Submission to the Scottish Executive on the Review of the Freedom of Information (Scotland) Act 2002

Commonwealth Human Rights Initiative
March 2006

The Commonwealth Human Rights Initiative (CHRI) is an independent, non-partisan, international non-government organisation mandated to ensure the practical realisation of human rights in the lives of the people in the Commonwealth. CHRI's Right to Information Programme has been working for more than 8 years to support Commonwealth member states to develop and implement strong right to information laws. CHRI works with intergovernmental organisations, governments, and civil society to promote this right. Please visit CHRI's website at if you would like to know more about CHRI's work (http://www.humanrightsinitiative.org/programs/ai/rti/international/laws_&_papers.htm).

CHRI welcomes the Scottish Executive's review of the *Freedom of Information (Scotland) Act 2002*. The review provides an excellent opportunity to ensure that the Scottish public is able to exercise its right to access information in a simple, cheap and timely way. Drawing on CHRI's right to information expertise as well as information provided to CHRI by civil society organisations working on these issues in Scotland, CHRI wishes to submits the following recommendations for consideration by the Scottish Executive during the review process.

Topic 1: Coverage of the Act

1. The value of access to information legislation comes from its importance in establishing a framework for 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.

2. To ensure that maximum disclosure occurs in practice, the definition of what information can be accessed under the Act should be drafted broadly. The types of bodies which will be covered by the law should also be broadly defined, to ensure that all arms of government are covered – executive, legislative and judicial. Additionally, ideally any body which spends public monies or performs public services, whether a private company, trust or association, should be covered by the Act via a general definition rather than requiring that they be notified specifically by the Executive.

Include the Housing Associations and the Law Society

3. CHRI endorses the submission from the Scottish Strategy Group, which recommended that the coverage of the Act should be extended to housing associations and to the Law Society of Scotland. In particular, they have noted that this would address the problems cause because some councils have transferred their housing stock to housing associations, which has meant that tenants have lost their right to access information from their landlord. By including housing associations under the Act, these tenants would once more be able to enjoy the same rights as council tenants. The Law Society of Scotland is a statutory body with public functions and so should also be included under the Act.

Recommendation: Include Housing Associations and the Law Society of Scotland under Schedule 1 of the Act.

Designate private bodies under the Act's coverage

4. CHRI reiterates the concern raised by the Scottish Strategy Group that the Scottish Ministers has failed to designate companies and other non-public bodies that carry out public services under contract from the Government to be covered by the Law. Private bodies are increasingly exerting significant influence on public policy. Many private bodies – in the same way as public bodies – are institutions of social and political power, which have a huge influence on people's rights, security and health. Furthermore, with the rise in outsourcing of important government functions, it is unacceptable that private bodies, which have such a huge effect on the rights of the public, should remain outside the purview of an Act which is designed to promote accountability.

5. A number of countries around the world have already brought private bodies within the ambit of their right to information regimes, generally, rather than by requiring notification. This is important because requiring specific notification could result in some bodies which should be covered being left outside the information regime, either inadvertently or deliberately. This is a real concern. In Canada for example, government bodies have put more and more work and funds through "trusts" because trusts were not automatically covered by the law. Over time, this severely eroded the right to information in practice. Conversely, in South Africa, section 50 of the law automatically brings under the scope of the Act all "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." Likewise, section 2(h) of India's Right to Information Act works so that the public can automatically make requests to "any body owned, controlled or substantially finance…by funds directly or indirectly provided by the appropriate Government".

Recommendation: The Scottish Executive should amend the law to extend the coverage of the Act to AUTOMATICALLY cover all private bodies that perform public services under contract with the Government or which spend public money (at least, in respect of those monies), rather than relying on specific notification of each body.

Remove absolute exemptions

6. While it is well accepted that there can be a small number of legitimate exemptions in any access regime, exemptions should be kept to an absolute minimum and should be narrowly drawn. The key issue should be whether disclosure would actually cause serious damage to a legitimate interest, which deserves to be protected. In this regard, it is encouraging that the Scottish Law includes a public interest test as set out in section 2(1)(b) which states that when considering disclosure officials should ensure that "the public interest in disclosing the information is not outweighed by that in maintaining the exemption."

7. However, the Act also includes an absolute exemption in s. 2(2). This contradicts common international best practice where an *overriding* public interest test ensures that any document which falls within the terms of a general exemption provision should still be disclosed if the public interest in the specific case requires it. Every case should be considered on its individual merits; there should be no blanket exemptions because these can lead to bureaucratic abuse and manipulation. This ensures that the public interest is always at the core of a right to information regime. The Indian and South African access laws both include general public interest overrides, to avoid exemptions being applied arbitrarily.

Recommendation: Remove s. 2(2) which lists a number of provisions which constitute "absolute exemptions" and ensure that the public interest override applies to all exemptions in the Act. Every test for exemptions should be considered in 3 parts:

(i) Is the information covered by a legitimate exemption?
(ii) Will disclosure cause substantial harm?
(iii) Is the likely harm greater than the public interest in disclosure?

Remove the power to issue Ministerial Orders

8. The power given to the Minister under sections 4(1)(b), 7(2)(a) to issue Ministerial Orders is entirely contrary to international best practice. Even in Australia, one of the few other jurisdictions in the world where Ministers are granted such discretion, the practice has often been attacked by parliamentarians and civil society as being contrary to good governance because it allows the Minister to remain unaccountable. Even at its inception, in 1978, the Parliamentary Committee which considered the Australian Bill concluded: "There is no justification for such a system tailored to the convenience of ministers and senior officers …This can only confirm the opinion of some critics that the bill is dedicated to preserving the doctrine of executive autocracy". In 1994, two officials from the Attorney General's Department concluded that: "The provisions for conclusive certificates are now anachronisms with little if any relevance to the contemporary world of FOI decisions. Time has proven that the substantive exemption provisions, without the added strength of certificates, are in fact more than adequate to the task of the exemption of genuinely sensitive documents."[1]

9. If Ministerial Orders are retained, at the very minimum, the use of Ministerial discretion should only be permitted if the Minister can show that the disclosure of the document would be contrary to the public interest. An additional clause should also be added explicitly requiring that any Ministerial Order issued be tabled in Parliament along with an explanation. Notably, in the UK, their Information Commissioner stated in May 2004 that "issues relating to each and every use of the veto will be brought before Parliament".

Recommendation: The power to issue Ministerial Orders should be removed and at the very least, subject to Parliamentary scrutiny.

Override non-disclosure provisions in other laws

10. Currently, section 64(1) of the Act gives Scottish Ministers the right to repeal or amend a "relevant enactment" that is "capable of preventing" the disclosure of information under Section 1 of the Act. However, this still leaves a significant loophole which could seriously diminish the effect of the Act over time because a Minister may easily choose NOT to repeal or amend new legislation or may not always be informed of new Acts that prevent the disclosure of information. This could significantly narrow the disclosure of Government information. An access law should be comprehensive and should capture all openness and secrecy provisions in one place. This will ensure that the framework is internally consistent. By effectively giving Ministers the power to decide which Acts can override the FOI Act, section 64(1) not only undermines the Acts objectives, but could confuse and overburden public officials handling applications because they will need to check that any information they can disclose under the FOI Act is not still exempted by some other Act of Parliament.

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[1] Campaign for Freedom of Information UK (2001) *The Ministerial Veto Overseas: Further evidence to the Justice 1 Committee on the Freedom of Information (Scotland) Bill*, http://www.cfoi.org.uk/pdf/vetopaper.pdf.

11. In England, the *Freedom of Information (Removal and Relaxation of Statutory Prohibitions on Disclosure of Information) Order 2004* was introduced to amend legislation so that information could be released if requested under the Freedom of Information Act 2000. For example, the 2004 Order applies to the Medicines Act 1968, the Health and Safety at Work Act 1974 and the Biological Standards Act 1997, all of which are UK wide.[2] A review of all Scottish laws should similarly be undertaken and conflicting provisions amended or repealed. Additionally, it should be explicit in the law that the FOI law overrides other secrecy provisions, because the exemptions in the FOI law are sufficient to protect sensitive information.

Recommendation: Amend s.64(1) to require that all confidentiality provisions in other statutes cannot override the FOI Act. Require that all other legislation – including the Official Secrets Act – be reviewed to identify provisions which conflict with the Act and develop a timetable for amending or repealing such provisions.

Topic 3: Fees/Charging

12. Best practice requires that no fees should be imposed for accessing information, particularly government information, as costs should already be covered by public taxes. At the very least, no application fee should be charged and where additional fees are imposed, access should be provided free of charge if a body fails to comply with the time limits for disclosure of information. It should be explicit in law that fee rates should be set with a view to ensuring that the costs imposed for access are not so high as to deter potential applicants. 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, because the latter could easily result in prohibitive costs, particularly if bureaucrats deliberately drag their heels when collating information in order to increase fees.

Reject proposals for application fees

13. CHRI has learnt that there are proposals for the imposition of a fee for making information applications under the Act. These proposals have arisen as a result of concerns about the alleged large number of frivolous requests being made and the costs of dealing with such enquiries. Similar concerns have led the UK Lord Chancellor to consider the imposition of application fees for England's *Freedom of Information Act*.

14. However, CHRI's international experience suggests that the imposition of fees on application is counterproductive to the FOI Act's fundamental goal of promoting open governance. If fees on application were imposed, this could act as a substantial disincentive for the public, who made up the clear majority of users of the Act last year according to the Information Commissioner's Annual Report. Ireland and Canada provide salutary examples of the debilitating effect of the imposition of fees on the use of freedom of information laws by the general public. More specifically, in Ireland, the introduction of application fees led to a 75% reduction in the use of the act by the Irish general public.

Recommendation: Proposals for the introduction of application fees as a means to prevent vexatious/frivolous requests should be rejected.

[2] Dunion, K (2006) "*Freedom of Information (Scotland) Act 2002 and the Public's Right to Know*", Office of the Information Commissioner, pg.10.
http://www.scotinfo.org.uk/documents/promoting/media/articles/KDFOIandhumanrights23Sep05.pdf

Remove charges for staff time

15. According to the Section 60 Code of Practice related to the charging of fees, staff time for processing requests can be charged at up to the maximum rate of 15 pounds per hour. However, official work that involves implementation of the freedom of information should be viewed as part of the overall day-to-day responsibilities of government officials and should not attract extra charges. Public taxes should cover the costs information management and disclosure. Eliminating charges for processing time would also contribute to transforming the culture of secrecy within the Scottish Civil Service by demonstrating that FOI is an ordinary part of every officials duties, and is not something special for which they can charge the public.

Recommendation: Charges covering the time taken for officials to retrieve, collate and/or compile requests should be removed.

Topic 4: Timescales

16. Timeliness of processing is a key feature of any FOI regime, because often the usefulness of information will depend on its currency. Timely disclosure is not only an issue for the media, who have regular deadlines to meet, but also for ordinary members of the public who should not be able to be given the run around by officials who want to delay exposing a bureaucratic mistake or addressing a legitimate grievance.

Reduce the 20 day response time

17. The response time for public authorities to inform applicants currently stands at 20 days. While there have been some suggestions that this should be extended, in fact, this is already on the high side of FOI timescales, especially compared with Scotland's European neighbours. For example, Croatia, the Czech Republic, Hungary, Latvia, Lithuania and Poland all have much shorter response times at 15 days. Indeed, Romania and Iceland have even quicker timescales at 10 and 7 days respectively. Given that Scotland has a longer tradition of democratic governance than most of the Eastern European countries mentioned above and given its comparatively smaller size of administration and advanced record management systems, there is no reason why Scottish citizens have to wait so much longer than their East European counterparts.

Recommendation: The response time for requests should be reduced to at most 15 days, and should definitely not be increased.