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## **THE RIGHT TO INFORMATION: THE KEY TO DEEPENING DEMOCRACY AND DEVELOPMENT**

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*In a government...where all the agents of the public must be responsible for their conduct, there can be but few secrets. The people...have a right to know every public act, everything that is done in a public way, by their public functionaries...The responsibility of officials to explain or to justify their acts is the chief safeguard against oppression and corruption.*

- Justice K K Mathew, Supreme Court of India

### **What Is The Right To Information?**

Over the past few years, the “right to information” has gained increasing prominence, in the human rights and the democratic discourse. As more and more countries have embraced democratic norms and adopted commitments to more open, responsive government, so too has there been an increase in the passage of laws which have entrenched a legal right to access information from governments, and even from private bodies in certain specified circumstances.

Different terminology has been used – freedom of information, access to information, the right to know – but fundamentally, the concept remains the same. At the heart of the right to information are two key concepts:

- The right of the public to request access to information and the corresponding duty on the government to meet the request, unless specific, defined exemptions apply;
- The duty of the government to proactively provide certain key information, even in the absence of a request.

In practice, this requires governments develop legislation, setting out the specific content of the right – who people can access information from, how, when and at what cost – and the duties on relevant bodies to provide information, including when they can legitimately refuse to provide information. Experience has shown that legislation is only the first step in operationalising the right. Effective implementation requires a genuine commitment to opening up to scrutiny from all levels of government, adequate resourcing, improved records systems and infrastructure and education for the public and bureaucracy on their rights and obligations under the new law.

### **Why Is The Right To Information Important?**

*“Access to public information is a requisite for the very functioning of democracy, greater transparency, and good governance and that, in a representative and participatory democratic system, the citizenry exercises its constitutional rights, inter alia, the rights to political participation, the vote, education, and association, by means of broad freedom of expression and free access to information”*

Organisation of American States General Assembly Resolution, 2003

### **Good Governance & Inclusive Democracy**

In practical terms, governance is undoubtedly strengthened by the existence of a right to information. As recently as 2002 the Commonwealth Law Ministers themselves recognized that “the right to access information [is] an important aspect of democratic accountability...[It] promote[s] transparency and encourage[s] full participation of citizens in the democratic process.”<sup>1</sup> The right to access information gives practical meaning to the principles of participatory democracy to which the Commonwealth has been devoted for over thirty years. From the Singapore Declaration in 1971 to the landmark Harare Declaration in 1991, the Commonwealth has been consistent in its commitment to the promotion and protection of every Commonwealth citizen’s “inalienable right to participate by means of free and democratic political processes in framing the society in which he or she lives”.<sup>2</sup>

<sup>1</sup> Communiqué 02/88, Meeting of Commonwealth Law Ministers in Kingstown, St Vincent And The Grenadines, 18-21 November 2002, p.6, [www.thecommonwealth.org/docs/communiques/News88.doc](http://www.thecommonwealth.org/docs/communiques/News88.doc).

<sup>2</sup> Declaration (1991), *Commonwealth Harare Declaration*, Issued by Commonwealth Heads of Government, Zimbabwe, 20 October 1991: <http://www.thecommonwealth.org/whowere/declarations/harare.html>

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Meaningful, substantive democracy is founded on the notion of an informed public that is able to participate thoughtfully in its own governance. In this context, parliamentarians committed to participatory and representative democracy have embraced the right to information as a practical mechanism for facilitating the meaningful engagement of their constituents in the activities of government. At a more basic level, without information, representative democracy is undermined because the public have insufficient information on which to base the exercise of their vote. Voters may fall back on tribal, clan, religious or class affiliations as the basis for their choice, instead of choosing their parliamentary representatives on the basis of their educational background, criminal record and/or the strength of their policies.

Apart from elections, access to information is vital to ensuring that the public can engage with their representatives and the bureaucracy on an ongoing basis, and can therefore more effectively participate in the development and implementation of policies and activities purportedly designed for their benefit. Too often, members of the public have difficulty finding out what government is doing and how they can be involved. To counter this, in addition to allowing access to information upon request, most access laws also specifically require proactive disclosure of information regarding public consultations, regular open meetings of committees and councils and any other opportunities for the public to participate in policy-making. Good access laws can also provide a useful oversight and participation mechanism for non-Cabinet MPs, who, in very closed governments, are also sometimes left out of key decision-making processes. MPs can use the right to information to more effectively engage with their own constituencies, for example, by gaining access to up-to-date information from the bureaucracy about the impact of government policies on their electorate.

### Enabling Access To Parliamentary Information

Parliaments exist as a major center of national decision-making power. Representatives elected by the people come together to discuss matters of national importance and to enact legislation in the national interest. In this context, access to information is vital. For example:

- Members of Parliament need a range of information from Government and the bureaucracy to make informed decisions about whether to support proposed laws, to respond to questions in Parliament and to answer queries from the public. To perform effectively in Parliament, they also need access to Parliamentary Standing Orders and other regulations governing their conduct;
- The public needs information about proceedings in Parliament, including copies of draft legislation, discussions in Parliament on proposed laws, the voting record of MPs, including what their elected members have achieved during their term in office, the final form of laws and regulations, and from Parliamentary Committees including submissions received and recommendations made.

Unfortunately, much of this information is not easy to access. For example, it was recently reported that Papua New Guinea has kept no published Hansard since 1997<sup>3</sup>. Likewise, civil society organisations have often reported difficulty in accessing draft legislation and rules so they can provide comments and input into the law-making process. Even final forms of laws can be difficult to access, which may explain the specific inclusion in Pakistan's *Freedom of Information Ordinance 2002* of a requirement that "*the acts and subordinate legislation such as rules and regulations, notifications, by-laws, manuals, orders having the force of law in Pakistan shall be duly published and made available to a reasonable price at an adequate number of outlets so that access thereof is easier, less time-consuming and less expensive*".

At a minimum, this requires a properly resourced Parliamentary Library which will hold up-to-date documentation from Parliament. Unfortunately, many libraries are under-staffed and under-funded. To ensure easier access for people living away from the parliamentary capital, documentation should also be kept in local government libraries and/or should be published on the Internet. This has been done to very good effect in the Pacific where the AustLII<sup>4</sup> and PacLII<sup>5</sup> websites have been set up to provide access to legislation and case law.

<sup>3</sup> (2004) "No Hansard In Parliament", *The National*, as reported in Pacific Islands News Association (PINA) Internet News Update, 10 July 2004.

<sup>4</sup> [www.austlii.edu.au](http://www.austlii.edu.au)

<sup>5</sup> [www.paclii.org](http://www.paclii.org)

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Democracy and national stability are also enhanced by policies of openness which engender greater public trust in elected representatives. This is crucial – without the support and trust of the people, government will be more likely to face resistance to proposed policies and programs and implementation will be more difficult. Conflict also becomes more likely, particularly if government secrecy exacerbates perceptions of favouritism and/or exclusion. It is notable in this context that a Commonwealth Foundation study in 1999 which sought the views of some 10,000 citizens in over 47 Commonwealth countries showed a growing disillusionment of citizens with their governments: “Citizens are suspicious of the motives and intentions of their governments. They feel ignored or even betrayed by their elected representatives. Indeed, they feel suspicious of the very programmes and agencies created to meet the needs they have. They feel neglected, ignored and uncared for.”<sup>6</sup> Systems that encourage communication and give people the ability to personally scrutinise government decision-making processes reduce citizens’ feelings of powerlessness, and weaken perceptions of exclusion from opportunity or unfair advantage of one group over another. It effectively reduces the distance between government and people and combats feelings of alienation. Access to information also provides a very simple method for parliamentarians to reassure their constituents of their bona fides.

### Tackling Corruption

Access to information is a key mechanism for ensuring transparency and is a proven anti-corruption tool. This is of immense value in a Commonwealth where corruption continues to impose massive costs on countries and ordinary citizens. The World Bank estimates that corruption can reduce a country’s growth rate by 0.5 to 1.0 percentage points per year. Transparency International estimates that over \$30 billion in aid for Africa – an amount twice the annual gross domestic product of Ghana, Kenya and Uganda combined – has ended up in foreign bank accounts.<sup>7</sup> The harmful effects of corruption are especially severe on the poor, who are hardest hit by economic decline, most dependent on the provision of public services, and least capable of paying the extra costs associated with bribery, fraud, and the misappropriation of economic privileges.

In this context, the right to information has proven to be an effective antidote to corruption, equipping parliamentarians, anti-corruption bodies and the public with a tool to breakdown the walls of secrecy that shield corrupt officials. A legally entrenched right to access documents held by the government (and in some cases, by private bodies) can be used to collect hard evidence of malfeasance and hold officials accountable. The right to information also serves as an important deterrent - the knowledge that a decision may be open to review by the public at a later stage can discourage the decision-maker from acting dishonestly. Officials will be aware that it will be much more difficult to hide their bad behaviour from public scrutiny. In practice, access laws can be used to expose high-level corruption, for example, through obtaining documents that reveal tainted government decision-making processes. They can also be used very effectively at the community level, for example, to expose cases where implementing agencies fail to properly discharge their duties, both to the government and the public. In this context, parliamentarians can utilise the law as a tool to oversee agencies working in their electorate and to ensure that constituents are collectively and individually receiving their proper entitlements from government.

### **Keeping An Eye On Those Responsible For Implementing Government Policies**

In Delhi, India a crusading NGO used right to information legislation to access information which showed that almost 90% of the food meant to be distributed to poor people under the Indian Public Distribution System (PDS), was being siphoned off by corrupt ration dealers. The NGO, named Parivartan, obtained the sales registers and stock registers of some ration dealers operating in Welcome Colony in October 2003 using the Delhi *Right to Information Act*. The records related to distribution of wheat, rice and kerosene during June 2003. The information was disseminated to supposed recipients of rations, who were aghast to see that rations had been siphoned off in their names. The ration dealers had told PDS beneficiaries that they were not receiving stocks from the government, while selling the rations on the black market.

<sup>6</sup> Commonwealth Foundation (1999) *Citizens and Governance: Civil Society in the New Millennium*, pp. 38-39, <http://www.commonwealthfoundation.com/information/infosheet.cfm?id=23> as on 1 October 2003.

<sup>7</sup> United Nations, (2000) Tenth United Nations Congress on the Prevention of Crime and Treatment of Offenders, Press Kit Backgrounder No3: <http://www.un.org/events/10thcongress/2088b.htm>

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Using the records obtained under the *Right to Information Act* and cross-checking it against the ration cards kept by PDS beneficiaries, Parivartan's research revealed that during the month of June, out of a total of 182 families interviewed, 142 families did not receive a single grain of wheat (only 595kg of 4650kg was distributed) and 167 families did not receive a single grain of rice (only 110kg of 1820kg was distributed). With their documents in hand, Parivartan was able to confront ration dealers with proof of their corrupt practices. Parivartan has since reported that of 82 families they spoke with in follow-up interviews, all were now getting their full entitlements at correct prices.

### Equitable Economic Growth

Economic development is enhanced and deepened by the right to information. As most experts agree, free information is crucial to the development of a modern economy capable of engaging in the globalised international marketplace while still fostering pro-poor economic growth. It is for this reason that most of the International Financial and Trade Institutions, such as the World Bank and IMF, have repeatedly endorsed the importance of transparency and have included the implementation of effective right to information legislation in country strategies as a key practical mechanism for promoting said transparency. Notably, one of the fundamental pillars underpinning market theory is the presumption of a perfect, free flow of information which enables all actors in the market to access sufficient information with which to make rational informed decisions in the market. Clearly, this is only possible if parties operating in the marketplace have an unrestricted right to access information. Markets, like governments, simply do not function well in secret. This has implications both for public and private sector bodies.

Open and free access to information is also valuable in ensuring equitable economic development. In this context, it is notable that the Commonwealth has recognised that the poor have too often been excluded from participating in the management of their own economies and from accessing the benefits of economic development. In 2002, CHOGM noted that "the benefits of globalisation must be shared more widely and its focus channelled for the elimination of poverty and human deprivation."<sup>8</sup> The right to information is an important tool that can be used to ensure markets work for people rather than corporations. At the high policy end, parliamentarians and the public can exercise their right to access information to obtain documents on trade and economic policy. At the other end of the spectrum, people can use their right to obtain information such as tax, wage and occupation health and safety entitlements and compliance.

### Participatory Development

Sadly, in 2003, poverty and under-development remain the hallmarks of the Commonwealth. Almost two thirds of the people living in the Commonwealth still live on less than \$2 a day.<sup>9</sup> Half of the 130 million children in the world who do not have access to primary education live in the Commonwealth.<sup>10</sup> Sixty per cent of HIV/AIDS cases worldwide are found in the Commonwealth.<sup>11</sup> Sub-Saharan Africa and South Asia (home to more than 85% of the Commonwealth) have within them the largest concentrations of hungry people in the world.<sup>12</sup> The sad fact is that while poor people throughout the Commonwealth have strong views on their own development destinies<sup>13</sup>, they remain excluded. They are often excluded from participating in the identification, design and/or implementation of the development activities being directed "at" them.

In this context, it is noteworthy that the Secretary-General of the United Nations, Kofi Annan observed in 2003 that: "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...is to make that change real for those in need, wherever they may be. With information on our side, with

<sup>8</sup> CHOGM (2002) *The Coolom Declaration: The Commonwealth in the 21st Century: Continuity and Renewal*, [http://www.thecommonwealth.org/dynamic/press\\_office/display.asp?id=417&type=press&cat=53](http://www.thecommonwealth.org/dynamic/press_office/display.asp?id=417&type=press&cat=53).

<sup>9</sup> World Bank (2001) *World Development Report 2000-01: Attacking Poverty*, Oxford University Press, New York.

<sup>10</sup> Cox, W. (2001) *The Role of the Commonwealth in Poverty Reduction*, address given at the Conference on Human Rights and the Alleviation of Poverty, Wilton Park, London.

<sup>11</sup> UNDP (2002) *HIV/AIDS Statistical Fact Sheet*, <http://www.undp.org/hiv/docs/barcelona-statistical-fact-sheet-2July02.doc>. Nine of the worst-affected countries are members of the Commonwealth: Botswana, Cameroon, Lesotho, Mozambique, Namibia, South Africa, Swaziland, Zambia and Zimbabwe.

<sup>12</sup> UNDP (2003) *UNDP Human Development Report 2003*, Oxford University Press, New Delhi, p.6.

<sup>13</sup> See Rademacher, A. & K.Schafft et al. (1999) *Voices of the Poor: Can Anyone Hear Us?*, Oxford University Press for the World Bank, <http://www.worldbank.org/poverty/voices/>.

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knowledge a potential for all, the path to poverty can be reversed."<sup>14</sup> With assured information, marginalised groups will be given their rightful voice and a powerful tool to scrutinise and engage with the development activities being directed at them. They can access information about their development rights, as well as the projects and programmes from which they are supposed to be benefiting. In fact, experience shows that personal information is the most common type accessed under right to information laws. People use the law to ensure they receive proper entitlements and find out what the government is doing for them or for their locality.

### Holding International Institutions Accountable

Some of the failure of poverty reduction and development strategies to date can be attributed to the fact that, for years, they have been designed behind closed doors by governments who consulted with 'experts' but shut out the very people who were supposed to benefit. Even a parliamentarian in Ghana complained that the interim Poverty Reduction Strategy Paper required by the World Bank, as well as crucial decisions to take advantage of the Highly Indebted Poor Country Initiative which will affect government policy directions for years to come, were not referred to Parliament at large.<sup>15</sup>

Donors have been complicit in keeping development planning processes closed. International Financial and Trade Institutions (IFTI), such as the World Bank, International Monetary Fund and the World Trade Organisation, are finally beginning to open up and have reviewed their Disclosure Policies with a view to enabling greater oversight and participation from member country parliamentarians and citizens. However, more work needs to be done. In this context, national access to information laws offer an additional avenue for accessing information from IFTI's, because they can be used to access IFTI papers and agreements which are held by the national government.

### International Legal Framework

*"Public bodies have an obligation to disclose information and every member of the public has a corresponding right to receive information... Public bodies should publish and widely disseminate documents of significant public interest...A refusal to disclose information may not be based on trying to protect government from embarrassment or the exposure of wrongdoing..."*

UN Principles On Freedom Of Information 2000

The United Nations General Assembly recognized more than 50 years ago that *"Freedom of Information is fundamental human right and the touchstone for all freedoms to which the United Nations is consecrated"*<sup>16</sup>. Enshrined in the Universal Declaration of Human Rights, the right's status as a legally binding treaty obligation was affirmed 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"*<sup>17</sup>. This has placed the right to access information firmly within the body of universal human rights law.

In 1998, the UN Special Rapporteur on the Freedom of Expression stated unequivocally that the right to seek, receive and impart information enshrined in Article 19 of the UDHR "imposes a positive obligation on States to ensure access to information, particularly with regard to information held by the Government in all types of storage and retrieval systems."<sup>18</sup> In 1998, the Commission on Human Rights passed a resolution welcoming this view.<sup>19</sup> In 2000, the Special Rapporteur endorsed a set of principles on freedom of information,<sup>20</sup> which the Commission has noted.<sup>21</sup>

<sup>14</sup> Annan, K. (1997) *Address to the World Bank conference "Global Knowledge '97"*, Toronto, Canada, on June 22: <http://www.ctcnet.org/kannan.html> as on 1 October 2003.

<sup>15</sup> Globalization Challenge Initiative, (2000) 'Who Governs Low Income Countries: An Interview with Charles Abugre on the Ghana Poverty Reduction Strategy Initiative', *IMF and World Bank News and Notices*, Fall: [www.challengeglobalization.org/html/news\\_notices/fall2000/fall2000-01.shtml](http://www.challengeglobalization.org/html/news_notices/fall2000/fall2000-01.shtml)

<sup>16</sup> UN General Assembly, (1946) Resolution 59(1), 65th Plenary Meeting, December 14.

<sup>17</sup> Emphasis added

<sup>18</sup> *Promotion and protection of the right to freedom of opinion and expression*, Report of the Special Rapporteur, UN Doc. E/CN.4/1998/40, 28 January 1998, para. 14.

<sup>19</sup> Res. E/CN.4/1998/42, 17 April 1998, para.2.

<sup>20</sup> Report of the Special Rapporteur, UN Doc. E/CN.4/2000/63, 18 January 2000, paras 43, 44. The Principles were developed by the non-governmental organisation Article 19 – the International Centre against Censorship.

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### Regional Standards: Africa

Nineteen of the Commonwealth's members are in Africa. It is therefore notable that Article 9 of the *African Charter on Human and Peoples' Rights* 1981 states that:

- (1) Every individual shall have the right to receive information.
- (2) Every individual shall have the right to express and disseminate his opinions within the law.

In 2002, the African Union's African Commission on Human and Peoples' Rights adopted a *Declaration of Principles on Freedom of Expression in Africa* which recognises that "public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information". Part IV of this Declaration deals explicitly with the right to information. Although it is not binding, it has considerable persuasive force representing as it does the will of a sizeable section of the African population.

#### **Summary: African Union Declaration of Principles**

- Everyone has the right to access information held by public bodies;
- Everyone has the right to access information held by private bodies which is necessary for the exercise or protection of any right;
- Any refusal to disclose information shall be subject to appeal to an independent body and/or the courts;
- Public bodies shall be required, even in the absence of a request, to actively publish important information of significant public interest;
- No one shall be subject to any sanction for releasing in good faith information on wrongdoing, or information which would disclose a serious threat to health, safety or the environment; and
- Secrecy laws shall be amended as necessary to comply with freedom of information principles.

### Regional Standards: Organisation of American States

Article 13(1) of the *American Convention on Human Rights* 1969 states that: "Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice." Paragraphs 2 and 3 of the *Inter-American Declaration of Principles on Freedom of Expression* 2000 specifically recognises that "access to information held by the state is a fundamental right of every individual. States have obligations to guarantee the full exercise of this right. This principle allows only exceptional limitations that must be previously established by law in case of a real and imminent danger that threatens national security in democratic societies". The Declaration was approved by the Inter-American Commission on Human Rights in October 2000. In furtherance of these commitments, on 10 June 2003, the OAS General Assembly adopted a specific resolution on *Access to Public Information: Strengthening Democracy*. The OAS Permanent Council is currently considering reports of the OAS Special Rapporteur for Freedom of Expression regarding operationalising the Resolution.

### Regional Standards: European Union

Article 11(1) of the 2000 Charter of Fundamental Rights of the European Union explicitly guarantees the right to receive and impart information and ideas without interference by public authority and regardless of frontiers. At an operational level, the 1997 Amsterdam Treaty of the EU granted a specific right of access to documents and specifically required detailed rules regarding access to be set out in secondary legislation. The Treaty came into force in 1999 and the EU Regulation on Freedom of Information was passed in 2001. It covers "all documents held by an institution, that is to say, drawn up or received by it and in its possession, in all areas of activity of the European Union". The Regulation obligates both the European Union Commission and the European Parliament to create public registers of documents on the Internet and to ensure that references are provided to all documents in the register as soon as they are created. In 2002, the European Ombudsman promulgated a Code of Good Administrative Behaviour, which requires officials of all institutions of the EU to "provide members of the public with the information that they request", and if they cannot to state the reasons for non-disclosure.

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<sup>21</sup> Res. E/CN.4/RES/2000/38, 20 April 2000, para 2.

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## **Commonwealth Commitments**

*"[F]reedom of information should be guaranteed as a legal and enforceable right permitting every individual to obtain records and information held by the executive, the legislative and the judicial arms of the state, as well as any government owned corporation and any other body carrying out public functions."*

Commonwealth Expert Group on the Right to Know, 1999<sup>22</sup>

As early as 1980, the Commonwealth Law Ministers' Meeting recognised that official information needs to be accessible to enable public participation in a democracy.<sup>23</sup> Unfortunately, little was done to promote this until 1999 when the Commonwealth Secretariat set up the Expert Group on the Right to Know and the Promotion of Democracy and Development. Based on the Expert Group's final report, the Commonwealth Law Ministers adopted the Commonwealth Freedom of Information Principles, recognising the right to access information as a human right whose "benefits include the facilitation of public participation in public affairs, enhancing the accountability of government, providing a powerful aid in the fight against corruption as well as being a key livelihood and development issue."<sup>24</sup>

### **Commonwealth Freedom of Information Principles (1999)**

- Member countries should be encouraged to regard Freedom of Information as a legal and enforceable right;
- There should be a presumption in favour of disclosure and governments should promote a culture of openness;
- The right of access to information may be subject to limited exemptions, but these should be drawn narrowly;
- Governments should maintain and preserve records;
- In principle, decisions to refuse access to records and information should be subject to independent review.

Unfortunately, the final set of Principles adopted by the Commonwealth Law Ministers is much less comprehensive and liberal than those recommended by the Expert Group. The principle of *maximum* disclosure was watered down, and the exemptions provision does not include the requirement that information be withheld "only when disclosure would harm essential interests [and] provided that withholding the information is not against the public interest". Also, the guidelines recommended by the Expert Group, which focus on ensuring that appropriate administrative provisions are in place to ensure effective implementation, largely did not find their way into the Law Ministers' final Principles.

The Commonwealth Law Ministers encouraged the Commonwealth Secretariat to actively promote the Principles, which the Commonwealth Heads of Government approved in November 1999.<sup>25</sup> To this end, the Secretariat has designed a Model Law on Freedom of Information<sup>26</sup> to serve as a guide to law-making. More recently, at the last Commonwealth Head of Government Meeting in Nigeria in 2003, the Heads specifically agreed that: "Among the objectives we seek to promote are...the right to information"<sup>27</sup>.

## **State of the Right in the Commonwealth today**

Unfortunately, despite numerous international and Commonwealth commitments to entrenching the right to information, in practice, most members of the Commonwealth have not done enough to implement their pledges. While over 55 countries in the world have laws which entrench the right to information, only 10 of these countries are members of the Commonwealth. Of these ten, India's law has yet to be brought into force, the United Kingdom and Jamaica's laws are still not fully operationalised and a number of the remaining laws require amendment to bring them into line with

<sup>22</sup> Document issued by the Commonwealth Expert Group Meeting on the Right to Know and the Promotion of Democracy and Development, London, 30-31 March 1999.

<sup>23</sup> Communiqué issued by the Commonwealth Law Ministers' Meeting, Barbados, May 1980, para. 24.

<sup>24</sup> Communiqué issued by the Commonwealth Law Ministers, Trinidad and Tobago, May 1999, para. 21.

<sup>25</sup> The Durban Communiqué, Commonwealth Heads of Government Meeting, Durban, 15 November 1999, para. 57.

<sup>26</sup> Freedom of Information Act [ ], Commonwealth Secretariat Doc. LMM(02)6, Annex, September 2002.

<sup>27</sup> CHOGM (2003) Aso Rock Declaration on Development and Democracy: Partnership for Peace and Prosperity, para 7.

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international best practice. A number of countries enshrine a right to information in their constitutions, but without legislation, it is difficult for people to access information in practice because officials are generally unwilling to release information only on the basis of the constitutional right and people do not generally have the resources to enforce their right through constitutional litigation every time they are denied information.

<b>Status of the Right to Information in the Commonwealth</b>			
<b>Access Regime</b>	<b>Constitutional Guarantee Only</b>		<b>No Access Regime</b>
	<b>Specific guarantee</b>	<b>Part of speech and expression</b>	
Australia	Ghana	Antigua and Barbuda	Bangladesh
Belize	Malawi	The Bahamas	Brunei Darussalam
Canada	Mozambique	Barbados	The Gambia
India <sup>#</sup>	Papua New Guinea	Botswana	Malaysia
Jamaica <sup>+</sup>	Uganda	Cameroon	Maldives
New Zealand	Tanzania	Cyprus	Nauru
Pakistan		Dominica	Namibia
South Africa		Fiji Islands	Samoa
Trinidad and Tobago		Grenada	Singapore
United Kingdom <sup>+</sup>		Guyana	Swaziland
		Kenya	Tonga
		Kiribati	Vanuatu
		Lesotho	
		Malta	
		Mauritius	
		Nigeria	
		Seychelles	
		Sierra Leone	
		Solomon Islands	
		Sri Lanka	
		St Kitts and Nevis	
		St Lucia	
		St Vincent and the Grenadines	
		Tuvalu	
		Zambia	

# Not yet in force  
<sup>+</sup> Not yet fully operational

### **Entrenching The Right To Information In Practice**

*"[F]reedom of information should be guaranteed as a legal and enforceable right permitting every individual to obtain records and information held by the executive, the legislative and the judicial arms of the state, as well as any government owned corporation and any other body carrying out public functions."*

Commonwealth Expert Group on the Right to Know, 1999<sup>28</sup>

The right to information can be protected through a variety of legal mechanisms, from explicit constitutional safeguards to individual departmental orders that allow for access. For example, information can be obtained through the provisions in citizens charters adopted voluntarily by departments or through executive orders. The United Kingdom has been providing access to information since 1997 through the *Open Government Code* which will be in force until the *Freedom of Information Act 2000* comes into effect in 2005. Enabling access to information through executive orders and administrative directions is not ideal, as they can be easily overturned at any time.

<sup>28</sup> Document issued by the Commonwealth Expert Group Meeting on the Right to Know and the Promotion of Democracy and Development, London, 30-31 March 1999.

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Constitutional protection is also often provided. The constitutions of Ghana, Malawi, Mozambique, Papua New Guinea, South Africa, Tanzania and Uganda<sup>29</sup> all give the right to information explicit protection. In other countries, such as India and Sri Lanka, although the constitution does not specifically mention the right to information, courts have read this right into the constitutionally recognised right to freedom of speech and expression or freedom of thought. Even where there is no specific access legislation, sector-specific laws sometimes mandate disclosure. For example, environmental laws may require publication of impact assessments, or corporate laws may require the dissemination of annual reports and financial statements.

Ideally, even in countries with constitutional guarantees, legislation should still be passed which details the specific content and extent of the right. Legislation sets a clear framework for putting in place systems and creating cultures of openness that are uniform across public bodies. While application processes, forms of access and appeals mechanisms may differ according to countries contexts, all access to information should meet the minimum principles outlined below:

- **Maximum Disclosure:** The principle of maximum disclosure must underpin the law such that there should be a strong presumption in favour of access and a clear statement that “all people have a *right* to access information and all bodies covered by the act have a corresponding *duty* to provide access in accordance with the law. The law should cover all public bodies, as well as private bodies and non-government organisations that carry out public functions or where their activities affect people’s rights. This recognises that in this age of increased privatisation and outsourcing of government activities, the private sector has increasing influence and impact on the public and should therefore not be beyond their scrutiny. 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 because it is a fundamental right to which they are entitled. The definition of “information” should be wide and inclusive.
- **Minimum Exemptions:** The limits on disclosure need to be tightly and narrowly defined. Any denial of information must be based on proving that disclosure would cause serious harm and that denial is in the overall public interest. Commonly, exemptions allow for non-disclosure where release of information would cause serious harm to national security, international relations, legitimate law enforcement activities, a fair trial, or the competitive position of a party. Unreasonable disclosure of personal information is also usually not permitted. Notably, legislation should avoid broad, blanket exemptions. In most cases, each document and the context of its release is unique and should be judged on its merits. Accordingly, exemptions should be subject to content-specific case-by-case review and non-disclosure only permitted where it is in the public interest and release would cause serious harm.
- **Independent Appeals:** Effective enforcement provisions ensure the success of access legislation. Any body denying access must provide reasons. Powerful independent and impartial bodies must be given a comprehensive mandate to review refusals to disclose information and other procedural matters, compel release and impose sanctions for non-compliance. They should have full investigatory powers and their decisions should be binding. Commonly, this role will be filled by a Information Commission(er) set up specifically for this purpose, such as in Canada, England and two states in Australia. Alternatively, an existing Ombudsman may serve in this role, as in New Zealand and Pakistan, or an existing administrative tribunal may hear appeals, as in Australia federally. In all cases, the courts should remain the final appeal body.
- **Strong Penalties:** The law should impose penalties and sanctions where there has been unreasonable delay or withholding of information, knowing provision of incorrect information, concealment or falsification of records, wilful destruction of records subject to requests, obstruction of the work of any public body under the law and/or non-compliance with the Information Commissioner’s orders. Penalties must be sufficiently large to act as a deterrent and should be able to imposed on individual officers, including heads of department, rather than just the organisation itself. Personal penalties have been included in the access laws in the States of Maharashtra and Delhi in India. Notably, without personalised sanctions, many public officials may shirk their duties, safe in the knowledge that their employer will suffer the consequences, rather than themselves.

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<sup>29</sup> Art. 21(1)(f), Constitution of Ghana; Art. 37, Constitution of Malawi; Art.74(1), Constitution of Mozambique; Art. 51, Constitution of Papua New Guinea; Art.32, Constitution of South Africa; Art.18(2), Constitution of United Republic of Tanzania; Art.41, Constitution of Uganda.

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- **Proactive Disclosure:** The law should impose an obligation on government to routinely and proactively disseminate information of general relevance to citizens, including updates about structure, norms and functioning of public bodies, the documents they hold, their finances, activities and any opportunities for consultation. All of the Commonwealth laws, except Pakistan's, include such provisions. The initial effort will be worth the investment as proactive publication of key information will reduce requests in the long run because people will be able to easily access routine information without having to apply to public bodies.
- **Simple, Cheap Access:** 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. Usually, a Public Information Officer (PIO) is appointed for each body, with powers delegated to Deputy PIOs who sit in local offices. Applications are submitted to PIOs, in writing (electronically, by mail or by hand) or orally where the applicant is illiterate, and are then processed, within 5 to 30 days. Ideally, fees should not be imposed. At most, following the examples set by Trinidad & Tobago, applications fees should not be levied. Only the actual costs incurred in copying and posting the requested information should be passed on to applicants.
- **Effective Monitoring & Implementation:** A body should be given specific responsibility for monitoring and promoting the Act. Usually, the independent appeals body will be given this responsibility. Members of Parliament also play an important oversight role, as reports on compliance with the law are usually submitted annually to Parliament for consideration and comment. The law should obligate government to actively undertake training and public education programmes. In South Africa for example, the Human Rights Commission has been given a specific mandate to raise public awareness on the new law and provide training to public officials. Records management systems should be created and maintained which are designed to facilitate the aims of the law. Notably, the implementation of proper records systems has public sector efficiency dividends beyond just enabling access to information.

### Implementing The Right To Information At The International Level

While domestic legislation is important, it is necessary that complementary policies are also developed in the international arena. In this context, it is notable that despite the Commonwealth's commitments to openness and transparency, the Official Commonwealth itself has a poor record in terms of information-sharing. The Commonwealth Secretariat does not have a comprehensive disclosure policy in place, and despite some welcome good practice at recent meetings of its officials, the Official Commonwealth continues to hesitate to engage civil society in its working or functions. Information such as communiqués of meetings are released, but records of policy formation and decision-making (and even the internal administration of the Secretariat) are automatically deemed confidential and remain secret for thirty years; even after that time access can be difficult.

By contrast, the UNDP's Public Information Disclosure Policy is extremely wide and inclusive. The Policy's objective is stated clearly to be to "ensure that information concerning UNDP operational activities will be made available to the public in the absence of a compelling reason for confidentiality".<sup>30</sup> There is "a presumption in favour of public disclosure of information and documentation generated or held by UNDP".<sup>31</sup> Anyone can ask for copies of any document in the UNDP's possession, except those expressly exempted on such grounds as commercial confidentiality, confidentiality of internal deliberative processes, legal privilege and privacy of employees.<sup>32</sup> Where a request is refused, an appeal can be made to an Oversight Panel consisting of three UNDP professional staff members and two outsiders.<sup>33</sup> Such policies are an important step forward, facilitating citizens' participation in projects that affect them and working to ensure that economic development reaches its target.

30 UNDP (1997) *Public Information Disclosure Policy*, paras 1 and 6, <http://www.undp.org/csopp/CSO/NewFiles/policiesinfo.html>, as on 1 October 2003.

31 *Ibid.*

32 *Ibid.* Part II.

33 *Ibid.* paras 20-23.

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### Role of Parliamentarians

Parliamentarians – both as law-makers, but more broadly as community leaders – can play an important role in making the right to information a practical reality for the public. In the numerous Commonwealth countries where right to information laws have not yet been enacted, parliamentarians can actively push for the enactment of effective legislation. In countries that already have laws, experience has shown that it remains important that parliamentarians maintain a close watch on implementation to ensure that access is not undermined in practice.

### Support For Enacting Legislation

Individual parliamentarians – in their capacity as members of Government or the Opposition, members of parties and members of Parliament – can use their position to strategically push for the development and passage of a well-drafted, effective law. Obviously, members of Government can raise the issue with Cabinet and lobby for a commitment to the enactment of a law. In the interim, Government Ministers can also consider passing departmental administrative orders granting access to information held by departments within their portfolio, as was done in India in 1998<sup>34</sup>. At the very least, Ministers can direct their departments to publish useful information regularly on the department's website, such as policies, guidelines, criteria for welfare or other entitlements, opportunities to participate in government consultations, project proposals and the like and/or to provide copies of such information for inspection at all offices. In addition to pushing for the development of a law, parliamentarians should also support the review of Standing Orders and other parliamentary procedures and rules to ensure that they do not promote secrecy. In this context, the Speaker of Parliament can take a leadership role.

Parliamentarians who are also members of political parties can lobby for the inclusion of a commitment to the right to information in their party's manifesto. Such a commitment to open government will likely be well-received by voters and provides a good starting point for implementing transparency and accountability at a practical level when in power. Parliamentarians may also want to consider using a Private Member's Bill as a means of putting right to information on the Government legislative agenda. This was done with some success in the United Kingdom, where four Private Member's Bill were passed which increased citizen's access to information prior to the enactment of the *Freedom of Information Act 2000*.<sup>35</sup> In federal systems, parliamentarians in state governments could also consider taking the lead, passing a good law which can then be used as a model for national legislation. This was famously done in Japan, where the push for right to information started at the local council level and eventually snowballed into the enactment of a comprehensive national law.

More generally, parliamentarians can catalyse broader support for the right to information by utilising the media to raise awareness in the community of the value of the right, while demonstrating its importance to the public to fellow parliamentarians. At an individual level, parliamentarians can also ensure openness via their own parliamentary offices. Documents such as draft Bills and Rules, committee reports, answers to questions on notice, policy papers, government and bureaucratic guidelines, press releases and the like, can be collected by parliamentarians from Parliament and/or the bureaucracy and made available for inspection or copying at local parliamentary offices and/or on parliamentarians' websites. In the same vein, where a constituent specifically requests a document, their representative in Parliament can take an active interest in attempting to secure access and distribute the document more broadly if it is in the public interest. Support for the maintenance of an effective Parliamentary Library will also be useful in this context, because if the Parliamentary Library at least has copies of all parliamentary and official information, parliamentarians and their constituents will be more easily able to gain cheap and timely access to information.

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<sup>34</sup> In October 1998, Union Minister Ram Jethmalani directed his Ministry to issue an Office Memorandum which would give all citizens the right to inspect any file of the Ministry and obtain photocopies of any pages of the file on payment of a nominal fee. Unfortunately, this Memorandum was blocked by the Cabinet Secretary of the time, purportedly with the approval of the Prime Minister: See Supreme Court of India Writ Petition (Civil) No 637 of 1998 for more details.

<sup>35</sup> *Access to Personal Files Act 1987* (UK), *Access to Medical Reports Act 1988* (UK), *Environment and Safety Information Act 1988* (UK) and *Access to Health Records Act 1990* (UK): see <http://www.cfoi.org.uk/legachiev.html>.

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### Support For Implementation

Even once legislation is finally enacted, parliamentarians must remain engaged to ensure the Government and the bureaucracy properly implement the law. While during the hey-day of the democratising 1990s, success was equated with the passage of a well-drafted access law, it has become increasingly obvious in recent years that the enactment of right to information legislation is merely the first step of many on the road to open government. In this context, the maintenance of the political will to implement the law is widely recognised as one of the most important determinants in the effectiveness of any law. Breaking down entrenched cultures of secrecy amongst the bureaucrats responsible for the day-to-day implementation of the law is more likely if parliamentarians maintain their active support for the law and send a clear message to officials – through their speeches, their writing and their own conduct - that openness and transparency is the norm in government and secrecy will no longer be rewarded.

It is also important that vigilance is maintained to guard against amendments to the law which operate to narrow its impact. Unfortunately, experience in countries with laws on the books for many years show that governments which supported openness when in opposition have often undermined it when in power, an ironic reversal when one considers that openness benefits all groups in parliament in the long-term. Unfortunately, as the Canadian Information Commissioner recently noted: “[T]here remains a deep nostalgia in the bureaucracy for the days when officials controlled information and the spin of the message. Officials have not given up the fight to weaken the law, but they have come to realize that the only effective strategy left to them is to rewrite the law”<sup>36</sup>. This observation prompted the Information Commissioner to submit a Special Report to Parliament waving a flag of concern about the government's proposals to rewrite the Act.

At a more practical level, it is notable that most access to information laws include (and if not, *should* include) provisions that require parliament to act as an oversight body in respect to implementation. Specifically, access laws usually require the preparation of a report that analyses the implementation of the law to be submitted to Parliament annually. Sometimes, the body with responsibility for presenting the Report – often, the Ombudsman or Information Commissioner – will also be given the power to make recommendations for reforming the law or improving implementation. For example, in South Africa, the Human Rights Commission may make recommendations regarding the development, improvement, modernisation, reform or amendment of the Act or other legislation having a bearing on access to information. Likewise, the Canadian Information Commissioner can present ad hoc reports to Parliament on urgent and important matters. While these powers are important, without the focussed attention of MPs, the reports will have little practical effect. While they may contain important recommendations and conclusions, only parliament has the power to take action accordingly. At the very least, it is important that parliamentarians scrutinise the reports and demand explanations for non-compliance or poor implementation from the Minister responsible for administering the Act and/or the Minister responsible for the non-performing department.

### **CHRI's & Right to Information**

CHRI is mandated to ensure the practical realisation of human rights in the countries of the Commonwealth. In support of its overarching human rights mission, CHRI run two key programmes: (1) Access to Information and (2) Access to Justice. CHRI's Access to Information Programme works within the Commonwealth:

- To build awareness and capacity in bureaucrats and civil society to catalyse the entrenchment of the right to information as a foundation for open governance;
- To support effective networking and dialogue within and between civil society and government;
- To inform the law-making process through the promotion of best practice standards and dissemination of lessons learned; and
- To ensure that sufficient attention, resources and expertise are directed towards ensuring effective implementation of new access regimes.

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<sup>36</sup> Reid, J. (2003) *Annual Report: Information Commissioner 2002-2003*, Ministry of Public Works and Government Services, Canada, p.12.

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Promoting the right to information across the Commonwealth has been a core program for CHRI for six years now. This work culminated in the publication of CHRI's major report in 2003, *Open Sesame: Looking for the Right to Information in the Commonwealth*. CHRI is equipped to provide law-making support to parliamentarians and governments wishing to develop best practice right to information legislation. For example, CHRI recently reviewed the Private Member's Bill on the right to information in Uganda drafted by MP Abdu Katuntu, as well as the Ugandan Government Access to Information Bill tabled in April 2004. CHRI has also reviewed draft laws in Pakistan (Pakistan People's Party draft) and India (federal *Freedom of Information Act 2002*, which may be amended by the new UPA Government), as well as a number of model Bills developed by civil society.

CHRI is also active in supporting implementation activities. In this context, CHRI is pleased to be able to draw on its network of international experts, such as the International Records Management Trust or the ODAC WhistleBlower team, to provide technical inputs in specialised areas. CHRI itself is also equipped to assist with the development of implementation action plans and training for public officials responsible for implementing the law. More generally, CHRI's staff have extensive experience in promoting right to information principles and legislative best practice and are always available to act as resource people at workshops for parliamentarians and other key stakeholders.

CHRI's Headquarters, which is located in New Delhi, India, is responsible for monitoring and supporting right to information activities in the Asia-Pacific, Caribbean and Eastern and Southern Africa. CHRI's office in Accra, Ghana is responsible for work in West Africa, although it is anticipated that as the office grows it will eventually be responsible for CHRI's work throughout the continent. CHRI would be pleased to discuss this paper and the Access to Information Programme with interested parliamentarians. Parliamentarians are encouraged to contact Ms Charmaine Rodrigues who leads CHRI's Right to Information Programme at [charmaine@humanrightsinitiative.org](mailto:charmaine@humanrightsinitiative.org) or by phone on +91-11-2686-4678/ 2685-0523. Alternatively, CHRI encourages parliamentarians to access CHRI's website - [www.humanrightsinitiative.org](http://www.humanrightsinitiative.org) - which has been designed as a comprehensive right to information resource for people working in the Commonwealth. Links are provided to all Commonwealth right to information legislation as well as key papers and contacts.