

## **The Freedom of Information Bill 2002 – a comparative perspective**

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### **Its been a long winding road**

On December 16, 2002 the Rajya Sabha passed the Freedom of Information Bill 2002 (FOI Bill 2002). The battle for a law on right to information in India has been a long one – in the past seven years there have been several drafts of model legislation prepared. In 1996, the Press Council of India presented a draft model law, another draft was presented by Consumer Education and Research Council, Ahmedabad, neither of which have been seriously considered by the government.

It was in 1997 that the United Front government set up a working group under the Chairmanship of Mr H.D Shourie (Shourie Committee) with the mandate to prepare a draft freedom of information legislation. It needs to be said at this point that the Shourie Committee Bill has come under criticism for not meeting the standard of disclosure set down in the Bill presented by civil society in the previous year<sup>1</sup>. Perhaps a reflection of the fact that the Shourie Committee consisted of 10 members - 8 of whom were senior bureaucrats from the Central Government. Due to political upheaval at the Centre the Shourie Committee draft was never introduced in parliament.

However in 2000, the Freedom of Information Bill, 2000 (FOI Bill 2000) was introduced in Parliament, this Bill was a modified and even more watered down version of the Shourie Committee Bill. The FOI Bill 2000 was referred to the Parliamentary Standing Committee on Home Affairs for examination. The Standing Committee sought suggestions and recommendations from many organizations and experts on the issue and submitted its report in July 2001<sup>2</sup>. The Standing Committee report listed the various suggestions presented to it and recommended that the government take into consideration the suggestion made by civil society and include the same where the Bill was found lacking. In addition the Standing Committee made some specific recommendation. The government chose not to consider any of the suggestion made by organizations and experts before the Standing Committee, some specific suggestions made by the Standing Committee have been included the net result is the FOI Bill 2002 – a bureaucrats delight and a citizens nightmare.

### **In the mean time...**

While the law at the center has been doing the rounds of various departments and committees, several states have taken the initiative and enacted laws on the right to information namely, Tamilnadu, Goa, Rajasthan, Karnataka, Maharashtra<sup>3</sup> and NCT Delhi. In Madhya Pradesh and Chattisgarh there are no laws on right to information but there are government has issued executive orders to over 50 departments to provide the citizen access

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<sup>1</sup> For a comparative analysis of the Shourie Committee Bill and the Press Council and CERC drafts please see *Legislating freedom of information: India in Comparative Perspective*, Vikram Chand, (CHRI, 1998).

<sup>2</sup> Electronic copy of the report of the standing committee can be accessed on <http://www.humanrightsinitiative.org/Programmes/rTI/Law/Legislation/Asia/India/freedomofinfo.htm>

<sup>3</sup> The Maharashtra government enacted the Maharashtra Right to Information Act in 2000 – the law was found to be lacking in many respects. In September 2002 – the Government promulgated the Maharashtra Right to Information Ordinance 2002.

to information. This paper attempts to compare the laws at the state with the FOI Bill 2002, as also test the Bill against internationally recognized standards for FOI legislation.

**It is a fundamental right after all....**

In State of U.P v Raj narain AIR 1975 SC 865 the Supreme Court said “ In a government of responsibility like ours where the agents of the public must be responsible for their conduct there can be but a few secrets. The people of this country have a right to know every public act, everything that is done in a public way by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearings. The right to know which is derived from the concept of freedom of speech, though not absolute, is a factor which should make one wary when secrecy is claimed for transactions which can at any rate have no repercussions on public scrutiny.”

Unlike South Africa, Nepal, Ghana and many other countries the Constitution of India does not specifically state that the right to information is a fundamental right. But, there are innumerable judicial decisions that clearly state that right to information is inherent to a democracy and flows from the right to freedom of speech and expression guaranteed under the Constitution, thereby making right to information a fundamental right.

In fact the Supreme Court has clearly affirmed the linkage between the right to know and the right to life in Reliance Petrochemicals Limited v Proprietors of Indian Express Newspapers Bombay Pvt Ltd AIR 1989 SC 190 – “ We must remember that people at large have a right to know in order to take part in participatory development in industrial life and democracy. Right to know is a basic right that citizens of our country aspire under Article 21 of our Constitution”.

The interesting aspect of the position in India is that right to information is seen not only as a part of the right to freedom of speech and expression but also as an inherent part of the fundamental right to life. This gains importance in the Indian context as demonstrated by the right to information movement in Rajasthan where members of the Mazdoor Kissan Shakti Sanghatan demand information on issues relating to life and livelihood and expose corruption in the functioning of the government through jan sunwaii's through the process of social audit.

A question is often raised – why do you need a law if right to information is a fundamental right. The answer is quiet simple really – a law is required in order to put in place a system and a people friendly mechanism through which the ordinary citizen can access relevant information. The biggest obstacle to providing information is the culture of secrecy prevalent in government, which can only be countered by a culture of openness. It is necessary to cast a specific duty on public bodies to provide information this can only be done through a law that lays down these duties and recognizes the right of the citizen. Like all other fundamental rights, the right to information is also subject to certain reasonable limits – these limits should be clearly defined in order to avoid arbitrary blockage of information. Lastly, a fundamental right can only be enforced by moving the High Court or the Supreme Court – needless to say it is impossible for ordinary citizens in the country to file a petition in higher courts every time information is denied to them.

### **Where do we stand now.....**

As things stand today there is a central law on the right to information and there are about six states in the country that have laws on the issue. The state laws will continue to apply in respect of state government departments, central law will apply to central government bodies in these states. In states that do not have right to information legislation, the FOIL Bill, 2002 will be applicable to all central and state government bodies.

For the purposes of this paper the FOI Bill 2002 will be compared with the state laws in so far as what has come to be considered the salient feature of a right to information legislation. The salient features have evolved over the years from practical experience of implementing right to information laws – content of law varies from country to country, but there are certain basic features that need to be there in order to have a workable right to information legislation. Model laws<sup>4</sup> suggested by various organizations Indian and international are based on the principle that right to information legislations must have:

- ❖ Clear and narrowly defined exemptions, which are subject to a public interest override.
- ❖ Simple procedure for accessing information.
- ❖ Minimal fee structure.
- ❖ Duty on the government to mandatorily and voluntarily provide certain types of information.
- ❖ Reasonable and specific time limits for providing information.
- ❖ An independent mechanism for citizens to appeal against denial/delay of information
- ❖ Penalty provisions to be applied against officers delay in providing information or provide wrong/misleading information.
- ❖ An independent monitoring body to oversee and review the implementation of the law.

### *What Information?*

FOI Bill 2002 defines the freedom of information as the right to not only seek certified copied of records, diskettes, floppies but also as the right to inspect and take extracts and notes<sup>5</sup>. The Rajasthan and Delhi Acts have defined the right to information in the largest manner by including in addition to the above rights the right to inspect public works and taking of samples from public works. These are positive developments, but this necessarily means that departments must provide facilities for inspection of records. A concern raised by Mr Fali Nariman , M.P in the Rajya Sabha<sup>6</sup> is that this provision for inspection will not be implemented due to the logistical issues involved.

### *Information from whom?*

FOI Bill 2002 says that information can be obtained from public authorities that have been defined as bodies established under the Constitution, laws of appropriate governments and

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<sup>4</sup> Model law drafted after a South Asia study on right to information by Commonwealth Human Rights Initiative (India), Article 19 (UK), Centre for Policy Alternatives (Srilanka) and Human Rights Commission (Pakistan),

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<sup>6</sup> Rajya Sabha debates on Freedom of Information Bill 2002. <http://164.100.24.167/today/lsy.htm> (accessed on December 17, 2002).

bodies owned, controlled, substantially funded directly or indirectly by the government<sup>7</sup>. The state legislations have been much clearer in defining the term public authority, the definition includes companies, societies, trusts etc that are substantially funded by the government directly or indirectly. It is not very clear what is meant by “funded directly or indirectly” only the Maharashtra Ordinance states that any body that receives aid in the form of land at concessional rates from the government or any monetary concessions like tax exemptions will be considered as being aided indirectly by the government hence will be a public authority<sup>8</sup>. The Goa legislation also includes organizations that are executing public works on behalf of the government<sup>9</sup>.

The net result of this is the law brings under its purview aided educational institutions, hospitals, non-governmental bodies and various other kinds of organizations that use public funds. It does remain to be seen how effectively the law will be implemented in the context of these bodies.

#### Exceptions to the right to information

Right to Information like all fundamental rights is not an absolute right and there are some exceptions, the challenge lies in defining these exceptions in the narrowest manner. Even though certain information is exempt, there can be some instances where the public interest in providing the information may be greater than keeping the information a secret – this is known as **Public Interest Override**. For example, if there is an industrial tragedy and the remedy or medicines required to counter the effect is a trade secret, the public interest in disclosing the trade secret is greater than the interest in protecting it. Even if the language of the exemptions clause is wide, if there is a public interest override, the interest of the citizen can be protected.

The longest list of exceptions is in the Tamilnadu right to information law – there are 23 broad categories of exceptions. Not only is the list long, the language used is wide and causes a great deal of confusion for instance, information can be withheld on any matter which is likely to help the commission of offence; or likely to help or facilitate to escape from legal custody, or affect prison security, or likely to impede the process of investigation or apprehension or prosecution of offenders<sup>10</sup>. Further, information that would harm the ability of the Government to manage economy, prejudice the conduct of official market operations, or could lead to improper gain or advantage to any person, can also be denied<sup>11</sup>. It is virtually impossible to get any information under this legislation.

The Supreme Court has held that right to information is a fundamental right following from Article 19(1)(a) of the Indian Constitution, which essentially means that the restrictions on the right to information should be limited to what is stated in Article 19 (2) of the Constitution. Information can therefore be restricted if disclosure would affect sovereignty and integrity, security, friendly relations with foreign states, public order, decency or

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<sup>7</sup> Section 1(3)(f) of FOI Bill 2002.

<sup>8</sup> Section 1(6) of Maharashtra Right to Information Ordinance, 2002.

<sup>9</sup> Section 2(c) Goa Right to Information Act, 1997.

<sup>10</sup> Section 3(2)(v) Tamilnadu Right to Information Act, 1997

<sup>11</sup> Section 3(2)(n) Tamilnadu Right to Information Act, 1997

morality, contempt of court, defamation or incitement to an offence. This language is wide enough as it is, the FOI Bill 2002 and some of the state laws go a step further and include much more within the exceptions clause. It must be said at this point that even though most states laws also contain the same provisions, several of them have included certain checks within the law, which negates arbitrary usage of the exception clause to deny information. For instance the Maharashtra Ordinance states that if information is being denied on the ground that disclosure is prejudicial to the sovereignty and integrity of the country – this decision cannot be made by the public information officer, but must be made by a Committee headed by the additional chief secretary of the state<sup>12</sup>. The result of this is it reduces the arbitrary usage of this clause by public information officers. The right to information laws of Goa, Karnataka and Maharashtra laws clearly state that information that is available to the members of parliament and state legislature will be made available to the public.

Other common categories of exceptions are:

- ⇒ Information whose disclosure would affect center state relations.
- ⇒ cabinet papers including deliberations of council of ministers and secretaries.
- ⇒ records of minutes and advice given and opinions expressed during decision-making. While cabinet papers and deliberations have been excluded during decision-making, the Karnataka Act states that once policy has been formulated and decisions made, the records and minutes should be made available to the public<sup>13</sup>. The Goa Act and Maharashtra Ordinance do not include cabinet papers, records and minutes in the exception clause – this information is available to the public in these states.
- ⇒ trade and commercial secrets. Some of the exemptions in the Maharashtra right to information Ordinance, 2002 contain a public interest override. Information that is generally exempt because it is a trade secret or because it is personal information can be disclosed if the greater public interest warrants disclosure<sup>14</sup>. This provision is very positive because there is a definite presumption in favour of disclosure. The FOI Bill 2002 does not contain any such provision.
- ⇒ information that will result in breach of privilege of the parliament or state legislature. Breach of privilege – the Goa and Karnataka laws state that decision on whether disclosure of certain information would result in a breach of privilege cannot be taken by the public information officer. The concerned authority must take the decision in the state legislature<sup>15</sup>. The FOI Bill 2002 does not contain this safe guard.

Exclusion of Organizations: Under Section 16 of the FOI Bill 2002 certain security and intelligence organisations have been excluded from the purview of the law, further, the central and the state governments reserve the right to add more organisations to this list. None of the state government laws contain these provisions. As the list stands today there are 19 organisations including Intelligence Bureau , Research and Analysis wing of the

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<sup>12</sup> Section 7(a) proviso of Maharashtra Right to Information Ordinance 2002.

<sup>13</sup> Section 2(d) Karnataka Right to Information Act 2000.

<sup>14</sup> Sections 7(d), (e) and (k) Maharashtra Right to Information Ordinance, 2002.

<sup>15</sup> Section 5(d) of the Goa Right to Information Act 2002; Section 4 of the Karnataka Right to Information Act, 2000.

Cabinet Secretariat, Narcotics Bureau, Border Security Force, Assam Rifles. There is absolutely no rationale for excluding these organisations especially when the exception clauses are wide enough to restrict information of sensitive nature. In addition it is not clear the basis on which these organisations have been selected and included – it appears to be rather arbitrary.

That right to information is not absolute is accepted, but the law needs to protect the citizen against arbitrary refusal of information, merely providing blanket exceptions without guidelines on how they must be applied is dangerous. It is of value to the public to know the basis for government decisions. Openness in decision-making will create precedent and bring certainty and an element of objective criteria that the public can depend on. It will reduce opportunity for favouritism because there is a possibility of eventual scrutiny. As opposed to this value formulation the FOI Bill 2002 hides the process of decision making from public scrutiny.

Under the FOI Bill 2002 – the ultimate power is in the hands of the public information officer, as demonstrated above some of the state laws provide some checks even within the exceptions clause, therefore in some sense restricting arbitrary exercise of power by officers. The state laws are better in this respect than FOI Bill 2002 – the exceptions clause is a bureaucrats delight.

#### *Suo Moto disclosures*

The most important provision of any right to information legislation is the one concerning suo moto disclosures. This provision is very important because it casts a duty on the government and public bodies to mandatorily and voluntarily provide information without a citizen asking for the same. The idea behind the suo motto disclosure provision is to make information of general interest available to the public. When an ordinary citizen is looking for information, one does not know where to go and how to get it. There must be a larger onus on the government to put information out in the public domain, by make relevant information available to the public, in the long run there will be less information requested through the application process.

The Tamilnadu and Goa laws do not contain any provision for suo motto disclosures. The Rajasthan law does not contain a detailed provision though Section 12-A of the Rajasthan Right to Information Act does states that the government may from time to time exhibit information that it deems fit – a provision of this kind does not really cast a duty on the government to publish information, it is entirely left to the discretion of the government.

Information regarding functions, duties, records, etc: The FOI Bill 2002 states that every public authority must publish from time to time particulars of its organization, functions and duties, powers and duties of its officers, details of facilities available for citizens to access information and name and designation of the officer concerned<sup>16</sup>. At the state level the laws of Karnataka, Maharashtra and Delhi have similar provisions on suo moto disclosures as the FOI Bill 2002. The Maharashtra Ordinance requires the government to publish from time to time information the list of records available in the office that can be made available to

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<sup>16</sup> Section 4(b), FOI Bill 2002.

citizens<sup>17</sup>. This particular clause is very important since every often citizens are not aware of the kind of records and documents maintained by government bodies, providing the citizen a list of records will help them narrow down their queries and be more specific in their requests for information.

The Standing Committee on home affairs recommended “*public authorities must publish list of their publications so that general public could browse them for knowing about the activities and functions of public institutions*”<sup>18</sup>. The Government has not accepted this recommendation and the FOI Bill 2002 does not contain any provision in this regard.

Publish ... but where: While the law provides for the above-mentioned information to be published from time to time, the question as to where this information is to be published will be answered in the rules. Needless to say publication in the Official Gazette hardly services the purpose. The Delhi and Karnataka state laws<sup>19</sup> have stipulated that the information required to be published from time to time should be displayed in notice boards outside every office of the concerned government bodies. The rules made under the Maharashtra Ordinance do not contain any provision regarding suo moto disclosures – this only means that the government is not implementing this aspect of the Ordinance at this time.

Information regarding policies and projects: The FOI Bill 2002 further casts an obligation on the government to publish relevant facts concerning important decisions and policies when these decisions and policies are being made public. Further, before initiating any project, facts concerning the same must be made available to the public<sup>20</sup>. Similar provisions are contained in the right to information laws of Delhi, Karnataka and Maharashtra. However, the state governments have not formulated rules with respect to these provisions, therefore these provisions are not being implemented. While making rules for FOI Bill 2002 the Central government must take into consideration and make specific provision to use the media and public broadcasting system to make this information available to the public.

#### Time Limits:

The time limit for providing information under FOI Bill 2002 is 30 days, but where information requested concerns the life and liberty of a person the information is to be provided within 48 hours. This amendment was introduced based on civil society recommendations in this regard to the Standing Committee – notably this clause is the only significant difference between the FoI Bill 2000 and FOI Bill 2002.

Most state legislations have set time limits between 15 – 30 days; among the states only the Goa contains a provision to provide information concerning life and liberty within 48 hours. The Delhi government has found that delay in providing information is commonplace and has occurred in more than 50% of the cases where people applied for information under the

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<sup>17</sup> Section 4(iv) of Maharashtra Right to Information Ordinance, 2002.

<sup>18</sup> Report on the Freedom of Information Bill 2000 of the Department related standing committee on home affairs, July 2001.

<sup>19</sup> Karnataka Right to Information Rules, 2002; Delhi Right to Information Rules, 2001.

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Delhi right to information Act<sup>21</sup>. Given that the FOI Bill 2002 contains no penalty clause it remains to be seen how the government deals with this scenario.

Fees:

The fee structure needs to be reasonable and not excessive – prescribing high fees for copies and records will deter the citizen from asking for information. The FOI Bill 2002 states that a fee will be charged – the exact amount will be prescribed in the rules. Unlike the laws of Karnataka, Delhi and Rajasthan the FOI Bill does not state that the fee charged should not exceed the cost of supplying the information.

In spite of stating that fees will not exceed cost of supplying information the Delhi law through the rules imposes an application fee of Rs 50 per application in addition the applicant is required to pay Rs 5 per page for photocopying and in case of a request for contracts and tenders the application fee is Rs 500. In Karnataka, the rules do not prescribe an application fee – copying charges of Rs 5 per page and Rs 100 for a floppy has been prescribed. Maharashtra Ordinance and rules require that a court fee stamp of Rs 10 be fixed on the application, in addition 50 paise per page will be charged for photocopying information that is easily available, information that needs to be gathered Rs 2 per page is charged.

The fee structure varies from state to state, but a high application fee has proved to be a deterrent in the case of Delhi. One needs to watch out for the rules that will be formulated under the FOI Bill 2002, especially since the Bill does not even qualify the fee provision by stating that the fee charged will not exceed the cost of supplying the information.

Appeal from Caesar to Caesar:

The FOI Bill 2002 ignores one of the basic principles of any right to information law, namely, creating an independent body to review the decision to deny information. The FOI Bill, 2002 does not have an independent appeal mechanism. Under Section 12 two levels of appeals are recognised – both these are within the government, first appeal to an authority appointed, second appeal to the central or the state government as the case may be. ***The result is the government is acting as a judge in its own cause twice.***

In addition, Section 15 of the Central Bill bars the jurisdiction of courts. There is no justification for barring the jurisdiction of courts when an effective alternate dispute resolution mechanism has not been created in law. Laws on right to information, the world over have incorporated an independent appeals mechanism<sup>22</sup> – many State laws in India provide for appeal to quasi judicial bodies, thereby ensuring independent examination of the case.

Karnataka – first appeal lies within the government while the second appeal is to the Karnataka Appellate Tribunal. Rajasthan – first appeal to the Controlling officer and second

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<sup>21</sup> Presentation made by official of the Delhi Government at a conference on Implementing right to information and Administrative Reform organized by Delhi government on December 10<sup>th</sup> and 11<sup>th</sup>, 2002 in New Delhi.

<sup>22</sup> South Africa, Canada, Australia, and Thailand to name a few have Information Commissioners who decide on cases on a regular basis.



appeal to either the Vigilance committee of the district or the Rajasthan Civil Service Appellate Tribunal, as the case maybe. Delhi NCT – only one appeal to the Public Grievances Commission. Maharashtra – first appeal within the government and second appeal to the Lok Ayukta/ Upa Lok Ayukta.

Unless an independent body is created to deal with appeals the only recourse available to a citizen under the FOI Bill 2002 is to file a writ petition for violation of a fundamental right. In its preamble the FOI Bill 2002 purports to secure access to information to every citizen and to promote openness, transparency and accountability – by not providing a forum for appeal the Bill in one sweep takes away the fundamental right of the citizen.

Penalty:

The FOI Bill, 2002 purports to set in place a system through which a citizen can access information - while the Bill in some sense provides for a system, it fails to fix accountability. If the public information officer does not provide information within the stipulated time frame or provides misleading/wrong/ incorrect information – there is really nothing a citizen can do since the Bill does not provide for imposition of penalties on the concerned officer. By not providing a penalty clause, the FOI Bill, 2002 is weakening the fundamental right to information of the citizen of India. The central government needs to take a leaf out of the book of state laws in this regard

Karnataka – fine in case of delay/ or proving wrong or incorrect information upto Rs 2000 and disciplinary action – fine to be recovered from salary of officer. Delhi – penalty for delay is Rs 50 per day subject to a maximum of Rs 500; for providing false information is Rs 1000 per application. Maharashtra – fine in case of delay is Rs 250 per day; fine for proving misleading and incorrect information is upto Rs 2000 and disciplinary action. Fine to be recovered from salary of concerned officer. The culture of secrecy prevalent in government will not change overnight without an effective penalty clause there is really no incentive for officers to implement the FOI Bill 2002.

Independent monitoring body for implementing the right to information:

If openness, transparency and accountability are to be the norms of the day – there has to be concerted effort on the part of the government and also civil society to make the system work. One way of doing this is to have an independent monitoring body, which will review the working of the right to information law on a periodic basis. Some state laws on right to information have provided for this body - Goa - has a state council for information; Delhi – has a state council for information; Maharashtra Ordinance – provides for councils at the divisional level and one at the state level.

These bodies consists of representatives of the government, NGO's, residents, journalists, academicians etc. These bodies have to review the implementation of the laws from time to time and provide recommendations and suggestions on how to make access easier, suggest training methodology, better records management systems, mechanisms for greater publicity, etc. However, the working of the monitoring body entirely depends on the initiative of the Government and the members concerned – even tough Goa law provided for a state council for information – the council has met once, and the law has been in force since 1997. In Delhi on the other hand the state council has been active and has been looking into

problems citizens especially with regards to the excessive application fees and also imposition of penalties.

Unlike the states The FOI Bill 2002 does not provide for a monitoring body looking into issues of monitoring and implementing right to information law. In South Africa the Human Rights Commission has been nominated as the monitoring body – it helps to have a specific body looking into problems faced by the citizen and also government officials else there will be a great deal of inconsistency in the implementation of the FOI Bill 2002 from department to department and state to state.

**Conclusion:**

The biggest failing of the FOI Bill, 2002 is that it does not provide for penalties to be levied and for an independent appeal mechanism. If the government claims to usher in an era of openness and transparency, the least they can do is reflect that intention in the content of the law. Even though the FOI Bill 2002 purports to put in place a system to provide the citizen access to information – the system is completely useless since it only makes the citizen run from pillar to post and cause increased harassed. The FOI Bill 2002 is a halfhearted measure at bringing in transparency and accountability in government. The government has deliberately ignored suggestions and recommendations made by many experts and organisations before the Standing Committee, there is really no significant difference between FOI Bill 2000 and FOI Bill 2002.

Commonwealth Human Rights Initiative