as may be decided by the appellate authority, Information Tribunal or the Courts.

- (4) Before any penalty is imposed, the relevant official has a right to be heard before the [insert name of independent appeal body] or the [insert name of relevant Court], as the case may be.
- (5) Any fines imposed under sub-sections (1), (2) and (3) shall be recoverable from the salary of the concerned officer, including the Public Information Officer, or if no salary is drawn, as an arrears of land revenue.
- (6) The Public Information Officer or any other officer on whom the penalty under sub-sections (1), (2) and (3) is imposed shall also be liable to appropriate disciplinary action under the service rules applicable to him.

- Insert a new provision permitting the imposition of departmental penalties for persistent non-compliance.

New Part 9: Monitoring, Training and Public Education

New provision – Public awareness raising

78. It is increasingly common to include provisions in the law itself mandating a body not only to handle appeals and monitor implementation of the Act, but also to actively promote the concept of open governance and the right to information within the bureaucracy and amongst the public. The independent body responsible for handling appeals (see Part 7 above for more) could do this job, in furtherance of their role as a champion of openness in administration. In other jurisdictions, such provisions often specifically require that the government ensure that programmes are undertaken to educate the public and the officials responsible for administering the law. Sections 83 and 10 of the South African *Promotion of Access to Information Act 2000* together provide a very good model:

South Africa: 83(2) [Insert name], to the extent that financial and other resources are available--

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

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

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

10(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...

(3) The [Insert name of body] must, if necessary, update and publish the guide at intervals of not more than two years.

Recommendation:

Insert a new section placing specific responsibility on a body(s) – ideally the Ombudsman/NHR/Information Commissioner, but alternatively a unit in the Ministry responsible for administering the Act – to promote public awareness, including through the publication of a Guide to RTI, and requiring resources to be provided accordingly.

New provision – Annual reporting

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

Recommendation:

Insert a new provision giving the Ombudsman/NHRI/Information Commissioner an obligation to monitor implementation of the law, as follows:

- (2) *The [insert name of body] must as soon as practicable after the end of each year, prepare a report on the implementation of this Act during that year and cause a copy of the report to be laid before each House of the Parliament.*
- (3) *Each responsible department/ministry shall, in relation to the offices within their jurisdiction, collect and provide such information to the [insert name of body] as is required to prepare the report under this section, and shall comply with any prescribed requirements concerning the furnishing of that information and the keeping of records for the purposes of this section.*
- (4) *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 [insert name of body] 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;*
 - (viii) *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.*

New provision – Regular Parliamentary Review of the Act

80. 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 5 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 the Maldives. 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.

New provision – Records management

81. The huge volume of information in governments' hands requires that information be carefully managed so that authorities can locate and provide requested information in a timely and efficient way. In recognition of this fact, a new provision should be inserted in the Bill specifically requiring that *“Every public body is under an obligation to maintain its records in a manner which facilitates the right to information as provided for in this Act.”* Section 6 of the *Pakistan Freedom of Information Ordinance 2002* provides useful guidance in this context, specifically requiring computerisation of records and networking of information systems. Consideration should also be given to empowering an appropriate body - perhaps the Information Commissioner – 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.

Recommendation:

Insert a new provision requiring appropriate record keeping and management systems to be implemented to ensure the effective implementation of the law.

New provision - Protect whistleblowers

82. 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.

Recommendation:

- An additional article be included dealing with whistleblower protection. Section 47 of the Article 19 Model FOI Law provides a good model:

- (a) No one may be subject to any legal, administrative or employment-related sanction, regardless of any breach of a legal or employment obligation, for releasing information on wrongdoing, or that which would disclose a serious threat to health, safety or the environment, as long as they acted in good faith and in the reasonable belief that the information was substantially true and disclosed evidence of wrongdoing or a serious threat to health, safety or the environment.*
- (b) For purposes of sub-section (1), wrongdoing includes the commission of a criminal offence, failure to comply with a legal obligation, a miscarriage of justice, corruption or dishonesty, or serious maladministration regarding a public body.*