

SUPPLEMENTARY RECOMMENDATIONS FOR STRENGTHENING

THE DRAFT RIGHT TO INFORMATION ORDINANCE 2008

Submitted by

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CHRI's SUPPLEMENTARY RECOMMENDATIONS FOR STRENGTHENING

The Draft Right to Information Ordinance, 2008

1. In August 2005, the Commonwealth Human Rights Initiative (CHRI) wrote to the Minister of Law, Justice and Parliamentary Affairs, Government of Bangladesh offering support for the Government's efforts to review the *Official Secrets Act, 1923* and enact a Right to Information Act. Since then, CHRI has also been collaborating with Manusher Jonno, to promote greater awareness amongst the public and civil society networks about the value of the access to information legislation in Bangladesh. In April 2006, the Law Ministry wrote to CHRI informing us that the Government is currently reviewing the Bangladesh Law Commission's "Working Paper on the Proposed Right to Information Act, 2002" with a view to developing a Right to Information Bill. Since the Working Paper was drafted, more countries have passed access laws which Bangladesh could draw on. Most notably, in 2005, neighbouring India passed its *Right to Information Act, 2005*, which reflects many new developments in access legislation and is widely regarded as a good model law. In 2006 CHRI submitted another set of recommendations to the Government of Bangladesh based on its experience of involvement with the implementation of the Indian access law. In February 2008 CHRI submitted to the Ministry of Information, Government of Bangladesh detailed recommendations for strengthening the provisions of the draft Right to Information Bill prepared and submitted to the Government of Bangladesh by civil society organizations under the leadership of Manusher Jonno Foundation.
2. CHRI commends the current Care-taker Government for moving towards crafting a right to information law for Bangladesh. CHRI commends the Government for encouraging widespread consultation on the Draft Ordinance prior to its enactment. CHRI also lauds the Care-taker Government for drafting the Draft Ordinance in Bangla which is the native language of millions of Bangladeshis. This will ensure that literate citizens will be able to read and understand this uniquely empowering legislation for themselves. Experience has shown that a participatory law-making process can be a major factor in laying a strong foundation for an effective right to information regime. Implementation is strengthened if right to information laws are 'owned' by both the government and the public.
3. As this is a path breaking law with the potential to make government truly participatory and governance accountable to people in a real and practical sense, it is important to craft its provisions to the highest degree of precision.
4. CHRI's assessment is that the Bill in its current form is that the Bill is relatively comprehensive and to a large extent includes provisions that are at par with best practice international standards. Nonetheless, CHRI in its preliminary submission suggested certain key amendments which if incorporated in the Ordinance may improve the scope and implementation of the law.

5. CHRI has prepared a supplementary set of suggestions identifying additional areas which needs to be reworked to ensure the right to information is better protected and better promote the fundamental principles of: maximum disclosure; minimum exceptions; simple, cheap and user-friendly access procedures; independent appeals; strong penalties; and effective monitoring and promotion of access.

Specific Recommendations:

Section number and topic	Summary of content	Recommendations for improvement
Preamble	Lays down the objectives and the principles of the Ordinance	<p>The Preamble can be an important tool for the courts while clarifying ambiguities arising in the operation of any provision of any legislation. It establishes the context of the law and provides a statement of the intention of lawmakers.</p> <p>1. The Preamble in its present form in the first paragraph declares that the right of access emanates from <i>‘the natural desire of people to know information.’</i> Historically speaking, the right to information stems from people’s movements against corruption, mal-governance and lack of adequate people’s participation in public affairs. These cherished values informed the struggle for freedom in Bangladesh as well. Founding it on the natural human tendency of curiosity can be avoided in order to preserve the dignity of such a path-breaking Ordinance. The Preamble could be re-drafted to explicitly recognising the status of the right to information as a fundamental human right in and of itself. <i>Consideration may be given to revising this general statement in the Preamble to reflect the status of RTI as a basic human right. Reference may be made to Article 19 of the International Covenant on Civil and Political Rights to which Bangladesh acceded in 2000 as the source of this human right.</i></p> <p>2. The Preamble makes a reference to the Constitutional sanction for the right to information without referring to any specific Constitutional provision. The constitutional/legal underpinnings establishing this right in Bangladesh should be made clear. A suggestion to link it with the ICCPR has already been discussed above. <i>Or cconsideration may be given to replacing the first paragraph of the Preamble with the following,</i></p>

		<p><i>‘WHEREAS the right to information is a universally recognised fundamental human right which can contribute to deepening democracy, improving governance, increasing public participation, promoting transparency and accountability and reducing corruption.’</i></p> <p>3. The second paragraph of the Preamble provides that the Ordinance extends to “government and non-government establishments”. <i>In accordance with CHRI’s recommendation in the preliminary submission that the term ‘authority’ be bifurcated into ‘public authorities and ‘private bodies’ consideration may be given to replacing the terms - “government and non-government establishments” with “public authorities and private bodies”.</i></p> <p>4. The Preamble could also state explicitly the two alternative ways the legislation will provide information to the public – that is, through proactive disclosure of certain specified categories of information and through providing a mechanism for the public to formally apply for other kinds of information. <i>Consideration may be given to amending the Preamble suitably.</i></p> <p>4. The wording of the fourth paragraph of the Preamble is confusing. It indicates that along with “national security and confidentiality”, “public interest” is pitted against the people’s right to information. It must be remembered that in a responsible democratic set up information can be withheld from disclosure only for protecting a larger public interest. <i>Consideration may be given to rephrasing the paragraph as follows:</i></p> <p><i>“Whereas it is necessary to balance the determination of people’s right to information and other public interests like national</i></p>
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		<p><i>security and confidentiality...;</i>”</p> <p>6. <i>Consideration may be given to inserting a new paragraph at the end of the Preamble that clarifies the aforementioned position more explicitly.</i> For example: <i>“And whereas revelation of information in actual practice is likely to conflict with other public interests including efficient operations of the Government, optimum use of limited fiscal resources and the preservation of confidentiality of sensitive information and whereas it is necessary to harmonise these conflicting interests while preserving the paramountcy of the democratic ideal;”</i></p>
General		<p><i>Consideration could be given to including an index after the Preamble</i> but before the operative provisions so that users of the law can more easily navigate it and find the relevant section they are seeking without much difficulty.</p>
Definitions		
2 (ka) – ‘Information’	This provision identifies the materials that could be included in the definition of ‘information’	<p>1. The term “<i>oopatto</i>” (data) appears twice under the definition “information” as currently defined under section 2 (ka). <i>Consideration may be given to removing the repetition</i> so as to prevent confusion.</p> <p>2. The Draft Ordinance in the last part of the definition of the term ‘information’ uses the phrase – “<i>and any information obtained under any law for the time being in force about any authority</i>” – this may be interpreted to reflect the broad coverage of entities within the purview of the Draft Ordinance. In accordance with the recommendations for bifurcation of the bodies covered under section 2 (ga) in the preliminary submission, <i>amendment is suggested to the last phrase in the definition of ‘information’ as follows: “and any information relating to any private body which</i></p>

		<i>can be accessed by a public authority under any other law for the time being in force.”</i>
Missing definitions		
‘competent authority’	No provision exists	In a country like Bangladesh where there is a clear division of powers between the legislative, executive and judicial arms of the State the Government which primarily consists of the executive arm cannot make Rules for implementing this law outside its sphere of influence. <i>Consideration may be given to including a definition of the term ‘competent authority’ indicating the Speaker of Parliament and the Chief Justice of Bangladesh, as well as the President as authorities competent to make Rules (other than those which define the procedure for disposal of appeals and complaints received by the Information Commission) for implementing this law within their respective spheres. The President should be vested with the power to make rules relating to disposal of appeals and complaints by the Information Commission.</i>
‘Information Commission’, ‘Chief Information Commissioner’, ‘Information Commissioner’	No definitions exists	There is no mention of the Information Commission, the Chief Information Commissioner and the Information Commissioners in the definitions portion of the Draft Ordinance. <i>Consideration may be given to including them in the definitions section with reference to the subsequent provisions in the Ordinance which relate to them.</i>
Person	No definition exists	Occasionally the Draft Ordinance refers to the term ‘person’ which is not defined. <i>Consideration may be given to including a new clause to the definition section which provides the definition of the term ‘person’.</i> The definition of person may be taken from the Income Tax Act or the Companies Act where such a definition may be found. This will ensure that individuals and organized groups such as NGOs, companies, Trusts and other similar bodies can also access information under this law. Please see related recommendation under s.4 (ka)

<p>Section 4 (ka) Citizen’s right to information</p>	<p>This provision reiterates the modes of access to information while establishing the citizen’s right of access</p>	<p>The various modes of access and types of information accessible under this law are already dealt with in the definitions section. There is no need to repeat it here. Furthermore a general right to obtain information cannot be established at this stage without subjecting it to the section dealing with exemptions to disclosure.</p> <p><i>Consideration may be given for streamlining this provision by merely establishing the citizen’s right to seek and obtain information from public authorities and private bodies subject to the provisions of this Ordinance.</i></p> <p><i>As proposed earlier, consideration may also be given to replacing “citizen” with “person” so that artificial-juridical entities may be enabled to seek and obtain information under the Ordinance.</i></p>
<p>Section 4(kha)</p>	<p>This provision has two parts – a) obligation of entities covered by this law to maintain records and information indexed and catalogued to facilitate easy access and b) right of information not to be subjected to withholding or limitation of access</p>	<p>1. The first part of this provision matches with the contents of section 5 dealing with the obligation of public authorities and private bodies. <i>Consideration may be given to moving this part of the provision to the top of section 5.</i></p> <p>2. The second part of this provision matches with the contents of section 4(ka) which deals with right to information. <i>Consideration may be given to moving this part of the provision to section 4(ka) and adding it to the recommendation relating to that section given above.</i></p>
<p>Section 10 “public interest disclosure”</p>	<p>Allowing disclosure in public interest</p>	<p>This is the all important provision that requires the custodian of information to make a decision in favour of disclosure even if one or more exemptions are applicable to the information requested by any person. It is advisable to word the provision with precision leaving no room for doubt about its primacy. <i>Consideration may be given to improving the provision to indicate that the public authority or private body ‘shall’ disclose information if disclosure outweighs</i></p>

		<p><i>the harm that would occur in the event of its disclosure. Similarly consideration may be given to rephrasing the title of this section to - a more appropriate - “disclosure in public interest.”</i></p> <p>This section enables “government/authority” to disclose information in public interest. When an information request is being considered, the government is too remote an entity to be involved in the decision making. Further, the government’s role is a broader one of laying down policies. <i>Consideration may be given to empowering the public authority or private body that is the custodian of information to decide on disclosure of information in public interest.</i></p>
<p>Section 12 “Information Commission”</p>	<p>Provision relating to the constitution of the Information Commission.</p>	<p>1. Sec 12 (gha) Ideally the Selection Committee would consist of a total number of members that is an odd number in order to enable making of decisions by vote if consensus is not achievable. <i>Consideration should be given to having odd number of members in the Selection Committee such as 3 or 5.</i></p> <p><i>In order to ensure a high level of prestige for the Information Commission consideration may be given to replacing the proposed membership of the selection committee with high constitutional functionaries such as the Prime Minister, the Leader of the Opposition and the Chief Justice of the Supreme Court. This is in tune with best practices in the Commonwealth.</i></p> <p>It is essential that the procedure for appointing members of the Information Commission is impartial and independent of government interference, to ensure that the Information Commission is seen as non-partisan and can act as an independent body. As such, it would be ideal if the committee’s candidate were to be approved by Parliament and not merely appointed by the President as under s.12 (ga). At present, subsection 12(gha) provides a list of committee members who will be responsible for the selection of</p>

members to the Information Commission. It is essential that this committee is independent as possible. Whether this is the case will depend on whether their positions are vulnerable to political influence themselves.

In order to promote public confidence in the Information Commission and to ensure that the people chosen to be on the Information Commission are carefully selected, ideally, the selection process should include a strong element of public participation. For example, when a list is being drawn up by the bureaucracy of possible candidates for the vacancies in the Commission, it should be required that the relevant department also calls for nominations from the public.

At the very least, any list which is put together by the bureaucracy should also be published at least one month prior to consideration by the selection committee mentioned in subsection 12(gha) and the public should be permitted to make submissions to the selection committee on this list. Notably, at a minimum, the list prepared by the bureaucracy should also include a detailed explanation of the reasons for the candidate being nominated, in accordance with agreed criteria.

See also further comments under section 14.

2. Section 12 (chha) (2): *Please amend the list of qualifications as necessary for an Information Commissioner to ensure at a minimum that they are committed to transparency and accountability in Government, are not tainted in any way by allegations of corruption or criminality; are respected by civil society and have the expertise to do the job. Consideration should be given to include 'media' in the list of areas of specialisation.*

		<p>In order to ensure that no post in the Commission may remain vacant for too long, consideration may be given to adding the following provision after sub-section (chha) (2)</p> <p><i>“(3) It shall be the duty of the Government to fill up any vacancy, arising due to the retirement or resignation or removal of the Chief Information Commissioner or an Information Commissioner, appointed under this Ordinance, as expeditiously as possible and in any case no later than a period of ninety days from the date on which such post fell vacant.”</i></p>
Section 17 “Powers, functions and appeal.”	Section 17 (kha) empowers the Commission to initiate an inquiry if it is satisfied that there are reasonable grounds to inquire into a complaint. Section 17 (ga) gives <i>suo moto</i> powers to the Commission to conduct inquiries on a complaint when needed.	<p>The distinction between Section 17 (kha) and 17 (ga) is not clear. CHRI considers that it is not necessary to link the Commission’s <i>suo moto</i> powers to enquire into complaints alone as Section 17 (kha) already deals with the Commission’s power to inquire on a complaint. <i>Consideration may be given to empowering the Commission with suo moto powers in general and not limiting them to complaints alone.</i></p> <p>When <i>suo motu</i> inquiries are launched they must have some logical outcomes. <i>Consideration may be given to inserting a new provision below sub-section 17 (ga):</i></p> <p><i>“(gha) Upon completion of an inquiry into the patterns of non-compliance by a information officer in a public authority or private body as the case may be, the Information Commission shall submit to Parliament a report containing details of its findings and any recommendations that it may deem appropriate and furnish a copy of the said report to the public authority or private body as the case may be, that was the subject of the inquiry.”</i></p>
Section 19 Appeals	Provision relating to appeals.	This section does not specify a time limit for arriving at a decision on appeals filed before the Information Commission. In India the absence of a time limit for giving decisions on appeals has resulted

		<p>in disputes pending unresolved for several months. Information not given in a timely manner is as good as non-information.</p> <p><i>Consideration should be given to insert a new provision requiring Information Commissioners to make decisions within a given time limit.</i></p> <p><i>Consideration may be given to the insertion of the following provisions after s.19 subsection (kha)</i></p> <p><i>“(ga) The Information Commission must make a decision, and provide all parties with a written decision notice, within 60 working days of the applicant lodging the appeal notice.</i></p> <p><i>(gha) Where an application concerns the life or liberty of a person, the Information Commission shall make a decision within 48 hours of the applicant lodging the appeal notice.</i></p> <p><i>(nga) Where no decision is received from the Information Commission within the time limits set by this Ordinance, the appeal is deemed to be rejected and further appeal may be lodged with High Court.”</i></p>
New provisions		
	Procedure to deal with third party cases	<p>The Draft Ordinance recognises the rights of third parties whose information is sought by a requestor. However no procedure for dealing with such requests has been outlined. International best practice is to provide the broad outline of the decision-making procedure in the legislation itself. <i>Consideration may be given to inserting the following provisions :</i></p> <p><i>“Third party information: Where an Information Officer intends to disclose any information or record, or part thereof on a request made under this Ordinance, which relates to or has been supplied</i></p>

		<p><i>by a third party and has been treated as confidential by that third party, the Information Officer shall, within five days from the receipt of the request, give a written notice to such third party of the request and of the fact that the Information Officer intends to disclose the information or record, or part thereof, and invite the third party to make a submission in writing or orally, regarding whether the information should be disclosed, and such submission of the third party shall be kept in view while taking a decision about disclosure of information.</i></p> <p><i>(2) Where a notice is served by the Information Officer under sub-section (1) to a third party in respect of any information or record or part thereof, the third party shall, within ten days from the date of receipt of such notice, be given the opportunity to make a representation against the proposed disclosure.</i></p> <p><i>(3) Notwithstanding anything contained in section 7, the Information Officer shall, within 30 days after receipt of the request under section 6, if the third party has been given an opportunity to make representation under sub-section (2), make a decision as to whether or not to disclose the information or record or part thereof and give in writing the notice of his decision to the third party.</i></p> <p><i>(4) A notice given under sub-section (3) shall include a statement that the third party to whom the notice is given is entitled to prefer an appeal under section 19 against the decision.</i></p>
	Promoting the use of RTI by the Government	Consideration may be given to placing obligations on the Government to develop programmes to promote awareness about the rights available to citizens under the Ordinance and to train Information Officers/public authorities as well as the users of the law. <i>Consideration may be given to inserting the following</i>

		<p><i>provisions:</i></p> <p><i>“Duties to educate the public and train officials: (1) The Government shall allocate adequate resources for and undertake to—</i></p> <p><i>(a) developing and organising educational programmes to spread awareness amongst the people about their right to information and the procedures for accessing information under this Ordinance with particular focus on disadvantaged communities;</i></p> <p><i>(b) encouraging public authorities and private bodies to participate in the development and organisation of programmes referred to in clause (a) and to undertake such programmes themselves;</i></p> <p><i>(c) promoting timely and effective dissemination of accurate information by public authorities and private bodies about their activities; and</i></p> <p><i>(d) training Information Officers, appellate authorities and other officers, public servants and employees of public authorities and private bodies and producing relevant training materials for their use.</i></p> <p><i>(2) The Government shall, within twelve months from the commencement of this Ordinance, compile and publish in its official language a guide containing such information, in an easily comprehensible form and manner, as may reasonably be required by a person who wishes to exercise any right specified in this Ordinance and disseminate the guide amongst the public.</i></p>
	<p>Provision relating to whistleblowers protection.</p>	<p>In order to support disclosure of information about wrongdoing in public authorities and private bodies by officers or employees working in such bodies, the law should also provide for their</p>

protection. Such persons are called “whistleblowers” that is, individuals who disclose information about contraventions or possible contraventions of the law because they believe that such disclosure is in the public interest. Whistleblower protection is based on the premise that such individuals should be protected from legal, administrative or employment-related sanctions for releasing information on wrongdoing. The inclusion of strong whistleblower protection is important in order to send a message to the public and officials that the Government is serious about opening itself up to legitimate public scrutiny.

Consideration may be given to inserting a new provision to protect whistleblowers:

“ (1) No one may be subject to any legal, administrative or employment-related sanction, regardless of any breach of a legal or employment obligation, for releasing information on wrongdoing, or that which would disclose a serious threat to health, safety or the environment, as long as they acted in good faith and in the reasonable belief that the information was substantially true and disclosed evidence of wrongdoing or a serious threat to public health, safety or the environment.

(2) For purposes of sub-section (1), wrongdoing includes the commission of a criminal offence, failure to comply with a legal obligation, a miscarriage of justice, corruption or dishonesty, or serious maladministration regarding a public authority or private body.”