



Commonwealth Human Rights Initiative

NGO in Special consultative Status with the Economic and Social Council of the United Nations

B-117, First Floor, Sarvodaya Enclave, New Delhi – 110 017

Tel: 91-11-2686 4678, 2 685 0523 Fax: 91-11-2686 4688

E-mail: chriall@nda.vsnl.net.in

Website: www.humanrightsinitiative.org

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The Hon John Howard MP

Prime Minister of Australia
PO Box 6022
House of Representatives
Parliament House
Canberra ACT 2600

21 September 2006

Re: Promoting an effective freedom of information regime in Australia

I am writing from the Commonwealth Human Rights Initiative (CHRI), an international non-government organisation headquartered in New Delhi, India. CHRI's Right to Information (RTI) Programme works to promote the right to information, in particular by assisting governments throughout the Commonwealth to develop strong RTI legislation and to support implementation of new access laws.

We are deeply concerned with the status of freedom of information (FOI) in Australia given the High Court's recent decision in *McKinnon v Secretary, Department of Treasury*. The judgment appears to permit Ministers considerable leeway – without any independent oversight – to determine what is in the public interest. This sets a dangerous precedent, both domestically and internationally, and undermines the intention and spirit of the *Freedom of Information Act*.

Australia has a strong history of FOI, being one of the first countries in the world to introduce an FOI law. The three objectives of the legislation are: to increase public scrutiny and accountability of government, to increase the level of public participation in the processes of policy making and government and to provide access to personal information. However, the primary role of FOI legislation in democratic governance appears to be steadily eroding as detailed in various reports such those by the Australian Ombudsman and the Australian Law Reform Commission, and now to the decision in *McKinnon*.

Australia has long been committed to implementing an effective right to access information. However, in its current form, the federal legislation falls far short of international best practice standards on FOI today. CHRI urges your Government to consider amending the FOI Act to bring it into line with prevailing international norms. At the very least, the Government should promote greater openness and accountability within the bureaucracy and should send a strong message that FOI is a priority for the Government.

CHRI's 2003 Report to CHOGM, *Open Sesame: Looking for the Right to Information in the Commonwealth* (see attached), captured the key principles that should underpin an effective freedom of information law. These principles draw on international and regional standards, evolving State practice, and the general principles of law recognised by the community of nations. These standards have been summarised into the five principles set out in the Annex 1 attached below, which I would encourage you to consider and action in the form of amendments to the FOI Act.

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Commonwealth Medical Association
Commonwealth Parliamentary Association, Commonwealth Press Union.

If you wish to discuss this letter, or if CHRI can be of assistance in promoting a more effective FOI regime in Australia, please do not hesitate to contact me on +91 9810 199 745 or +91 11 2685 0523 or via email at majadhun@vsnl.com. Alternatively, please contact Ms Cecelia Burgman, Programme Officer, Right to Information Programme at cecelia@humanrightsinitiative.org.

Yours sincerely



Maja Daruwala
Director

CC:

- The Hon Philip Ruddock MP, Attorney-General, PO Box 6022, House of Representatives, Parliament House, Canberra ACT, Australia 2600.
- The Hon Kim Beazley MP, Leader of the Australian Labor Party, PO Box 6022, House of Representatives, Parliament House Canberra ACT, Australia 2600.
- Mr. Kelvin Thomson MP, Shadow Minister for Public Accountability, PO Box 6022, House of Representatives, Parliament House Canberra ACT, Australia 2600.
- Ms. Nicola Roxon MP, Shadow Attorney-General, PO Box 6022, House of Representatives, Parliament House Canberra ACT, Australia 2600.
- Senator Bob Brown, Leader of the Australian Greens, Senator for Tasmania, 9th Floor, Marine Board Building, 1 Franklin Wharf, Hobart Tasmania, Australia 7000.
- Senator Lyn Allison, Leader of the Australian Democrats, Senator for Victoria, 1st Floor, 62 Wellington Parade, East Melbourne Victoria, Australia 3002.

Annex 1: Best Practice Legislative Principles

Maximum Disclosure

The value of access to information legislation comes from its importance in establishing a framework of open governance. In this context, the law must be premised on a clear commitment to the rule of maximum disclosure. This means that there should be a presumption in favour of access in the objectives clause of any Act. Every member of the public should have a specific *right* to receive information and those bodies covered by the Act therefore have an *obligation* to disclose information. Any person at all should be able to access information under the legislation, whether a citizen or not. People should not be required to provide a reason for requesting information.

To ensure that maximum disclosure occurs in practice, the definition of what is covered by the Act should be drafted broadly. Enshrining a right to access to "information" rather than only "records" or "documents" is therefore preferred. Further, the Act should not limit access only to information held by public bodies, but should also cover private bodies "that carry out public functions or where their activities affect people's rights". This recognises the fact that in this age where privatisation and outsourcing is increasingly being undertaken by governments, the private sector is gaining influence and impact on the public and therefore cannot be beyond their scrutiny. Part 3 of the South African *Promotion of Access to Information Act 2000* provides a very good example to draw on.

Bodies covered by the Act should not only have a duty to disclose information upon request, but should also be required to proactively publish and disseminate documents of general relevance to the public, for example, on their structure, norms and functioning, the documents they hold, their finances, activities, any opportunities for consultation and the content of decisions/policies affecting the public. Section 4 of the new Indian *Right to Information Act 2005* provides a useful model.

In order to support maximum information disclosure, the law should also provide protection for "whistleblowers" that is, individuals who disclose information in contravention of the law and/or their employment contracts because they believe that such disclosure is in the public interest. Whistleblower protection is based on the premise that individuals should be protected from legal, administrative or employment-related sanctions for releasing information on wrongdoing. It is important in order to send a message to the public that the government is serious about opening itself up to legitimate scrutiny.

Minimum Exceptions

The key aim of any exceptions should be to protect and promote the public interest. The law should therefore not allow room for a refusal to disclose information to be based on trying to protect government from embarrassment or the exposure of wrongdoing. In line with the commitment to maximum disclosure, exemptions to the rule of maximum disclosure should be kept to an absolute minimum and should be narrowly drawn. The list of exemptions should be comprehensive and other laws should not be permitted to extend them. Broad categories of exemption should be avoided and blanket exemptions for specific positions (eg. President) or bodies (eg. the Armed Services) should not be permitted; in a modern democracy there is no rational reason why such exemptions should be necessary. The law should require that other legislation be interpreted, as far as possible, in a manner consistent with its provisions.

Even where exemptions are included in legislation, they should still all be subject to a blanket "public interest override" whereby a document which is presumed exempt under the Act should still be disclosed if the public interest in the specific case requires it.

Simple, Cheap and Quick Access Procedures:

A key test of an access law's effectiveness is the ease, inexpensiveness and promptness with which people seeking information are able to obtain it. The law should include clear and uncomplicated procedures that ensure quick responses at affordable fees. Applications should be simple and ensure that the illiterate and/or impecunious are not in practice barred from utilising the law. Officials should be tasked with assisting requesters. Any fees which are imposed for gaining access should also not be so high as to deter potential applicants. Best practice requires that fees should be limited only to cost recovery, and that no charges should be imposed for applications nor for search time; the latter, in particular, could easily result in prohibitive costs and defeat the intent of the law. The law should provide strict time limits for processing requests and these should be enforceable.

All public bodies should be required to establish open, accessible internal systems for ensuring the public's right to receive information. Likewise, provisions should be included in the law which require that appropriate record keeping and management systems are in place to ensure the effective implementation of the law.

Effective Enforcement: Independent Appeals Mechanisms & Penalties

Effective enforcement provisions ensure the success of access legislation. In practice, this requires that any refusal to disclose information is accompanied by substantive written reasons (so that the applicant has

sufficient information upon which to appeal) and includes information regarding the processes for appeals.

While internal appeals provide an inexpensive first opportunity for review of a decision, oversight by an umpire independent of government pressure is a major safeguard against administrative lethargy, indifference or intransigence and is particularly welcome where court-based remedies are slow, costly and uncertain. The fear of independent scrutiny ensures that exemption clauses are interpreted responsibly and citizens' requests are not unnecessarily obstructed. While the courts satisfy the first criteria of independence, they are notoriously slow and can be difficult to access for the common person. As such, in many jurisdictions, special independent oversight bodies have been set up to decide complaints of non-disclosure. They have been found to be a cheaper, more efficient alternative to courts and enjoy public confidence when they are robustly independent, well-funded and procedurally simple.

Best practice supports the establishment of a dedicated Information Commission with a broad mandate to investigate non-compliance with the law, compel disclosure and impose sanctions for non-compliance. Experience from a number of Commonwealth jurisdictions, including Canada, England, Scotland and Western Australia, has shown that Information Commission(er)s have been very effective in raising the profile of the right to information and balancing against bureaucratic resistance to openness. Of course, there are alternatives to an Information Commission. For example, in Australia, the Administrative Appeals Tribunal has appeal powers and in New Zealand and Belize the Ombudsman can deal with complaints. However, experience has shown that these bodies are often already overworked and/or ineffective, such that they have rarely proven to be outspoken champions of access laws.

The powers of oversight bodies should include a power to impose penalties. Without an option for sanctions, such as fines for delay or even imprisonment for wilful destruction of documents, there is no incentive for bodies subject to the Act to comply with its terms, as they will be aware that the worst that can happen is simply that they may eventually be required to disclose information.

In the first instance, legislation should clearly detail what activities will be considered offences under the Act. It is important that these provisions are comprehensive and identify all possible offences committed at all stages of the request process – for example, unreasonable delay or withholding of information, knowingly providing incorrect information, concealment or falsification of records, wilful destruction of records without lawful authority,

obstruction of the work of any public body under the Act and/or non-compliance with the Information Commissioner's orders.

Once the offences are detailed, sanctions need to be available to punish the commission of offences. International best practice demonstrates that punishment for serious offences can include imprisonment, as well as substantial fines. Notably, fines need to be sufficiently large to act as a serious disincentive to bad behaviour. Corruption – the scourge that access laws assist to tackle – can result in huge windfalls for bureaucrats. The threat of fines and imprisonment can be an important deterrent, but must be large enough to balance out the gains from corrupt practices.

Monitoring and Promotion of Open Governance:

Many laws now include specific provisions empowering a specific body, such as an existing National Human Rights Commission or Ombudsman, or a newly-created Information Commissioner, to monitor and support the implementation of the Act. These bodies are often empowered to develop Codes of Practice or Guidelines for implementing specific provisions of the Act, such as those relating to records management. They are usually required to submit annual reports to parliament and are empowered to make recommendations for consideration by the government on improving implementation of the Act and breaking down cultures of secrecy in practice.

Although not incorporated in early forms of right to information legislation, it is increasingly common to include provisions in the law itself mandating a body to promote the Act and the concept of open governance. Such provisions specifically require that the government ensure that programmes are undertaken to educate the public and the officials responsible for administering the Act.