



CHRI

Commonwealth Human Rights Initiative

NGO in Special Consultative Status with the Economic & Social Council of the United Nations

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Sir Richard Gonzey, KCMG
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1 August 2008

Dear Sir

Re: Offer of assistance regarding drafting of Right to Information Bill

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

My team recently came across the campaign called 'A Right to Know: Giving People Power' launched in Bermuda earlier this year in the *Royal Gazette*. We have also recently had the opportunity to review the conclusions of the Seventh Report of the Parliament of the United Kingdom's Select Committee on Foreign Affairs. Since the UK Freedom of Information Act, 2000, came into force in 2005, Parliament has begun to focus its attention on securing similar access laws in the British Overseas Territories. At paragraph 233 of the Seventh Report, the Select Committee recommends, "all Overseas Territories, which have not yet done so to introduce freedom of Information legislation."¹

I should note this letter follows up previous correspondence with the Premier, The Hon. William Alexander Scott, pursuant to a draft Freedom of Information Law the Bermuda government was scheduled to table in 2007. The purpose of my previous correspondence was to commend your Government for taking that step forward and to offer the services of CHRI's ATI team to assist with the drafting process. Once again I wish to extend CHRI's offer of support towards the development of an access to information regime for Bermuda.

CHRI has considerable experience in this area. Our ATI team played a crucial role in the drafting of India's Right to Information Act, 2005. CHRI has also reviewed a number of draft freedom of information bills throughout the Commonwealth, including most recently, Pakistan, Bangladesh, Malta, Ghana and The Cayman Islands (please view our website at <http://www.humanrightsinitiative.org/> for more). Specifically, I wish to draw your attention to our work in the Cayman Islands. CHRI had the opportunity to critique a Government draft right to information Bill and the Government wrote back to the

¹ See Section 3 of the report on "Governance" (<http://www.parliament.the-stationery-office.co.uk/pa/cm200708/cmselect/cmcaff/147/14702.htm>).

ATI Team to specifically thank CHRI for its submission and indicated that it found the submission very useful. Furthermore, when the draft right to information Bill was published for public comment, the Government uploaded CHRI's critique on its website for reference to aid in the public discourse. More recently, CHRI provided technical assistance to the Government of Cayman Islands on the pending Regulations for the Freedom of Information Act, 2007, scheduled to come into force in January 2009.

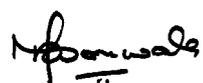
I will also note that in 2006 we worked with the Commonwealth Parliamentary Association to conduct a 3-day workshop on Freedom of Information Laws held in collaboration with the Parliament of Dominica. CHRI chaired three sessions where various aspects of ATI legislation and its implementation were discussed by Ministers, Members of Parliament, senior representatives of civil society and the media. Bermuda was represented by Ms. Kimberley McKeown from the Central Policy Unit of the Cabinet Office. Since this workshop CHRI has continued to work with partners in the Caribbean, providing technical advice and resources on ATI-related issues.

At this early stage, I would like to take this opportunity to encourage the Government to develop any Bill through full public participation. Experience has shown that for a right to information legislation to be effective, it needs to be respected and 'owned' by both the government and the people. Participation in the legislative development process requires that policy-makers proactively encourage the involvement of civil society groups and the public broadly through the mass media. This can be done in a variety of ways, for example, by: convening public meetings to discuss the drafting process and the content of any 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 participate in the development of access legislation; inviting submissions from the public at all stages of the legislative drafting process; and publishing and circulating the draft Bill widely for public comment and giving any such comments due consideration while finalizing the contents for presentation to Parliament.

I have attached at Annex 1 a summary of key principles which should underpin any effective right to information law for your reference. These principles are based on international and regional standards, the evolving body of best practice in Commonwealth countries, and the general principles of law recognised by the community of nations. At Annex 2 I have attached some of the key arguments in favour of freedom of information which might provide useful background for any explanatory memorandum or Cabinet submission on the Bill.

If we can be of assistance with developing a draft right to information Bill for Bermuda, please do not hesitate to contact me on (011) 2685 0523 or via email at majadhun@vsnl.com. Alternatively, please contact Mr Venkatesh Nayak, Coordinator of the Access to Information Programme, at venkatesh@humanrightsinitiative.org.

Yours sincerely



Maja Daruwala
Director

Annex 1: Best Practice Legislative Principles

Notably, in CHRI's 2003 Report, *Open Sesame: Looking for the Right to Information in the Commonwealth* (see enclosed), the RTI team captured the key principles which should underpin any effective right to information law, drawing on international and regional standards, evolving State practice, and the general principles of law recognised by the community of nations. 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 Organisation of American States³ and the Commonwealth⁴ - both of which Bermuda is a member - have also endorsed minimum standards on the right to information. These generic standards have been summarised into the five principles below, which I would encourage you to consider when you finalise your own right to information bill.

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

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

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 Organisation of American States - General Assembly (2003) *Access to Public Information: Strengthening Democracy*, resolution adopted at the fourth plenary session, June 10 2003, AG/RES.1932 (XXXIII-O/03).

⁴ 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.

public. Section 4 of the new Indian *Right to Information Act 2005* provides a useful model.

An Act should also provide that bodies covered be required to make every reasonable effort to assist applicants on request. "Every reasonable effort" is an effort which a fair and rational person would expect to be done or would find acceptable. The use of "every" indicates that a public body's efforts are to be thorough and comprehensive and that it should explore all avenues in verifying the completeness of the response. The burden of proof should be on the public body to show that it has conducted an adequate search. Section 6 of British Columbia's *Freedom of Information and Protection of Privacy Act* 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 public interest. Whistleblower protection is based on the premise that individuals should be protected from legal, administrative or employment-related sanctions for releasing information on wrongdoing. 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 (e.g., President) or bodies (e.g., the Electoral Commission) 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, consistently 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 wilful 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, wilful destruction of records without lawful authority, obstruction of the work of any public body under the Act and/or non-compliance with the Information Commissioner's orders.

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.

Annex 2: Arguments in support of right to information

When presenting any Bill in Parliament, you may wish to draw on some common arguments as to why the right to information is so crucial to democracy, development and human rights. In fact, more than fifty years ago, in 1946 the United Nations General Assembly recognised that “Freedom of Information is a fundamental human right and the touchstone for all freedoms to which the United Nations is consecrated”.⁵ Soon after, the right to information was given international legal status when it was enshrined in Article 19 of the International Covenant on Civil and Political Rights which states: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and *to seek, receive and impart information and ideas through any media and regardless of frontiers*” (emphasis added). Over time, the right to information has been reflected in a number of regional human rights instruments, including the American Convention on Human Rights⁶. This has placed the right to access information firmly within the body of universal human rights law.

In addition to the overarching significance of the right to information as a fundamental human right which must be protected and promoted by the state, the following arguments in support of the right should also be recalled when advocating the right to parliamentarians and other key stakeholders:

It strengthens democracy: The right to access information gives practical meaning to the principles of participatory democracy. The underlying foundation of the democratic tradition rests on the premise of an informed constituency that is able thoughtfully to choose its representatives on the basis of the strength of their record

⁵ UN General Assembly, (1946) Resolution 59(1), 65th Plenary Meeting, December 14.

⁶ See Art. 13(1), *American Convention on Human Rights*, 1969, Costa Rica, OAS Treaty Series No. 36, 1144 U.N.T.S. 123.

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 are able to 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 for themselves why development strategies have gone askew and press for changes to put development back on track.

It is a proven anti-corruption tool: In 2004, of the ten countries scoring best in Transparency International's annual Corruption Perceptions Index, no fewer than eight 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, only 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 elected officials. 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, 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 from opportunity or unfair advantage of one group over another.