

**Detailed Analysis of the  
Sierra Leone civil society draft  
Freedom of Information Act 2005  
&  
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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**For more information or to discuss this paper, please contact:**

Ms Charmaine Rodrigues, Programme Co-Coordinator or

Ms Tapasi Sil, Project Officer

Right to Information Programme, Commonwealth Human Rights Initiative (New Delhi)

Email: [charmaine@humanrightsinitiative.org](mailto:charmaine@humanrightsinitiative.org) or [tapasi@humanrightsinitiative.org](mailto:tapasi@humanrightsinitiative.org)

Phone: +91-11 2686 4678 / 2685 0523; Fax: +91-11 2686 4688

## **Analysis of the Sierra Leone Freedom of Information Bill**

1. The Society for Democratic Initiatives (SDI), Sierra Leone forwarded a copy of a draft Freedom of Information Bill to the Commonwealth Human Rights Initiative (CHRI) for review and comment. CHRI welcomes this opportunity to comment on this Bill. The analysis below suggests areas which could be reconsidered and reworked, as well as providing examples of legislative provisions which could be incorporated into a revised version of the Bill. Taking account of the number of amendments CHRI has recommended, CHRI suggests that any revised draft Bill be distributed again for a second consultation and review.
2. In the context of the current law-making exercise, CHRI would like to specifically encourage SDI to continue to develop the law participatorily because 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 government 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.

### **THE VALUE OF THE RIGHT TO INFORMATION**

3. At the outset, it is worth reiterating the benefits of an effective right to information regime. These arguments could be useful when SDI starts lobbying Parliament to enact the Bill.
  - *It strengthens democracy.* The foundation of democracy is an informed constituency that is able to thoughtfully choose its representatives on the basis of the strength of their record and that is able to hold their government accountable for the policies and decisions it promulgates. The right to information has a crucial role in ensuring that citizens are better informed about the people they are electing and their activities while in government. Democracy is enhanced when people meaningfully engage with their institutions of governance and form their judgments on the basis of facts and evidence, rather than just empty promises and meaningless political slogans.
  - *It supports participatory development.* Much of the failure of development strategies to date is attributable to the fact that, for years, they were designed and implemented in a closed environment - between governments and donors and without the involvement of *people*. If governments are obligated to provide information, people can be empowered to more meaningfully determine their own development destinies. They can assess why development strategies have gone askew and press for changes to put development back on track.
  - *It is a proven anti-corruption tool.* In 2003, of the ten countries scoring best in Transparency International's annual Corruption Perceptions Index, no fewer than nine had effective legislation enabling the public to see government files. In contrast, of the ten countries perceived to be the worst in terms of corruption, not even one had a functioning access to information regime. The right to information increases transparency by opening up public and private decision-making processes to scrutiny.
  - *It supports economic development.* The right to information provides crucial support to the market-friendly, good governance principles of transparency and accountability. Markets, like governments, do not function well in secret. Openness encourages a political and economic environment more conducive to the free market tenets of 'perfect information' and 'perfect competition'. In turn, this results in stronger growth, not least because it encourages greater investor confidence. Economic equity is also conditional upon freely accessible information because a *right* to information ensures that information itself does not become just another commodity that is corralled and cornered by the few for their sole benefit.

- *It helps to reduce conflict.* Democracy and national stability are enhanced by policies of openness, which engender greater public trust in their representatives. Importantly, enhancing people's trust in their government goes some way to minimising the likelihood of conflict. Openness and information sharing contribute to national stability by establishing a two-way dialogue between citizens and the state, reducing distance between government and people and thereby combating feelings of alienation. Systems that enable people to be part of, and personally scrutinise, decision-making processes reduce citizens' feelings of powerlessness and weakens perceptions of exclusion or unfair advantage of one group over another.

#### **ANALYSIS OF DRAFT BILL AND SUGGESTIONS FOR IMPROVEMENT**

4. 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*<sup>1</sup>, provides more detailed discussion of these standards. The critique below draws on this work.<sup>2</sup>
5. Overall, CHRI's assessment is that the Bill is relatively strong, a fact which stems largely from the fact that the draft Bill draws heavily on the Article 19 Model Law. SDI should be commended for incorporating such best practice model legislative provisions into the draft Bill. However, CHRI has still made a number of recommendations for improving the Bill, because the Article 19 Model Law was drafted in 2001, and since then there have been a number of important developments in the area of access legislation which have extended and broadened the right to information.

#### **Part I: Definitions and Purpose**

##### Preamble

15. It is positive that the introduction to the draft Bill specifically states that it seeks to enable access to information held by public bodies and private bodies and that the law is underpinned by the principle of maximum disclosure in the public interest. However, to assure a liberal interpretation of the right to information and to promote the presumption in favour of access, the Preamble could be extended and/or an objectives clause inserted which establishes clearly the principle of maximum disclosure, transparency and accountability.

##### **Recommendation:**

- *Amend the current Preamble to more clearly set out the broader democratic objectives of the Bill, for example:*

*WHEREAS there exists a need to:*

- foster a culture of transparency and accountability in public authorities by giving effect to the right of freedom of information and thereby actively promote a society in which the people of Sierre Leone have effective access to information to enable them to more fully exercise and protect all their rights;*
- give effect to the fundamental Right to Information, which will contribute to strengthening democracy, improving governance, increasing public participation, promoting transparency and accountability and reducing corruption*
- Establish voluntary and mandatory mechanisms or procedures to give effect to right to information in a manner which 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 reasonable manner.*
- Promote transparency, accountability and effective governance of all public authorities and private bodies by including but not limited to empowering and educating all persons to:*
  - *Understand their rights in terms of this Act in order to exercise their rights in relation to public authorities and private bodies.*
  - *Understand the functions and operation of public authorities; and*
  - *Effectively participating in decision making by public authorities that affects their rights.*

<sup>1</sup> [http://www.humanrightsinitiative.org/publications/chogm/chogm\\_2003/default.htm](http://www.humanrightsinitiative.org/publications/chogm/chogm_2003/default.htm)

<sup>2</sup> All references to legislation can be found on CHRI's website at [http://www.humanrightsinitiative.org/programs/ai/rti/international/laws\\_&\\_papers.htm](http://www.humanrightsinitiative.org/programs/ai/rti/international/laws_&_papers.htm)

### Move Section 52 to Section 1

16. The title and commencement provisions in the Act should be included under Part I of the Act instead under Part IX.
17. The Bill does not provide for a specific time limit for the implementation of the Act. However, it does require that if the President does not proclaim a date for commencement, the law shall automatically come into force 6 months “after its passage into law”. Consideration needs to be given to how a law passes into law in Sierra Leone – is a gazettal notice required and if so, can the Government or bureaucracy delay implementation by simply failing to allow the Act to pass into law”. To guard against this problem a specific commencement date should simply be nominated in the Act to ensure that there is no room for the current provision to be abused and implementation to be stalled indefinitely. Experience suggests a maximum limit of 1 year between passage of the law and implementation should be sufficient (see Mexico for a good example).

#### **Recommendations:**

- *Move section 52 to sit as section 1*
- *Amend s.52(2) to clearly state a time limit for the Act to come into force.*

### Section 2

18. The Bill currently defines and uses the term “records” throughout, rather than the broader term “information”. It is recommended that the term “information” be included in the definitions section and then used in the Bill instead of “records”. Allowing access to “information” means that applicants are not restricted to accessing only information which is already collated into a “record” at the time of the application. Also, the use of the term “record” can exclude access to items such as videos, models or materials. This can be a serious oversight because it has been shown in many countries that the public’s ability to oversee government activities and hold authorities to account, in particular those bodies which deal with construction or road works, is enhanced by allowing them to access samples of materials and the like. Consideration should be given to reworking the current definitions of “information” and “record” to specifically include physical materials and models, such as those used in construction/infrastructure activities.
19. Section 2 should be amended to insert a definition of the term “access” to clarify the content of the right to “access” information to ensure 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:**

- *Amend s.2 to include a definition of the term ‘information’, which should subsume the current definition of record. A model definition could be:  
“information” means 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.*
- *Amend s.2 to include a definition of the term “access”. A model definition could be:  
“access” to information means the inspection of works and information, taking notes and extracts and obtaining certified copies of information, or taking samples of material.*

## **PART II – RIGHT TO ACCESS INFORMATION HELD BY PUBLIC AND PRIVATE BODIES**

### **Section 3**

20. Section 3 appears to have been misdrafted because it refers only to the right of the public to access information held by public bodies, even though later clauses – and in fact, the heading to the entire Part – indicate that the law is intended to permit access to certain information held by private bodies as well.

#### **Recommendation:**

- *Amend s.3 to read:  
“Everyone shall have the right to access information from public authorities and the right to access information held by private bodies where the information is necessary for the exercise or protection of a right, subject only to the provisions of this Act.*

### **Section 4**

21. Section 4 has been drafted in an overly complicated manner, in particular because it refers to both access to “records” and to “information”. To ensure consistent use of terms, with a view to ensuring maximum accessibility to the public, s.4(1) should be amended to refer to “information” only.

22. The Bill should clarify the public has a right to access information created, collected or held by public and private bodies before passage of the Bill. The public has the right to access historical documents because people have a right to know not only what their government is and is intending to do – but what it has done and why.

#### **Recommendation:**

- *Amend s.4(1) to read:  
Any person making a request for information to a public body shall be entitled, subject only to the provisions of Parts II and IV of this Act: –  
(a) to be informed whether or not the public body holds the information or can access or derive the information from other sources; and  
(b) if the information is held or under the control of the public body, to have access to that information*
- *Insert a new sub-clause making it explicit that the public has a right access information created, collected or held by public and private bodies before passage of the law*

### **Section 7**

23. In accordance with the recommendation in paragraph 20 above, the definition of record in s.7(1) should be incorporated into the definition of “information” in s.2.

24. The definition in s.7(2)(a) of when a body “holds” information needs to be amended (or even deleted) because it currently operates to exclude information held “on behalf of someone”, which could unjustifiably exclude large amounts of important information from the law. Unless a public body holds information in legal trust AND in confidence for someone, there is no reason why such information should automatically be excluded from coverage of the law. If it is genuinely sensitive and/or private, it will be excluded under the personal privacy exemption clause. Even if a public authority is an *agent* for someone, the public still has a right to know what the public authority is doing in its position as agent, unless an exemption applies. It is important that third party information is not automatically excluded.

#### **Recommendation:**

- *Incorporate s.7(1) into the definition of “information” in s.2*
- *Amend or delete s.7(2)(a) to remove the words “other than on behalf of another person”*

## Section 8

25. Section 8 is a crucial provision because it sets out the actual process for the public to request access to a document. While it is positive that s.8(1) permits a member of the public to submit an application to anyone in an agency, the efficacy of this in practice may need to be reconsidered. Will it really be realistic for officials at any level to receive and process applications? Who will a requester address the application to – in terms of the name of the envelope? This can be important for rural people who may not have easy access to telephones or the internet to find out who to contact.
26. It is positive that s.8(5) recognises that once an official receives an application they can transfer it to an “Information Officer”. However If this is the officer who will actually process the applications, that should be made explicit. In this respect, it may make the law easier to understand and apply if the provisions regarding Information Officers, which are currently in s.16, are moved to sit with s.8(1) and additional provisions included to explain the role of the Information Officer in the application process. In fact, it would be useful to review s.8 and s.16 and clarify more precisely how exactly – including by whom – an application will be (i) received; (ii) acknowledged (ie. who will give the requester a receipt); (iii) processed; and (iv) responded to. At the very least, it should be clarified that all requests can be addressed to the Information Officer, even if they are submitted to any official.
27. Whatever option is chosen, consideration should also be given to including specific wording in the law 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”*.
28. Section 8(6) should be amended to make it clear that although a form may be developed for applications, requesters will not be *required* to use the forms, as long as they provide sufficient information for the application to be processed. In countries with entrenched bureaucratic cultures of secrecy, it needs to be made explicit that applications cannot be refused under the law simply because they were not on the right form.
29. An additional clause should be inserted to clarify that applications can be made in any of Sierra Leone’s local languages. It should be the duty of the relevant public body to translate the request. To require all requestors to submit an application in only an official language could in practice exclude people from utilising the law.

### **Recommendation:**

- *Review s.8 and amend to clarify more precisely how exactly – including by whom (official or Information Officers) – an application will be (i) received; (ii) acknowledged (ie. who will give the requester a receipt); (iii) processed; and (iv) responded to;*
- *Move s.16 (Information Officers) to sit with s.8 (Making requests)*
- *Clarify that requests can be made electronically as well as in writing or in person*
- *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 s.8(6) cannot be rejected if not made on specified forms*
- *Amend s.8(7) to clarify that receipts should at a minimum include the date of submission of the application and the name and position of the person receiving the application*
- *Clarify that applications can be made in any local language*

## Section 10

29. The provisions for giving written notice to requesters of the outcome of their application is a good one. However:

- S.10(1)(a) should also require that details be provided of further fees together with the calculations made to arrive at the amount;
  - S.10(1)(d) dealing with the right of appeal of a requester should explain that an appeal may lie with respect to a decision regarding non-disclosure of information or any part thereof, 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.
30. There is no reason why the content of notices sent by private bodies to requesters should be different from those sent out by public authorities. As such, s.10(2) should also require that notice's explain the amount of fee charged, the form of access provided, and the applicant's rights with respect to review of the decision regarding non-disclosure of the information, including the particulars of the appellate authority, time limit, process, etc.

#### **Recommendations**

- *Amend s.10(1) to require notices to include fee calculations and to include the full list of possible appeal grounds and rights*
- *Amend s.10(2) so that private bodies provide the same notices to requesters as public authorities*

#### **Section 11**

31. Best practice requires that no fees should be imposed for accessing information, particularly government information, as costs should already be covered by public taxes. The Bill follows this best practice to the extent that it does not provide for payment of fees at the application stage. Notably, the Bill could go further and replicate s.17(3) of the Trinidad & Tobago Act and s.7(6) of the Indian *Right to Information Bill 2004* which state that even where fees are imposed, if a body subject to the Act fails to comply with the time limits for disclosure of information, access to which the applicant is entitled shall be provided free of charge.
32. Section 11(1) permits fees to be imposed under for access. In this case, 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. Also, where the costs of collecting the fee outweighs the actual fee (for example, where only a few pages of information are requested), fees should be waived.
33. Furthermore, a provision should be included in the Bill allowing for fees to be waived where that is in the public interest, such as where a large group of people would benefit from release/dissemination of the information or where the objectives of the Act would otherwise be undermined (for example, because poor people would be otherwise excluded from accessing important information). Such provisions are regularly included in access laws in recognition of the fact that fees may prove a practical obstacle to access in some cases. Section 29(5) of the Australian *Freedom of Information Act* actually provides a good model.

*Without limiting the matters the agency or Minister may take into account in determining whether or not to reduce or not to impose the charge, the agency or Minister must take into account:*

- (a) whether the payment of the charge, or part of it, would cause financial hardship to the applicant, or to a person on whose behalf the application was made; and*
- (b) whether the giving of access to the document in question is in the general public interest or in the interest of a substantial section of the public.*

#### **Recommendations**

- *A new clause should be inserted 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".*

- *A new clause should be inserted which states that "if a body subject to the Act fails to comply with the time limits for disclosure of information, access to which the applicant is entitled shall be provided free of charge".*
- *A new clause should be inserted which allows for the waiver or remission of any fees where their imposition would cause financial hardship or where disclosure is in the general public interest.*

## Section 12

34. In accordance with paragraph 21 above, which recommends that the right to access information should extend to the right to inspect public works and the right to take samples of public works (in accordance with the right enshrined in the Indian *Right to Information Act 2005*), the list of forms of access in s.12(1) should be amended.

35. Section 12(3)(a) overlaps with s.14(2) and both clauses should either be deleted or at least amended to clarify when processing a request could legitimately be considered to be "unreasonably interfering with the operations of the body". It may be that the it needs to be clarified that a request can be refused where the volume of the records that need to be retrieved and the time taken to review them would be interfere with the body's operations. Even in such a case though, the requester should be contacted and given an opportunity to narrow their search before their application is finally rejected. This clarification is necessary because otherwise the provision could be abused by officials who could argue that information is so sensitive that its disclosure would interfere wit the organisation's operations – but such a concern should be dealt with via the exemptions regime in Part IV.

36. The Bill does not currently address the issue of translation of requested information. A society which promotes democratic participation and aims to facilitate the involvement of all of the public in its endeavours should ensure that people are able to impart and receive information in their own language and cultural context. Section 12 of the Canadian *Access to Information Act 1983* provides a useful example:

*Where access to a record or a part thereof is to be given under this Act and the person to whom access is to be given requests that access be given in a particular official language, a copy of the record or part thereof shall be given to the person in that language*

- (a) *forthwith, if the record or part thereof already exists under the control of a government institution in that language; or*
- (b) *within a reasonable period of time, if the head of the government institution that has control of the record considers it to be in the public interest to cause a translation to be prepared.*

## Recommendations

- *Section 12(1) should be amended to permit access via inspection of public works and taking samples from public works*
- *Section 12(3)(a) should be deleted or amended to narrow the ambit of what could be considered "unreasonably interference with the operations of a body". Even in such cases, the public authority should assist the applicant to modify his/her request. Only once an offer of assistance has been made and refused can the public or private body reject the application on this ground*
- *A new section should be inserted to permit translations of requested information, at least where it is in the public interest*

## Section 13

37. Section 13 deals with transfer of applications. The key principle, which should underpin all transfer provisions, is the fact that applications should be processed quickly and at minimum cost to the applicant. It is simpler, cheaper and timelier to *require* public bodies to simply transfer applications,



which would be better handled by another body. As such, s.13(2)(b) which anticipates that public bodies should assist applicants to redirect their applications should be deleted – the responsibility should not be on the applicant. A clear time limit should be set forth for transfer of application as envisaged under s.13 as well, and the applicant should be notified of the transfer immediately.

**Recommendations**

- Section 13(2)(b) should be deleted
- Insert a new clause stating that “a transfer of an application pursuant to s.13 shall be made as soon as practicable but not later than 5 days after the date of receipt of the application, and the applicant shall be given detailed written notice of the transfer immediately”

**Section 14**

38. Best practice requires that no application shall be rejected unless the information requested falls under a legitimate and specifically defined exemption. Information that does not fall within an exempt category cannot be denied. Accordingly, s. 14(1) which permits rejection on the grounds that the “request for information which is vexatious” should be deleted. This provision could too easily be abused, particularly by resistant bureaucrats, many of whom may be of the opinion that any request for information from the public is vexatious. If this clause is retained, at the very least the provision needs to be amended to clarify what constitutes a ‘vexatious request’.

39. Section 14(2) allows applications to be rejected because processing would “unreasonable divert its resources”. This provision is ripe for abuse. While it is understandable that there may be cases where a request is genuinely too large to process without unreasonably interfering with the public or private body’s workload, the bottom line should be that in such cases the public or private body should be required to consult the applicant and assist them to try to narrow their search. Applications should not be summarily rejected simply because of the anticipated time it will take to process them or would unreasonably divert their resources.

**Recommendations**

- Section 14(1) should be amended to delete the words “which is vexatious or”
- Section 14(2) should be deleted or at least amended so that where a public or private body is of the opinion that processing the request would substantially and unreasonably divert its resources from its other operations, the public authority shall assist the applicant to modify his/her request accordingly. Only once an offer of assistance has been made and refused can the public or private body reject the application on this ground

**PART III – MEASURES TO PROMOTE OPENESS**

**Section 16**

40. As noted in paragraphs 27 and 28 above, it is positive that the Bill required that all public authorities appoint Information Officers who will be central contact points in terms of access under the law, but the exact role of the Information Officer in the application process could usefully be elaborated upon. Additionally, s.16(1) should be amended to make it a minimum requirement that all contact details for all Information Officers are put on-line and are published in the telephone directory. The latter requirement is included in the South African *Promotion of Access to Information Act 2000*. Contact details for individual public authority’s Information Officers should also be put up on notice boards in all offices and units of the public authority.

**Recommendations**

- Section 16 should be elaborated upon to clarify the role of the Information Officer
- Contact details for ALL Information Officers should be published as widely as possible, including in

**Section 17**

41. It is positive that s.17 imposes obligations on public bodies to proactively publish certain information so that the public are not required to submit individual applications for routine information. Proactive disclosure obligations are a key means of automatically increasing transparency in public bodies. They also work at a more practical level towards reducing the number of requests made under access legislation. The new generation of access laws are now recognising the proactive disclosure can be a very efficient way of servicing the community's access needs efficiently, while reducing the burden on individual officials to respond to specific requests. The more information is actively put into the public domain in a systemised way, the less information will be requested by the public.
42. While the current provisions require the practice disclosure of a considerable amount of information, nevertheless, consideration should be given to extending the categories of information, which need to be automatically disclosed. Section 4 of the new India Right to Information Act 2005 provides a very good model. Likewise, Article 7 of the Mexican *Federal Transparency and Access to Public Government Information Law 2002* 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.
43. Section 17(1) should also be amended to specifically require that the first publication of the information should be completed within 3 months of the law coming into force. After that, a new section should be included recognising that the different categories of information will need to be updated regularly, with each category possibly needing updating at different times, because some information will change more rapidly than other types of information. These different updating times should be specified in regulations. 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.
44. Even if the current minimum amount of information is retained, nonetheless, s.16 should be amended to require more explicitly that information is disseminated more broadly than just in the Gazette – which many governments commonly use as a dissemination method – and newspapers, which are mainly directed at urban, literate people. Consideration should be given to effective methods for ensuring the information reaches the villages – for example, by posting it on noticeboards, broadcasting it on the radio or including it in telephone directories.

**Recommendation:**

*CHRI recommends that s.17 of the Bill be replaced with more comprehensive proactive disclosure provisions:*

*“(1) Every public body shall*

- (a) within publish [before? within 3 months of?] the commencement of this Act:*
- (i) the particulars of its organisation, functions and duties;*
  - (ii) the powers and duties of its officers and employees;*
  - (iii) the procedure followed in the decision making process, including channels of supervision and accountability;*
  - (iv) the norms set by it for the discharge of its functions;*
  - (v) the rules, regulations, instructions, manuals and records, held by it or under its control or used by its employees for discharging its functions;*
  - (vi) a statement of the categories of documents that are held by it or under its control;*
  - (vii) the particulars of any arrangement that exists for consultation with, or representation by, the members of the public in relation to the formulation of its policy or implementation thereof;*

- (viii) a statement of the boards, councils, committees and other bodies consisting of two or more persons constituted as its part or for the purpose of its advise, and as to whether meetings of those boards, councils, committees and other bodies are open to the public, or the minutes of such meetings are accessible for public;
  - (ix) a directory of its officers and employees;
  - (x) the monthly remuneration received by each of its officers and employees, including the system of compensation as provided in its regulations
  - (xi) the budget allocated to each of its agency, indicating the particulars of all plans, proposed expenditures and reports on disbursements made;
  - (xii) the manner of execution of subsidy programmes, including the amounts allocated and the details of beneficiaries of such programmes;
  - (xiii) particulars of concessions, permits or authorisations granted by it;
  - (xiv) details in respect of the information, available to or held by it, reduced in an electronic form;
  - (xv) the particulars of facilities available to citizens for obtaining information, including the working hours of a library or reading room, if maintained for public use;
  - (xvi) the names, designations and other particulars of the Public Information Officers;
  - (xvii) 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 in sub-section (1) shall be updated at least every 6 months, while regulations may specify shorter timeframes for different types of information, taking into account how often the information changes to ensure the information is as current as possible.
- (3) It shall be a constant endeavour of every public authority to take steps in accordance with the requirements of clause (b) of sub-section (1) to provide as much information suo moto 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 cost. Effectiveness, local language and the most effective method of communication in that local area and the information should be easily accessible, to the extent possible in electronic format with the Public Information Officer, available fee or at such cost of the medium or in print cost price may be prescribed”

### Section 21

45. Section 21 of the Bill deals with reports to the Information Commissioner by public authorities. In fact, it is increasingly 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.

46. The current monitoring provisions in the Bill are a good start, but require considerable reworking if they are to be really effective in ensuring that implementation of the law is properly monitored.

Section 21 should be moved to sit with s.39 so that it is clear that all public bodies are required to report annually to the Information Commissioner (although their reports could be more comprehensive), and the Information Commissioner him/herself should also be required to publish an annual report which provides an overview of implementation across the board. This ensures a single monitoring point and output, which can be used to identify common problems and draw attention to key challenges of openness and access that need to be addressed.

**Recommendations:**

- CHRI recommends that s.21 and s.39 should be incorporated
- The following items should be added to the list of issues in s.21 which all public authorities must report to the Commissioner on:
  - (a) *the nature of the complaints and the outcome of the appeals;*
  - (b) *particulars of any disciplinary action taken against any officer in respect of the administration of this Act;*
  - (c) *any facts which indicate an effort by public authorities to administer and implement the spirit and intention of this Act;*
  - (d) *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.*

**PART IV - EXCEPTIONS**

**Section 24**

47. It is very positive that the Bill includes provisions, which allow for partial disclosure of information where records may contain some exempt information only. The wording of s. 24 of the Bill dealing with severance is a little complicated and may be redrafted.

**Recommendation**

- *Section 24 should be redrafted as follows:*  
*“Where a request for access to information is rejected on the ground that it contains information which is exempt from disclosure, then, notwithstanding anything contained in this Act, access may be provided to that part of the record which does not contain any information which is exempt from disclosure under this Act and which can reasonably be severed from any part that contains exempt information”.*

**Sections 25 - 32**

48. It is very positive that Part IV begins with a public interest override provision, whereby a document, which falls within the terms of a general exemption provision shall still have to 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. Consideration may be given to specifically include a *non-exhaustive* list of factors which may be taken into consideration when weighing the public interest:

*In determining whether disclosure is justified in the public interest, the public authority shall have regard to considerations such as 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.*

49. Exemptions to the rule of maximum disclosure should be kept to an absolutely minimum and should be narrowly drawn. The exemptions in the Bill are mostly appropriate, but certain provisions should be reviewed and or deleted. Specifically

- Section 26 may be amended to specify that a body may refuse to give any privileged information relating to legal proceedings if disclosure may lead to contempt of court.
- Section 32(1)(c) is not appropriate because it could too easily be abused by secretive officials who believe that all their decision making processes are sensitive and should not be open to the scrutiny of the public. This is a very common reaction within the bureaucracy and needs to be broken down by an access law – not protected. Ironically, information which discloses advice given to the government during the policy and decision-making process is exactly the kind of information that the public *should* be able to access, unless it is particularly sensitive. The public has the right to know what advice and information the Government bases its decisions on and how the Government reaches its conclusions. It is not enough to argue that disclosure would inhibit internal discussions. Officials should be able – and be required – to ensure that their advice can withstand public scrutiny. To fear such transparency raises questions about the soundness of the entire decision-making process.

50. The time period of 30 years prescribed under s.33(2) is too long and as stated in paragraph 43 above, the time limit of 10 years should be considered.

**Recommendations:**

- *Consideration could be given to including in s.22 a non-exhaustive list of factors which weigh in favour of disclosing information in the public interest.*
- *Section 26 should be amended to prevent disclosures which would be in contempt of court*
- *Section 32(1)(c) should be deleted*
- *Section 33(2) should be amended to reduce the time period from 30 years to 10 years.*

**PART V – THE INFORMATION COMMISSIONER**

51. The provisions contained in this part of the Bill are generally in accordance with best practice, which is very positive. However, some refinements could still be considered to make the Information Commissioner even stronger.

Sections 34-36

52. It is extremely positive that the selection of the Information Commissioner will be through an open process. However, it may be useful to include some criteria for candidates for the position to ensure that they are properly qualified. Also, some of the disqualification criteria could be tightened, because it is essential that the Commission is utterly impartial and well-respected by the public as an upstanding citizen who is pro-transparency and accountability.

53. With regard to term of office mentioned in s.34(3), the period of seven years followed by re-appointment to serve a maximum of two further terms is too long for one person to hold office. The initial term of seven years could better be reduced to five years. Re-appointment should be restricted to only one other term. A maximum age limit could also be prescribed (for instance sixty-five years), beyond which an Information Commissioner shall not hold office. A provision permitting resignation should also be included.

**Recommendations:**

- *Insert minimum qualifications criteria for the Information Commissioner:*  
*The person to be appointed as the Information Commissioner shall –*
  - (a) *be publicly regarded as a person who can make impartial judgments;*
  - (b) *have sufficient knowledge of the workings of Government;*
  - (c) *have not been declared a bankrupt;*
  - (d) *have a demonstrated commitment to open government*
  - (e) *be otherwise competent and capable of performing the duties of his or her office;*

- Amend s.34(2)(b) so that even people pardoned should not be permitted to be appointed (because pardons can be abused) and that anyone who is charged of a criminal offence should not be eligible for appointment
- Reduce the term of appointment to five years
- Include a provision permitting resignation: "The Information Commissioner may at any time, by writing under his or her hand addressed to the President, resign from his or her office".
- Section 35(1) should be amended to clarify that the Information Commissioner will also have budget autonomy
- Section 36 should be amended to clarify that the Information Commissioner can recruit staff from outside the public service to ensure that they can get the people with the best expertise

54. It is very positive that s.39 requires the Commissioner to produce both annual reports and ad hoc reports to be considered by Parliament. However, to ensure that the reports are comprehensive and cover off all key issues, the law itself should set down minimum requirements for the Commissioners reports. Its also important that the Commissioner's reports are considered by Parliament, so the law should specify that a particular Committee will consider the report and submit comments to Parliament for consideration.

### **Recommendations**

- CHRI recommends that s.39 be reworked as follows:
  - (1) *The Information Commissioner 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.*
  - (2) *The [insert name of Committee] shall consider the Information Commissioner's report in the next possible session and report back to Parliament with its conclusions and recommendations*
  - (3) *Each report shall, at a minimum, state in respect of the year to which the report relates:*
    - (ii) *the number of requests made to each public authority;*
    - (iii) *the number of decisions that an applicant was not entitled to access to a document pursuant to a request, the provisions of this Act under which these decisions were made and the number of times each provision was invoked;*
    - (iv) *the number of appeals sent to the Information Commissioners for review, the nature of the complaints and the outcome of the appeals;.*
    - (v) *particulars of any disciplinary action taken against any officer in respect of the administration of this Act;*
    - (vi) *the amount of charges collected by each public authority under this Act;*
    - (vii) *any facts which indicate an effort by public authorities to administer and implement the spirit and intention of this Act;*
    - (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.*
  - (4) *The Commissioner may from time to time lay before each House of Parliament such other reports with respect to those functions as he thinks fit*

## **PART VI – ENFORCEMENT BY THE COMMISSIONER**

### Sections 41-46

55. Part VI has been drafted very comprehensively, which is encouraging because a strong, independent enforcement mechanism is essential to any effective access regime. It is positive that the remit of the Information Commissioner is broad, although a catch-all appeal clause should be included to ensure the Commissioner can basically look into any case of non-compliance. In that context, it is also positive that the Commissioners decision-making powers enable the

Commissioner to compel disclosure, but also to require compliance with other provisions of the Act, such as appointment of Information Officer and implementation of proactive disclosure provisions.

56. Both sections 42 and 43 refer to the power of the Information Commissioner to impose fines for non-compliance with the law. However the Bill fails to define the offences which could attract a fine and to set a minimum limit for the fine. 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 can be an important deterrent, but must be large enough to balance out the gains from corruption. The Bill also needs to require departmental disciplinary proceedings where an official is found to have breached the law.
57. Although there are penalty provisions in s.49 for deliberate and willful acts of criminal non-compliance, it is a major shortcoming in the Bill that it does not contain a more fulsome range of minor offences. The Bill needs to sanction practical problems like a refusal to accept an application, unreasonable delay or withholding of information, and knowing provision of incorrect, incomplete or misleading information. These acts could all seriously undermine the implementation of the law in practice and should be sanctioned to discourage bad behaviour by resistant officials. Consideration should also be given to imposing departmental penalties for persistent non-compliance with the law. Poorly performing public authorities should be sanctioned and their bad behaviour even brought to the attention of their Minister who should have to table an explanation in Parliament.
58. When drafting more detailed penalty provisions, lessons learned from India can be illuminating, because in that jurisdiction penalties are leviable on individual officers, rather than just the public authority. 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.
59. Section 44 is also one of the weaker provisions in Part VI. In order to ensure that the Information Commission can perform its appeal functions effectively, it is imperative that Commissioners are explicitly granted the powers necessary to undertake a complete investigation. The powers granted to the Canadian Information Commissioner under s.36 of the Canadian *Access to Information Act* 1982 provide a useful model:
- (1) *The Information Commissioner has, in relation to the carrying out of the investigation of any complaint under this Act, power:*
- (a) *to summon and enforce the appearance of persons before the Information Commissioner and compel them to give oral or written evidence on oath and to produce such documents and things as the Commissioner deems requisite to the full investigation and consideration of the complaint, in the same manner and to the same extent as a superior court of record;*
  - (b) *to administer oaths;*
  - (c) *to receive and accept such evidence and other information, whether on oath or by affidavit or otherwise, as the Information Commissioner sees fit, whether or not the evidence or information is or would be admissible in a court of law;*
  - (d) *to enter any premises occupied by any government institution on satisfying any security requirements of the institution relating to the premises;*
  - (e) *to converse in private with any person in any premises entered pursuant to paragraph (d) and otherwise carry out therein such inquiries within the authority of the Information Commissioner under this Act as the Commissioner sees fit; and*
  - (f) *to examine or obtain copies of or extracts from books or other records found in any premises entered pursuant to paragraph (d) containing any matter relevant to the investigation.*
- (2) *Notwithstanding any other Act of Parliament or any privilege under the law of evidence, the Information Commissioner may, during the investigation of any complaint under this Act, examine any record to which this Act applies that is under the control of a government institution, and no such record may be withheld from the Commissioner on any grounds.*

60. Section 46 is a key provision because it is absolutely essential that the Commissioner's decisions are understood by all parties to be binding and capable of enforcement. In that context, it should be noted that although the heading of the provision refers to the binding nature of the Commissioner's orders, the actual provisions does not.

**Recommendations:**

- *Section 41 should be amended to include an additional catch-all clause permitting the Information Commission to deal with "any other matter relating to a request for or access to information under the Act"*
- *A new provision should be inserted to provide a more comprehensive list of offences which can attract a fine, 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.*
- *A new provision should be inserted to enable sanctions to be imposed personally on any individual found guilty of an offence under the Act, including on any official who has been asked to assist an Information Officer to process and application*
- *A new provision should be inserted to require that an Information Officer or any other officer on whom the penalty is imposed shall also be liable to appropriate disciplinary action under the service rules applicable to him or her.*
- *A new provision should be inserted to impose departmental penalties for persistent non-compliance*
- *Section 44 which gives the Commissioner investigation powers, should be elaborated upon*
- *Section 46 should be amended to explicitly state that the Commissioner's decisions are binding*

**Parts VII - IX**

61. The remaining provisions of the Bill are well-drafted and cover off the key remaining issues. In particular, it is positive that Bill includes provisions to protect 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. 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. Likewise, it is very promising that training and promotion provisions have been included in the law because the legislation itself is one way of focusing attention and resources on the implementation of the law.

**Section 49**

62. It is positive that s.49 creates certain criminal offences under the law, but it is a problem that it does not clarify who will actually bring charges for the offences. Will the Information Commissioner be responsible for referring charges to the Director of Public Prosecutions? Also, consideration should be given to including additional offences for "*deliberately providing false, misleading, incomplete or inaccurate information in response to a request*".

**Recommendation**

- *Include an additional offence for "deliberately providing false, misleading, incomplete or inaccurate information in response to a request"*
- *Clarifying who will bring charges against officials under s.49(1)*