



Commonwealth Human Rights Initiative

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Senate Committee On Information

C/- The Secretary, Senate Committee on Information

Senate Committee Room 23 (First Floor)

National Assembly Complex

Abuja Nigeria

Maja Daruwala

Director

14 March 2005

Dear Senator

Members

T. Ananthachari

N.R. Madhava Menon

P.P. Rao

R.V. Pillai

Anu Aga

K. S Dhillon

Re: Submission to Senate Committee on Information recommending improvements to the *Freedom of Information Bill 2004*

I am writing from the Commonwealth Human Rights Initiative (CHRI), an independent, non-partisan, international non-governmental organisation, mandated to ensure the practical realisation of human rights in the countries of the Commonwealth. In furtherance of CHRI's overall human rights mandate, we have a specific programme dedicated to supporting the implementation of the right to information in Commonwealth member states.

CHRI's Right to Information Programme has been following the progress of the Nigerian *Freedom of Information Bill 2004* (FOI Bill) with interest. We are very encouraged that the FOI Bill has passed the second reading in the Senate and looks like being enacted in the short term.

We understand that the Senate Committee on Information will be holding public hearings on the FOI Bill in mid-March. Due to CHRI's location in New Delhi, India, we are not able to make an oral submission to the Committee. However, we hope that you will consider the following written submission on the FOI Bill. We understand that the Bill has already passed through a number of consultations and close review and therefore have limited our comments to key issues. Please note, the following comments on the Bill are based on our experience of FOI laws throughout the Commonwealth. They also draw on agreed international best practice principles, including the principles endorsed in 2004 by the UN Special Rapporteur on Freedom of Expression¹.

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Commonwealth Medical Association
Commonwealth Parliamentary Association, Commonwealth Press Union.

¹ (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*, <http://www.cidh.org/Relatoria/showarticle.asp?artID=319&IID=1>

Broaden the coverage of the law

Cover private bodies

It is very positive that s.2 read with s.3(3) appears to extend the coverage of the law to all arms of government, as well as going some way towards covering private bodies which have an impact on the public. Notably however, in accordance with the international best practice evidence in South Africa, consideration could be given to going further and covering all private bodies where the information requested is necessary for the exercise or protection of any right. Such a formulation recognises the huge impact that private bodies have on the public in this era which has seen multinational companies with a reach and budgets bigger than many countries. A number of alternate formulations are replicated below:

- *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, ie. 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.*
- *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*

If the current formulation is retained, at a minimum, consideration could be given to permitting additional bodies to be covered by the law, if prescribed by regulation. This would at least allow for key private bodies to be covered, on a case by case basis, which could be particularly important where public bodies are privatised and there is argument over whether the private body is performing “public functions”. Additionally, consideration could be given to enabling private bodies to be covered where the information requested may disclose some contravention of the law or a risk to public health or safety.

Clarify coverage of all arms of government

As noted above, it is positive that s.2 read with s.3(3) appears to extend the coverage of the law to all arms of government by specifying that it applies to the executive, legislature and judiciary. However, the phrasing in s.3(4) which mentions “institutions”, “authorities” and “agencies” may inadvertently narrow the scope of the law. Will Cabinet be considered an “institution”? Will individual MPs and their advisors be covered as “agencies”? The wording of this clause should be reconsidered to clarify these issues.

Broaden the definition of “public records”

Section 2 provides a right to access “records”. Consideration could be given to using the term access to “information” rather than access to “records” and then defining “information” broadly to include not only documents and other such data, but samples and materials. The right to information should then be defined to include a right to inspection and to taking samples. In India, the inclusion of this type of a broad definition in some State laws has been extremely effective in empowering the public to more effectively scrutinise public works to check that proper materials have been used and construction standards have been met.

Establish a non-court independent appeals mechanism with proper sanctioning powers

While it is positive that ss.22 and 24 permit appeals to the courts and that such appeals will be dealt with summarily, nonetheless, we strongly urge you to consider the establishment of an

additional independent appeal body which is empowered to hear appeals before they go to the courts. International best practice standards strongly support the establishment of a non-judicial independent appeal mechanism, on the basis that the courts are often too expensive, complex and slow to be an appropriate body to deal with simple first appeals.

We understand that there has been some concern that setting up an independent appeal mechanism could be too costly for Nigeria and too difficult considering its federal structure. However, comparative experience shows that this need not be the case. In Mexico, for example, the newly established Information Commission which deals with appeals from the federal access law has not been required to set up offices throughout the country and has been functioning extremely effectively despite this. Likewise, in Canada, the 20-year old federal Information Commission is recognised as a very simple, cost-effective appeal body, with only the more complex FOI cases going to the courts.

In this context, it is worth considering the fact that the South African access law did NOT include a non-judicial independent appeal mechanism and it has now been recognised that this is a major flaw in the country's legislation and a major impediment to the public getting cheap and quick access to documents without having to engage a lawyer to argue their case for them. An independent appeal mechanism, based on the Mexican model or the newly proposed Indian model¹, would enable the public to speedily have their complaints addressed without clogging up the courts.

Notably, for an independent appeal mechanism to work though, they would have to be given strong investigative, decision-making and sanctioning powers. On the issue of sanctions, CHRI notes that, regardless of which appeal process is finally decided upon in the FOI Bill, consideration should be given to tightening the offences and penalties provisions in s.10 to ensure that all offences will be properly punished. For example, it should be a punishable offence, whether by fine and/or imprisonment for more serious offences, to:

- Knowingly give incorrect, misleading or incomplete information;
- Obstruct the activities of an officer handling a request, [any appellate authority] or the courts;
- Mala fide deny or refuse to accept a request for information;
- Without any reasonable cause, fail to supply the information requested in time.

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

In order to ensure that public bodies properly implement the law, they too should be liable for sanction for non-compliance. This would ensure that heads of department take a strong lead in bedding down the law and ensuring that staff across their authority undertake their duties properly. Consideration should be given to including an additional provision in the FOI Bill to penalise public authorities for persistent non-compliance with the law. A fine could be imposed for example, where a public authority fails to implement the proactive disclosure provisions in a timely manner, consistently fails to process applications promptly and/or is found on appeal to consistently misapply the provisions of the law to withhold information. The minimum fine should be sufficiently large to act as a deterrent.

Tighten the exemptions

It is very positive that s.28(1)(iii) currently allows the Courts to order information to be released even if it is covered by *any* exemption, where release is in the public interest. It is also positive that many of the exemptions in the Bill already include a specific public interest override. In

¹ See Chapter III of the *Right to Information Bill 2004*:

http://www.humanrightsinitiative.org/programs/ai/rti/india/national/rti_bill_2004_tabled_version.pdf

keeping with international best practice however, consideration should be given to making all the exemptions subject to a public interest override which can be applied by the original decision-maker. This will ensure that bureaucrats are themselves always forced to consider the public interest when they are handling information requests, which will have positive outcomes in terms of changing bureaucratic culture towards greater openness.

More specifically, some of the exemptions need to be tightened to ensure that they only permit non-disclosure where release of information would cause serious harm to legitimate national interests. In this context:

- Sections 14(1)(i) and (ii) should be more tightly worded. Permitting non-disclosure because release of information would “interfere” with law enforcement activities is too low a harm test. Interference can be negative or positive – but non-disclosure should only be permitted where release of information would actually cause “serious harm” or “substantial prejudice”.
- Section 15(a) should be more tightly worded because it does not include a proper harm test. Section 15(a) allows information to be withheld simply because it “has substantial economic value or is likely to have substantial value”. But where is the harm? Surely non-disclosure should only be permitted if information has substantial economic value *and* that value would be substantially diminished by disclosure.
- Section 15(c) should be deleted because the interest to be protected does not merit protection. In any case, really significant research would be covered by s.15(a). At a minimum, a harm test should be included.
- Section 15(d) should be more tightly worded because the phrase “materially injurious to the financial interests” of Nigeria is too broad. What is intended to be considered relevant “financial interests”?
- It is positive that s.16 includes a specific public interest override, but nevertheless the provision is much too broadly worded. In keeping with common practice internationally, a general provision should be drafted allowing non-disclosure “where it would involve the unreasonable disclosure of personal information about a natural third party”. However, it should be explicit that such an exemption will not apply where the individual is or was an official of a public body and the information relates to his or her function as a public official. At a minimum, ss.16(1)(ii), (iii) and (v) should all be reconsidered. In particular, s.16(1)(ii) could easily be abused by corrupt officials.
- The protections in s.17 are too broad because the harm tests are not strict enough. In particular, s.17(1)(c) should be reworded to make it clear that bids/proposals/ etc can ONLY be kept secret where *premature disclosure* would give another party an unfair advantage.
- Section 18 is much too broadly worded because it exempts huge tracts of key advice and decision-making information. Ironically, this is exactly the kind of information that the public *should* be able to access, unless it is particularly sensitive. The public has the right to know what advice and information the Government bases its decisions on and how the Government reaches its conclusions. It is not enough to argue that disclosure would inhibit internal discussions. Officials should be able – and be required – to ensure that their advice can withstand public scrutiny. To fear such transparency raises questions about the soundness of the entire decision-making process. Of course, it will generally not be appropriate to disclose advice *prior* to a decision being reached. In this context, protection should be provided for “premature disclosure which could frustrate the success of a policy or substantially prejudice the decision-making process”. Of course, relevant information should still eventually be disclosed – it is only premature disclosure that should be protected. At a minimum, it is essential that this provision is made subject to a specific public interest override.

Tighten the request provisions, in particular, the fees provisions

To ensure that the public's right to access information is promoted and supported at all times, consideration should be given to making it explicit in s.4 and in other provisions as appropriate, that officials are required to assist applicants to formulate their applications. At the very least, illiterate and disabled applicants should be assisted. Additionally, a provision should be included in the FOI Bill which requires no application will be rejected until an applicant has: (i) been given an opportunity to fix it; and (ii) an official has offered to assist with fixing it. This is actually a common provision contained in most access laws (see for example, ss.18-20 of the South African Act; s.15 of the Australia Act; s.8 of the Jamaican Act; and s.6 of the current Indian Act).

Consideration should also be given to simplifying the fees provisions in s.9 of the FOI Bill, which are currently unnecessarily complicated. Ideally, no fee should be charged for application – which is the case under the United Kingdom Act. Experience has shown that collecting such fees can be often be more effort than it is worth – particularly where the fees are correctly set at a very low rate to ensure that no person is discouraged from applying because of cost.

Further, if charges are to be imposed for accessing information, consideration should be given to amending s.9 so that charges 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. Notably, at present it is not clear how the fee provisions will work in practice because they attempt to set a differential rate depending on the type of requester/request – but if a requester does not have to provide a reason for their request in accordance with s.2(2), then how will an official know which fee to charge?

It is very positive that s.9(2) allows for fees to be waived where release of information is in the public interest. In accordance with the good practice evidenced in s.29(5) of the Australian Act, for example, consideration should be given to further allowing fees to be waived where their imposition would cause financial hardship. Additionally, following the good practice evidenced in s.17(3) of the Trinidad & Tobago Act and s.7(6) of the new Indian Bill even where fees are imposed, if a body fails to comply with the time limits for disclosure of information, access to which the applicant is entitled should be provided free of charge.

Extend the proactive disclosure requirements

The proactive disclosure provisions in s.3(1) are very good. Notably however, their impact is diminished somewhat by the fact that they largely require public bodies to upload lists of important documents that could be available upon request, rather than actually proactively disclosing such documents. This limitation should be rectified. In that context, the provisions in s.3 of the new Indian Bill as well as those in Article 7 of the Mexican Act provide very good models. Both Acts for example, require the proactive disclosure of subsidy programs including the amounts allocated to them and criteria for access to them and all concessions, permits or authorisations granted, with their recipients specified. In Mexico, the law also requires the proactive publication of all contracts granted under the terms of applicable legislation “detailing for each contract the public works, goods acquired or rented, and the contracted service;... the amount; the name of the provider, contractor..., and the periods within which the contracts must be completed”. Consideration could be given to replicating these provisions in the Bill.

Strengthen the monitoring provisions

It is very positive that s.32 requires the Attorney General to submit annual reports on the implementation of the FOI Act. However, to ensure that the reports are an effective monitoring tool and can be used to promote the bureaucracy to implement the law properly, consideration should be given to amending s.32(4) to specifically require that the annual report is actually tabled in Parliament and to require that the Committee on Government Reform Oversight of the

House of Representatives and/or the Committees on Government Affairs and the Judiciary of the Senate must consider the annual report. This is the case in Canada for example, where the Information Commissioner's annual report is sent to a Parliamentary Committee designated to review the administration of the Act.

Consideration should also be given to including a new provision in the FOI Bill which specifically tasks a body with promoting the law, for example, by conducting public awareness programmes, conducting training for public officials and producing materials to explain the law and assist with its use. In South Africa for example, this role has been given to the South African Human Rights Commission under s.83 of the *Promotion of Access to Information Act 2000*. In the United Kingdom, the Information Commissioner undertakes such activities.

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CHRI's RTI Programme works to support governments and other stakeholders throughout the Commonwealth to develop and implement legislation which entrenches the right to information. We are very keen for you to consider us as a resource which you can call on to support the Government's ongoing legislative development and implementation activities. Please do not hesitate to contact Charmaine Rodrigues, who leads our Right to Information International Programme (charmaine@humanrightsinitiative.org) or me at our New Delhi Headquarters, if there is anything we can do to support your work, including sourcing and providing materials, providing technical legal expertise and putting you in contact with other like-minded organisations with relevant experience.

Yours sincerely



Maja Daruwala
Director

cc: Senator Rufus Spiff, Vice-Chairman
Senator Barr Julius Ucha
Senator Sale Usman Danboyi
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