Dr Hassan Saeed
Attorney General & Chairperson Law Commission
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9 December 2005

Dear Sir

Re: Support for drafting of Maldives freedom of information law

I am writing from the Commonwealth Human Rights Initiative (CHRI), an international non-government organisation headquartered in New Delhi. CHRI's Right to Information (RTI) Programme works throughout the Commonwealth to promote the right to information, in particular, by assisting governments to develop strong RTI legislation and to support implementation of access laws.

I recently read in the *Haveeru Daily Online* news dated 27 November 2005 that a draft Maldives Freedom of Information Law has been sent to the Law Commission for its approval. The report also stated that the Attorney General's Office intends to begin implementing the draft law prior to its approval by the People's Majlis. I also note that in 2004, in an interview with the *Haveeru Daily Online* news, you stated that the draft bill would be sent to Parliament in 2005.[1]

CHRI commends your Office for supporting the enactment and speedy implementation of a national right to information law. In this regard, I wanted to take this opportunity to offer the support of CHRI's RTI team to assist the Attorney General's Office and the Law Commission with both the drafting and implementation process. For example, we can undertake legislative research, reviewing the current draft of the Bill or provide training for officials. We have already written to President Gayoom in this regard. I am attaching a copy of the letter for your consideration.

Notably, CHRI has considerable experience in this area. Our RTI team has already reviewed a number of draft right to information bills throughout the Commonwealth, including most recently, Government Bills produced in India

[1](2004*) Maldives to have Freedom of Information Act*, Haveeru Daily Online, 27 May

and Kenya and civil society Bills in Malawi and Sierra Leone (please view our website at http://www.humanrightsinitiaitive.org/programs/ai/rti/international/laws_&_papers.htm for more). In India, we also have considerable implementation experience, as CHRI has been called on by more than 10 State Governments and the national government to assist with training of officials and various other discrete implementation tasks.

In terms of promoting implementation even prior to enactment of a comprehensive law one key area which I would encourage you to consider focussing on is proactive disclosure, by which I mean the automatic publication of key government information, even in the absence of a specific request. Ideally, all public authorities should routinely publish key information, on their websites and in hard copy (which could be held at their offices for inspection). At a minimum public authorities should publish information about their functions, decision-making norms, documents held, employee contacts, and budgets. In India, the law even requires public authorities to regularly disclose information about subsidy schemes (including details of beneficiaries) and the recipients of licenses, concessions and permits. In Mexico, the national transparency law also requires the publication of public contracts.

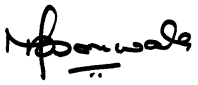
As your office starts to take steps to support the enactment and implementation of a national freedom of information law, I also wanted to take this opportunity to draw to your attention some key law-making principles which have been recognised as international best practice standards, which we hope the new Maldives law will comply with (See Annex A).

I would be very grateful to hear from you to advise how CHRI could be of most use in the drafting process and if you were able to send my office a copy of the current Bill. More generally, CHRI would strongly encourage you to adopt a participatory approach towards the drafting process by consulting widely with the public and other key stakeholders before the Bill is finalised and tabled in Parliament. Experience has shown that a participatory law-making process can be a major factor in laying a strong foundation for an effective right to information regime. Implementation is strengthened if right to information laws are ‘owned’ by both the government and the public. Public participation can be facilitated in a variety of ways, for example, by: setting up a committee of stakeholders (including officials and public representatives) to consider and provide recommendations on the draft Bill; inviting submissions from the public before the Law Commission or Parliament finalises and enacts the Bill; convening public meetings to discuss the proposed law; and strategically and consistently using the media to raise awareness and keep the public up to date on progress.

Finally, I am enclosing a copy of a comparative table of Commonwealth right to information laws, which summarises the key elements in the 12 RTI laws which are currently in force in the Commonwealth. I am also enclosing a copy of the new Indian Right to Information Act 2005, which was passed in June 2005, because it provides one of the most recent and best examples of right to information legislation in the Commonwealth. You may wish to use it as a model for the new Maldives law. In terms of your wish to start implementing the right to information even prior to enactment of a comprehensive national law, I am also enclosing some of the materials we have developed to support the implementation of the new Indian Right to Information Act.

As noted earlier, I would be very grateful if you could send to us a copy of the draft Maldives Freedom of Information Bill. If we can be of any other assistance in respect of entrenchment of a strong Maldives right to information law, please do not hesitate to contact me on (0)9810 199 745 or (011) 2685 0523 or via email at majadhun@vsnl.com. Alternatively, please contact Ms Charmaine Rodrigues, Co-Coordinator, Right to Information Programme at charmaine@humanrightsinitaitive.org.

Yours sincerely



Maja Daruwala
Director

Encl: Letter to President Maumoon Abdul Gayoom
- CHRI Comparative Table on Commonwealth Legislation.
- CHRI Report: *Open Sesame – Looking for Right to Information in the Commonwealth.*
- Indian *Right to Information Act 2005*
- Conference Resource Pack, Report and CD: *Implementing the new Indian Right to Information Act 2005*

Annex A: Best Practice Legislative Principles

In CHRI's 2003 Report, *Open Sesame: Looking for the Right to Information in the Commonwealth* (see enclosed), which was launched in the margins of the 2003 CHOGM, the RTI team captured the key principles which should underpin any effective right to information law, drawing on international and regional standards and evolving State practice. Article 19, an NGO which specifically works on right to information, has also developed "Principles on Freedom of Information Legislation" which were endorsed by the United Nations Special Rapporteur in 2000.[2] The Commonwealth of which the Maldives is a member - has also endorsed minimum standards on the right to information.[3] These various generic standards have been summarised into the five principles below.

Maximum Disclosure

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

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

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

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

Promotion of Access to Information Act 2000 provides a very good example to draw on.

Bodies covered by the Act should not only have a duty to disclose information upon request, but should also be required to proactively publish and disseminate documents of general relevance to the public, for example, on their structure, norms and functioning, the documents they hold, their finances, activities, any opportunities for consultation and the content of decisions/policies affecting the public. Section 4 of the new Indian *Right to Information Act 2005* provides a useful model.

In order to support maximum information disclosure, the law should also provide protection for "whistleblowers", that is, individuals who disclose information in contravention of the law and/or their employment contracts because they believe that such disclosure is in the pubic interest. Whistleblower protection is based on the premise that Individuals should be protected from legal, administrative or employment-related sanctions for releasing information on wrongdoing. It is important in order to send a message to the public that the government is serious about opening itself up to legitimate scrutiny.

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

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

Simple, Cheap and Quick Access Procedures:
A key test of an access law's effectiveness is the ease, inexpensiveness and promptness with which people seeking information are able to obtain it. The law should include clear and uncomplicated procedures that ensure quick responses at affordable fees. Applications should be simple and ensure that the illiterate and/or impecunious are not in practice barred from utilising the law. Officials should be tasked with assisting requesters. Any fees which are imposed for gaining access should also not be so high as to deter potential applicants. Best

practice requires that fees should be limited only to cost recovery, and that no charges should be imposed for applications nor for search time; the latter, in particular, could easily result in prohibitive costs and defeat the intent of the law. The law should provide strict time limits for processing requests and these should be enforceable.

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

Effective Enforcement: Independent Appeals Mechanisms & Penalties
Effective enforcement provisions ensure the success of access legislation. In practice, this requires that any refusal to disclose information is accompanied by substantive written reasons (so that the applicant has sufficient information upon which to appeal) and includes information regarding the processes for appeals.

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

Best practice supports the establishment of a dedicated Information Commission with a broad mandate to investigate non-compliance with the law, compel disclosure and impose sanctions for non-compliance. Experience from a number of Commonwealth jurisdictions, including Canada, England, Scotland and Western Australia, has shown that Information Commission(er)s have been very effective in raising the profile of the right to information and balancing against bureaucratic resistance to openness. Of course, there are alternatives to an Information Commission. For example, in Australia, the Administrative Appeals Tribunal has appeal powers and in New Zealand and Belize the Ombudsman can deal with complaints. However, experience has shown that these bodies are often already overworked and/or ineffective, such that they have rarely proven to be outspoken champions of access laws.

The powers of oversight bodies should include a power to impose penalties. Without an option for sanctions, such as fines for delay or even imprisonment for willful destruction of documents, there is no incentive for bodies subject to the

Act to comply with its terms, as they will be aware that the worst that can happen is simply that they may eventually be required to disclose information.

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

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

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

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

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