

**Analysis of the Bangladesh  
Law Commission Working Paper  
on the proposed  
Right to Information Act 2002  
&  
Recommendations for Amendments**

*"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, your task...is to make that change real for those in need, wherever they may be. With information on our side, with knowledge a potential for all, the path to poverty can be reversed."*

--- Kofi Annan



Submitted by the  
**Commonwealth Human Rights Initiative**  
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**For more information, please contact:**

Mr Jeet Mistry, Programme Officer  
Right to Information Programme, CHRI  
Ph: +91 11 2685 0523 / 2652 8152  
Fax +91 11 2686 4788  
Email: [jeet@humanrightsinitiative.org](mailto:jeet@humanrightsinitiative.org)

**CHRI ANALYSIS OF BANGLADESH**  
**LAW COMMISSION WORKING PAPER ON THE PROPOSED**  
**RIGHT TO INFORMATION ACT, 2002**

1. In August 2005, the Commonwealth Human Rights Initiative (CHRI) wrote to the Bangladesh Minister of Law, Justice and Parliamentary Affairs 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, a Bangladesh based NGO, to promote greater awareness amongst the public and legislators about the value of the access to information legislation in civil society networks in Bangladesh. In April 2006, the Law Ministry wrote to CHRI to advise 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.
2. CHRI commends the Government for moving towards developing a right to information law for Bangladesh. The Law Commission Working Paper is a good start. However, CHRI would like to take this opportunity to offer some additional comments on the Working Paper, based on CHRI's experience in drafting and reviewing access to information legislation across the Commonwealth, to ensure that the final legislation which is drafted is in line with recent international best practice on access to information. Since the Working Paper was drafted, numerous developing countries have passed access laws which Bangladesh could draw on, Most notably, in 2005, neighbouring India finally passed its *Right to Information Act, 2005*, which reflects many new developments in access legislation and is widely regarded as a good model law.
3. Even as the Government considers the recommendations of the Law Commission and this paper, CHRI encourages the Government's drafters to consult widely with the public and other key stakeholders before the Bill is finalised and tabled in Parliament. 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.

**DETAILED COMMENTS AND SUGGESTIONS FOR IMPROVEMENT**

**Insert new section - Preamble / Objects clause**

4. It is recommended that the Bill include a Preamble which, in addition to explaining the process aims of the Act, recognises the broader democratic objective of the law, which is to promote transparency and accountability. While these principles have been referenced in the introduction to the Working Paper, it is recommended that are also captured in a Preamble to ensure at the outset that officials and the public understand the overarching context of the new law. The Preamble can be an important tool for the courts when interpreting the operative provisions of the law, such that a clear list of objectives can be useful when there are disputes about whether to preference openness or secrecy in a specific case. Suggested wording has been included below.

### **Recommendation**

*Draft a Preamble to make it explicit that the objectives of the Act include - to:*

- (i) Give effect to the Fundamental Right to Information, which will contribute to strengthening democracy, improving governance, increasing public participation, promoting transparency and accountability and reducing corruption*
- (ii) Establish voluntary and mandatory mechanisms or procedures to give effect to right to information in a manner which enables persons to obtain access to records of public authorities, and private bodies where the information is needed for the exercise and/or protection of a right, in a swift, effective, inexpensive and reasonable manner.*
- (iii) Promote transparency, accountability and effective governance of all public authorities and private bodies by including but not limited to empowering and educating all persons to:*
  - Understand their rights in terms of this Act in order to exercise their rights in relation to public authorities and private bodies.*
  - Understand the functions and operation of public authorities; and*
  - Effectively participate in decision making by public authorities that affects their rights.*

### **Section 1- Short Title, Extent and Commencement:**

5. It is recommended that s.1(3) of the proposed law clearly specify the date the Act will come into force. Failure to specify a commencement date in the legislation itself can otherwise undermine the use of the law in practice. In India for example, the *Freedom of Information Act 2002* was passed by Parliament and even assented to by the President but it NEVER came into force because no date for commencement was ever notified. Although it is understandable that the Bangladesh Government may wish to allow for time to prepare for implementation, best practice shows that the law itself should specify a maximum time limit for implementation, to ensure there is no room for the provision to be abused and implementation to be stalled indefinitely. Experience suggests a maximum limit of 1 year between passage of the law and implementation is sufficient (see Mexico for example).

### **Recommendation**

*Amend s.1(3) to include a maximum time limit for the Act coming into force in, ideally immediately but not later than 1 year from the date the Act receives Presidential assent.*

## **NEW: PART 1 – THE RIGHT TO INFORMATION**

### **Section 2 - Application of the Law**

6. Section 2 attempts to deal with the coverage of the law, but is confusingly drafted, particularly when read together with the definition of “public authority” in s.3. Two amendments need to be made to s.2:
  - Delete the references in s.2 to the bodies to which the Act applies. The issue of coverage is dealt with by the definition of “public authority” in s.3 and the provision conferring the right to access information from public authorities in s.4.
  - Rework the remainder of the provision to make it more explicit that the new law will override all existing secrecy provisions. As it is currently drafted, s.2 appears to narrow the scope of the law by stating that it shall be applicable subject to the provisions of prevalent restrictive laws. This does not support the spirit of open government which is envisaged by the enactment of an access law. The whole point is to move from secrecy to transparency – but if old secrecy laws are left on the statute books and still override the new law, then little will have been achieved. Consideration could be given to replicating s.22 of the Indian *Right to Information*

Act, 2005 which states clearly that the Act overrides existing inconsistent legislation, including the Official Secrets Act.

### **Recommendation**

Amend s.2 to provide that:

*The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in the Official Secrets Act, 1923, and any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.*

### **Section 3 - Definitions**

7. Section 3, which contains the Act's definitions, needs to be drafted in greater detail to avoid confusion in interpretation at a later stage. Consideration should be given to reworking and/or adding in some more definitional clauses. It is extremely important to draft definitions carefully to ensure that they maximise the breadth of the coverage of the Act and do not inadvertently exclude relevant information from the scope of the law. Specifically:

- The definition of "information" is unnecessarily narrowed by requiring the information to relate to "affairs, administration or conduct of any public authority". This was the old definition used in the Indian *Freedom of Information Act 2002*, but the new Indian Right to Information Act 2005 uses a much broader definition of information. While it is positive that the current definition of "information" covers correspondence, memorandum, records, books etc, it still potentially excludes access to information such as materials used to construct buildings/roads/etc or samples. In developing country contexts in particular, access to such information has been extremely useful in ensuring that public works have been properly undertaken (see the State of Delhi in India where people have used the inspection power in their relevant access law to scrutinise public works and expose corruption). Consideration should be given to broadening the definition of information to include access to information in the form of samples and models.
- The definition of "public authority" needs to be more broadly defined. It should be made explicit that the Act covers all three arms of government: executive, legislature and judiciary, at the level of each their administrative units, subject to the exemptions.
- Consideration should be given to including a broad definition of "private bodies covered by the Act. It is positive that the definition of "public authorities" currently includes bodies such as companies, corporations, trusts, cooperative societies etc owned by the government ,or private individuals registered with the government. However, calling such bodies "public authorities" could be confusing because they are technically NOT public bodies. In any case, consideration should be given to broadening the range of private bodies covered by the Act. At a time when the Government is increasingly outsourcing and in some cases even privatising the provision of public services - in the electricity, telephones and transport sectors for example – it is important that the public still has an assured right to access information about these services irrespective of whether or not these agencies are registered entities with the Government. The definition should cover:
  - "bodies which are controlled or substantially financed by Government" – The new Indian *Right to Information Act 2005* covers such bodies, in recognition of the fact that any body which is funded by public money should be subject to public scrutiny;
  - "bodies which undertake public functions on behalf of the Government and/or under a contract with a Government body in relation to that contract" – This formulation is included in the United Kingdom *Freedom of Information Act 2000*.

It recognises that though there is increasing use of private contractors to provide public services, the nature of the provider should not affect the right of the public to oversee the services provided with their money.

- “private bodies where the information is necessary for the exercise or protection of a human right” – This formulation copies the South African *Promotion of Access to Information Act 2000* which recognises that many private bodies today can have a huge impact on the rights – environmental, labour, discrimination, etc - of ordinary people.
- The definition of “right to information” should be expanded to give access to information in the form of certified samples of material and information held in electronic form whether in the form of floppies, diskettes, tapes etc. This is the definition included in the new Indian *Right to Information Act 2005*.

### **Recommendations**

- Amend s.3(a) to reword the definition of “information” to ensure the broadest coverage, for example:

“Information” means any material in any form, including records, documents, file notings, memos, emails, opinions, advices, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, works, models, data, material held in any electronic form, correspondence, memorandum, book, plan, map, drawing, diagram, pictorial or graphic work, photograph, film, microfilm, sound recording, video tape, machine readable record, and any other documentary material regardless of physical form or characteristics, and any copy thereof and information relating to any private body which can be accessed by a public authority under any other law for the time being in force”

- Broaden the definition of “public bodies” to explicitly include all arms of government, including the executive, legislature and judiciary
- Broaden the definition of “public bodies” or include a new definition of “private bodies” which includes
  - “bodies which are controlled or substantially financed by Government”;
  - “bodies which undertake public functions on behalf of the Government”;
  - “private bodies where the information is necessary for the exercise or protection of a human right”.
- Broaden the definition of “right to information” to ensure the broadest coverage, for example:

“Right to information” means the right to access information and includes inspection, taking notes, and extracts, and obtaining photocopy or certified copies of documents or records, taking certified samples of materials; and obtaining information in the form of diskettes, floppies, tapes, video cassettes or in any other electronic mode or through printouts where such information is stored in a computer or in any other device, of any public authority.”

### **Section 4(1) – Right to Information**

8. It is positive that s.4(1) of the proposed Act provides every citizen with the right to access information on request from public authorities. However, there is no justification for the narrowing of the right to information “solely related to the decisions made, proceedings drawn or acts performed or proposed to be performed by any Public Authority.” The new Indian Act and in fact, most international laws simply broadly give a right to access information, with “information” being used as a defined term. At the most, s.3 should specify that access will be given to information “held by or under the control of any public authority”.

### **Recommendations**

*Amend s.4(1) to broaden the scope of the law to give people “the right to access information held by or under the control of any public authority”.*

## **NEW: PART 2 – PROACTIVE DISCLOSURE**

### **Section 4(2) – Records Management**

9. The huge volume of information in governments’ hands requires that information be carefully managed so that authorities can locate and provide requested information in a timely and efficient way. In this context, it is positive that s.4(2) requires all public authorities to properly maintain their records. However, s.4(2) should more explicitly require that appropriate record keeping and management systems are in place *to ensure the effective implementation of the law*. Section 6 of the *Pakistan Freedom of Information Ordinance 2002* provides useful guidance in this context, specifically requiring computerization of records and networking of information systems.

*Pakistan: s.6 Computerisation of records - Each public body shall endeavour within reasonable time and subject to availability of resources that all records covered by the provisions of this Ordinance are computerised and connected through a network all over the country on different system so that authorised access to such records is facilitated.*

10. Consideration should also be given to empowering an appropriate body to develop guidelines or a Code on records management to this end. This has been done in the United Kingdom where, under s.46 of the *Freedom of Information Act 2000*, the Lord Chancellor is responsible for developing a Code of Practice on records management.

### **Recommendations**

- *Amend s.4(2) to require every public body “to maintain its records in a manner which facilitates the right to information as provided for in this Act”, including requiring bodies to computerise records and network information systems;*
- *Consider designating a specific body to develop guidelines on proper record keeping and management which must be followed by all bodies subject to the Act.*

### **Section 5 – Publication of Information by Public Authority**

11. It is positive that s.5 requires *suo moto* or proactive disclosure of information by the bodies covered by the Act. However, the list of topics which public bodies are required to proactively publish and disseminate should be extended. The proposed provisions at s.5(1) and (2) currently focus only on providing very basic information about public authorities. The law has not exploited the opportunity to use proactive disclosure as a means of increasing transparency in public bodies and thereby reducing corruption and increasing accountability of officials.

12. Article 7 of the *Mexican Federal Transparency and Access to Public Government Information Law 2002* and s.4 of the *Indian Right to Information Act 2005* provide excellent models for consideration. They require disclosure of information such as the recipients of government subsidies, concessions and licenses, publication of all government contracts and information about proposed development works. Such provisions operate to assist the public to keep better track of what the government is doing as well as ensuring key activities of public bodies are always and automatically kept open to public scrutiny.

13. Section 5(1) should also be amended to make it explicit that the first publication of the required information should be completed within 3 months of the law coming into force. After that, Rules should be developed which set out a timetable for regular updating. Notably, the different categories of information will need updating at different times,

because some information will change more rapidly than other types of information. Although the initial effort of collecting, collating and disseminating the information may be a large undertaking, over time it will be worth the investment as it will reduce requests in the long run because people will be able to easily access routine information without having to apply to public bodies.

14. While it is a good start that the s.5(3) requires information to be made available for inspection, this is not sufficient. This information is so important and relevant to citizen's lives that every effort must be made to ensure that it is widely disseminated. It is recommended that provision be made for this information to be widely published – not only in the Official Gazette, but also in local newspapers, by posting it on noticeboards and official websites broadcasting it on the radio or including it in telephone directories etc. In addition, every public authority must be required to have this information on hand so that it may be copied or inspected on request.

### **Recommendations**

*Replace s.5 with more comprehensive proactive disclosure provisions. The following provisions are drawn from the Mexican and Indian access laws:*

*“(1) Every public body shall*

- (a) publish within 3 months of the commencement of this Act:*
  - (i) the particulars of its organisation, functions and duties;*
  - (ii) the powers and duties of its officers and employees;*
  - (iii) the procedure followed in the decision making process, including channels of supervision and accountability;*
  - (iv) the norms set by it for the discharge of its functions;*
  - (v) the rules, regulations, instructions, manuals and records, held by it or under its control or used by its employees for discharging its functions;*
  - (vi) a statement of the categories of documents that are held by it or under its control;*
  - (vii) the particulars of any arrangement that exists for consultation with, or representation by, the members of the public in relation to the formulation of its policy or implementation thereof;*
  - (viii) a statement of the boards, councils, committees and other bodies consisting of two or more persons constituted as its part or for the purpose of its advise, and as to whether meetings of those boards, councils, committees and other bodies are open to the public, or the minutes 'of such meetings are accessible for public;*
  - (ix) a directory of its officers and employees;*
  - (x) the monthly remuneration received by each of its officers and employees, including the system of compensation as provided in its regulations*
  - (xi) the budget allocated to each of its agency, indicating the particulars of all plans, proposed expenditures and reports on disbursements made;*
  - (xii) the manner of execution of subsidy programmes, including the amounts allocated and the details of beneficiaries of such programmes;*
  - (xiii) particulars of concessions, permits or authorisations granted by it;*
  - (xiv) details in respect of the information, available to or held by it, reduced in an electronic form;*
  - (xv) the particulars of facilities available to citizens for obtaining information, including the working hours of a library or reading room, if maintained for public use;*
  - (xvi) the names, designations and other particulars of Public Information Officers, and appellate authorities;*
  - (xvii) such other information as may be prescribed;*  
*and thereafter update there publications within such intervals in each year as may be prescribed;*
- (b) publish all relevant facts while formulating important policies or announcing the decisions which affect public;*
- (c) provide reasons for its administrative or quasi judicial decisions to affected persons;*

- (d) *before initiating any project, or formulating any policy, scheme, programme or law, publish or communicate to the public in general or to the persons likely to be affected thereby in particular, the facts available to it or to which it has reasonable access which in its opinion should be known to them in the best interest of natural justice and promotion of democratic principles.*
- (e) *Upon signing, public authorities must publish all contracts entered into, detailing at a minimum for each contract:*
- (i) *The public works, goods acquired or rented, and the contracted service, including any sketches, scopes of service and/or terms of reference;*
  - (ii) *The amount;*
  - (iii) *The name of the provider, contractor or individual to whom the contract has been granted,*
  - (iv) *The periods within which the contract must be completed.*
- (2) *It shall be a constant endeavour of every public authority to take steps in accordance with the requirements of clause (b) of sub-section (1) to provide as much information suo moto to the public at regular intervals through various means of communications so that the public have minimum resort to the use of this Act to obtain information.*
- (3) *All materials shall be disseminated taking into consideration the cost. Effectiveness, local language and the most effective method of communication in that local area and the information should be easily accessible, to the extent possible in electronic format with the Public Information Officer, available free of charge or at such cost of the medium or in print cost price may be prescribed”*

## **NEW: PART 3 – PROCEDURES FOR ACCESSING INFORMATION**

### **Section 6(1) – Designation of Public Information Officers**

15. Section 6 is a crucial provision because it sets out the actual process for the public to request access to a document. This provision currently still needs considerable reworking to make it capable of implementation in practice. In particular, it is a problem that s.6(1) does not properly identify who will be responsible within each public authority for receiving and processing applications.
16. The current formulation appears to envisage a ‘designated officer’ or in his/her absence the ‘head of the office or sub-office’ will be responsible for accepting and responding to applications. In accordance with common practice in other countries, consideration should be given to clearly designating these officers as “Information Officers”. This will make it easier for the public to know exactly who to address their application to. It will also ensure that officials will recognise these officers as having special responsibilities under the law, and will know who applications need to be referred to if they happen to receive an information request. . Consideration should be given to whether Information Officers need to be appointed in all offices of a public authority so that the public will not have to go to the body’s headquarters to submit an application in person. Alternatively, Assistant Information Officers could be appointed in sub-offices to receive applications and pass them on. These Officers could then be targeted for special training on the law and can take the lead in ensuring proper implementation.

### **Recommendations**

- *Amend s.6(1) to require the designation of as many “Information Officers” as are necessary to ensure easy, timely access to information in all public bodies and their offices and sub-offices. NB: Retain the requirement that where no Information Officer has been designated, the Head of the public authority will be deemed to be the Information Officer for the purposes of the Act.*
- *Consider appointing Assistant Information Officers in sub-offices to receive and forward applications to Information Officers.*



### **Sections 6(1) and (2) – Procedure for Making a Request for Access to Information**

17. Best practice requires that access procedures should be as simple as possible and designed to be easily availed by all members of the community, whether illiterate, disabled or geographically distant from centres of power.

### **Oral or written requests in any Bangladeshi language**

18. Section 6(1) should clarify that requests for information can be made in writing or through electronic means (fax, email, etc), in English, Bangla and any local language used in the area. It should be the duty of the relevant public body to translate the request. To require all requestors to submit an application only in Bangla or only in English could in practice exclude millions of people from utilising the law. It should further be clarified that Information Officers should also be required to receive oral requests, which will then be reduced to writing in cases where the applicant is illiterate or disabled or it is otherwise necessary to assist the requester to make their requests. In such cases, the Information Officer should reduce the application to writing and provide the requester with a copy.

### **No Compulsory Format for Requests**

19. Section 6(2) currently requires requestors to submit requests in a specific form supplied by the public authority. In practice this could prove an obstacle to access, as some people may not have easy access to the application form, for example because they cannot download it from the internet or because they are not proximate to a government office where they can be obtained. As long as the requestor provides sufficient particulars to allow information to be identified and located, that should be sufficient. This is what is happening in India under the new Act.

### **No Purpose Needs to be Stated to Justify the Request**

20. Section 6(2) should also make it explicit that applications shall not require requestors to state a reason for their request. There should be no room for officials to deny requests simply because they are not satisfied with the requestor's reasons for wanting the information. Access to information is a fundamental right and it is only denials of that right which must be justified. Openness should be seen as the norm. Most Acts in the Commonwealth specifically provide that no reasons need to be provided by an applicant.

### **Written Receipts for Applications**

21. Information Officers should be required to provide written receipts on the spot or no later than 5 days from an application being received. This will ensure that requesters have written proof of the date on which they submitted the application, which can then be used when calculating whether the time limits for providing information have been complied with. The receipt should also acknowledge the payment of fees, if any (see paragraphs 22-24 below for further discussion re fees).

### **Recommendations**

- *Amend s.6(1) to specify that:*
  - *requests for information can be made in writing or through electronic means (fax, email, etc)*
  - *requests for information can be made in English, Bangla or the local language of the area in which the application is being made*
  - *where a request cannot be made in writing the officer responsible for handling the request shall render all reasonable assistance to the person making the request orally to reduce the request to writing and shall provide a copy of the written application to the requester.*

- *Amend s.6(2) to clarify that requests for information will be accepted in any form – plain paper, printed or electronic format as long as the application contains the basic information necessary to process the application.*
- *Insert a new provision making it explicit that a requester will not be required to state the purpose for which they are requesting the information.*
- *Insert a new provision requiring Information Officers to provide a written acknowledgment of receipt of the application, including the date it was received, the name and contact details of the Information Officer and a receipt for any fees paid.*

### **Sections 6(2) and (3) - Fees for Applications and Access**

22. Best practice requires that no fees should be imposed for accessing information, particularly government information, as costs should already be covered by public taxes. Section 6(2) of the Bill appears to impose a fee of Taka 5 for getting a copy of an application form and submitting it. This provision should be removed. Imposing an application fee could constrain the poorer sections of the community from making an application. In countries like Mexico and the United Kingdom, no application fee is charged.
23. Section 6(3) then goes further and imposes fees for actually gaining access. If such fees are to be collected, the law should make it explicit that the rates should be set so that the costs imposed for access are not so high as to deter potential applicants. At the most, fees should be limited only to cost recovery, with no additional margin for profit, and a maximum limit should be imposed. Charges should only cover reproduction costs, not search or collation/compilation time. Imposing fees in respect of the latter could easily result in prohibitive costs, particularly if bureaucrats deliberately drag their heels when collating information in order to increase fees.
24. Where the cost of collecting the fee outweighs the actual fee (for example, where only a few pages of information are requested), fees should be waived. The Bill could also go further and replicate s.17(3) of the Trinidad & Tobago Act and s.7(6) of the Indian *Right to Information Act 2005* which state that even where fees are imposed, if a body subject to the Act fails to comply with the time limits for disclosure of information, access to which the applicant is entitled shall be provided free of charge.
25. In addition, most access laws actually include provisions permitting non-payment of fees in some circumstances. It is recommended that provision be made to allow the waiver of fees where the application is in the public interest, such as where a large group of people would benefit from release/dissemination of the information, where the imposition of fees would cause financial hardship or where the objectives of the Act would otherwise be undermined (for example, because poor people would be otherwise excluded from accessing important information). Such provisions are regularly included in access laws in recognition of the fact that fees may prove a practical obstacle to access in some cases. A definition of "public interest" may be included to provide direction to officials implementing the law. Section 29(5) of the Australian Freedom of Information Act provides a useful model:

### **Recommendations**

- *Delete s.6(2) which requires payment of a fee to get an application form.*
- *Insert a new clause clarifying that any fees charged for provision of information "shall be reasonable, shall in no case exceed the actual cost of providing the information such as making photocopies or taking print outs and shall be set via regulations at a maximum limit taking account of the general principle that fees should not be set so*

*high that they undermine the objectives of the Act in practice and deter applications".*

- *Insert a new clause which states that "where the cost of paying or collecting the fee is greater than the fee itself, no fee will be charged".*
- *Inserted a new clause which states that "if a body subject to the Act fails to comply with the time limits for disclosure of information, access to which the applicant is entitled shall be provided free of charge and any fees already paid shall be refunded".*
- *Insert a new clause which allows for the waiver or reduction of any fees where their imposition would cause financial hardship or where disclosure is in the general public interest.*

### **Insert new section – Transfer of Requests**

26. There are currently no provisions to deal with transfers of requests, where applications are made to a body which does not hold or control the information requested. This is a serious oversight. It is easy to envisage cases where requestors misdirect an application; often it is not clear to a layperson which department would have primary responsibility for a particularly subject. For example, the drilling of borewells relates to rural development and tribal welfare, as well as municipal and panchayat bodies – who would a requestor apply to for information about the borewell in their village? The government knows its own business most fully, such that the government should be responsible for ensuring that misdirected applications are transferred. Transfers should be prompt; in practice, public bodies will almost immediately be able to determine whether a particular request should be transferred and can do so without delay. Requestors themselves should not be required to resubmit applications as this could result in additional fees and unnecessary delays. Notification should be provided to requestors if an application is transferred, so that they will know who to follow up with.

### **Recommendation**

*Insert a new clause requiring bodies to transfer applications where they are submitted to the wrong body and to notify requestors in writing of the transfer as soon as practicable and no later than 5 days of the transfer.*

### **Section 6(3) - Notice of decisions**

#### Time limits

27. The time limits in s.6(3) are appropriate although consideration should be given to including an additional provision requiring information to be provided within 48 hours where it relates to the life and liberty of a person. This is consistent with s.7(1) of the Indian *Right to Information Act 2005*.

#### Decision notices

28. While it is positive that s.6(3) requires bodies to take measures to notify requestors of a decision to refuse access, it is not sufficient for applicants to only be notified when their requests for information are being denied. This provision should be amended to provide for a strict requirement that all applicants receive a decision notice within the prescribed time limits. The content of such notices should also be prescribed in the Act.

#### Form of access

29. Section 6(3) should be amended to make it clear that the form of access shall be the choice of requester, not the public authority – subject to cost and the need to preserve certain records. Currently, the provision reads as if the public authority has the choice as to what form of access will be permitted, but such an approach could be too easily abused by officials intent on providing obstacles to access. For example, officials may

demand the costly provision of copies to requesters rather than permitting free inspection.

### **Recommendations**

- Amend section 6(3) to:
  - include an additional sub-clause providing that “information will be provided within 48 hours where it relates to the life and liberty of a person”
  - require that all applicants must receive a notice of a decision on their request within the prescribed time limits.
  - make it clear that the form of access shall be the choice of the requester, not the public authority.
- Insert a new clause specifying the content of decision notices:
  - *Disclosure notice*: Where access is approved, the PIO shall give a notice to the applicant informing:
    - (a) that access has been approved;
    - (b) the details of further fees [see paragraphs 30 and 31 below re fees] together with the calculations made to arrive at the amount and requesting the applicant to deposit the fees;
    - (c) the form of access provided, including how the applicant can access the information once fees are paid;
    - (d) information concerning the applicant’s right with respect to review the decision as to the amount of fees charged or the form of access provided, including the particulars of the appellate authority, time limit, process and any other forms
  - *Non-disclosure notice*: Where access is refused or partially refused, the PIO shall give a notice to the applicant informing:
    - (a) that access has been refused or partially refused;
    - (b) the reasons for the decision, including the section of the Act which is relied upon to reject the application and any findings on any material question of fact, referring to the material on which those findings were based;
    - (c) the name and designation of the person giving the decision;
    - (d) the amount of any fee which the applicant is required to deposit, including how the fee was calculated;
    - (e) the applicant’s rights with respect to review of the decision regarding nondisclosure of the information, the amount of fee charged or the form of access provided, including the particulars of the appellate authority, time limit, process and any other forms.

### **Insert new sections - Translations and assistance to the disabled**

30. The Working Paper does not currently address the issue of translations of requested information. A society which promotes democratic participation and aims to facilitate the involvement of all of the public in its endeavours should ensure that people are able to impart and receive information in their own language and cultural context. Section 12(2) of the Canadian Access to Information Act 1983 provides a useful example:

*Where access to a record or a part thereof is to be given under this Act and the person to whom access is to be given requests that access be given in a particular official language, a copy of the record or part thereof shall be given to the person in that language*

- (a) forthwith, if the record or part thereof already exists under the control of a government institution in that language; or
- (b) within a reasonable period of time, if the head of the government institution that has control of the record considers it to be in the public interest to cause a translation to be prepared.

31. A new provision should also be included to provide assistance to disabled people who are attempting to access information. The new Indian Act specifically provides that

Information Officers must provide assistance to sensorily disabled people, for example by helping with inspection.

**Recommendation**

- *Insert a new section to permit translations of requested information, at least where it is in the public interest.*
- *Insert a new section requiring Information Officers to assist disabled people to effectively access information.*

**Insert new section – Deemed Refusals**

32. Experience with implementation of access to information regimes has shown that many officials avoid the application of the law by simply ignoring requests. To address this problem, “deeming” provisions need to be included so that a failure to respond to a request in time is automatically deemed a refusal, thereby allowing appeal provisions to be invoked. Experience in the states of India has shown that the absence of such a deeming provision has sometimes resulted in confusion over whether and when appeals can be lodged and dealt with.

**Recommendation**

- *Insert a new clause on deemed refusals in the following terms:  
If a Public Information Officer fails to give the decision on a request for access to the requestor concerned within the period contemplated in the Act, the Information Officer is, for the purposes of this Act, regarded as having refused the request.*

**NEW: PART 4 – INFORMATION WHICH IS NOT ACCESSIBLE**

**Insert new section – Public Interest Override**

33. ALL exemptions should be subject to a blanket “public interest override”, whereby a document which falls within the terms of a *general* exemption provision should still be disclosed if the public interest in the *specific* case requires it. This ensures that every case is considered on its individual merits and public officials do not just assume that certain documents will always be exempt. It ensures that the “public interest” is always at the core of a right to information regime. Section 8(3) of the Indian *Right to Information Bill 2004* and s.32 of the Ugandan *Access to Information 2004* provide examples of such clauses.

**Recommendation**

- Insert a new public interest override provision before s.7, in the following terms  
“A public authority shall, notwithstanding the exemptions specified in section [X] or elsewhere in the Act, allow access to information if the public interest in disclosure of the information outweighs the harm to the protected interest”*

**Section 7 - Exceptions**

34. The key principle underlying any exemption is that its purpose must be to genuinely protect and promote the public interest. All exemptions should therefore be concerned with whether disclosure would actually cause or be likely to cause harm. Blanket exemptions should not be provided simply because a document is of a certain type – for example, a Cabinet document, or a document belonging to an intelligence agency. The key issue should be whether disclosure would actually cause serious damage to a legitimate interest which deserves to be protected. Even where exemptions are included in legislation, they should not apply to documents more than 10 years old because at that point they should be deemed to be no longer sensitive and thus declassified.

35. As noted in paragraph 6, bullet 2 above, the Act should override all other secrecy provisions. What this means in practice is that the exemptions contained in the new access law should be comprehensive. It is not practical to have secrecy provisions scattered throughout numerous laws. This will be very confusing for the officials required to apply the law. Information Officers should be able to rely on one consolidated piece of legislation to provide a framework for openness and secrecy – and that should be the new access law. Accordingly, serious consideration needs to be given to the exemptions regime.
36. In accordance with international best practice, every test for an exemption (articulated by Article 19) should be considered in 3 parts:
- (i) Is the information covered by a legitimate exemption?
  - (ii) Will disclosure cause substantial harm?
  - (iii) Is the likely harm greater than the public interest in disclosure?

#### Section 7(2) – Commercial and trade interests

37. While it is legitimate to protect against disclosures which would unfairly harm the competitive or commercial interests of a public authority or private company, s.7(2) is poorly worded to protect such interests. The following issues need to be considered:
- The protection of trade secrets is legitimate because “trade secrets” are a recognised category of information specifically protected at common law and/or by statute. However, it is not clear what will constitute a “commercial secret”, with the result that this term could be broadly applied to deny the legitimate release of information.
  - It is not clear what is being referred to by the phrase “which would prejudice the law interest of such public authority”. More appropriately, the provision should try to protect against “unfair, serious detriment to the legitimate commercial or competitive interests of a public authority”.
  - Section 7(2) currently only protects public authorities. While the definition of “public authority” is quite broad, nonetheless, it should be made clear that where a private company has given a public authority secret trade information or information the release of which would unfairly harm its competitive interests, that third party should also be protected. For example, if a company submits a tender bid to a Ministry which contains sensitive financial information, it would be unfair if their competitor could access that information during the tender process.
  - Disclosure should still be required where the commercial information relates to possible environmental, human rights or social hazards.

#### Section 7(4) – Public safety and law enforcement

38. While it is understandable to try to protect against disclosures which could harm public safety, on the other hand, this is such a broad term that one could easily envisage a case where the provision could be abused to deny the legitimate release of information. Too often, governments which are unpopular and are facing public protests use the excuse of “public safety” to protect their own interests.

#### Section 7(5) – Unwarranted invasion of privacy

39. While it is common to exempt the disclosure of information that would constitute an unwarranted invasion of personal privacy, nonetheless the exemption at s.23 is much too broad. In particular, it is worrying that the section could be misused to permit non-disclosure of information about public officials. It is vital to government accountability that public officials can individually be held to account for their official actions

#### Section 7(8) Information already publicly available

40. Section 7(8), which exempts information relating to a matter that is already contained in a publication of sale, is too broadly drafted. The provision needs to be amended so that it exempt not information which “relates” to information in a publication available for sale, but “information contained in a publication available for sale”. It is also recommended that a new sub-clause be included requiring the public body when rejecting an application on this ground to communicate to the requestor what publication the information is held in and where it can be purchased.

#### **Recommendations**

- *Amend s.7(3) to:*
  - *Remove the reference to “commercial secrets*
  - *Replace the phrase “which would prejudice the law interest of such public authority” with “which would cause unfair, serious detriment to the legitimate commercial or competitive interests of a public authority”.*
  - *Include an addition phrase to protect the interests of “third party bodies”.*
- *Amend s.7(4) to remove the reference to “public safety”.*
- *Insert an additional sub-clause in s.7(5) to permit disclosure where:*
  - (a) the third party has effectively consented to the disclosure of the information;*
  - (b) the person making the request is the guardian of the third party, or the next of kin or the executor of the will of a deceased third party;*
  - (c) the third party has been deceased for more than 20 years; or*
  - (d) the individual is or was an official of a public body and the information relates to any of his or her functions as a public official OR relates to an allegation of corruption or other wrongdoing*
- *Amend s.7(8) to cover only information which is “contained” in a publication available for sale and require public bodies relying on the exemption to advise the requester what publication the information is contained in and where it can be purchased.*
- *Insert a new blanket declassification provision, which requires all information to be accessible after 20-30 years.*

#### **Insert new section – Partial Disclosure**

41. No provision currently exists for partial disclosure of information where records contain some – but not all - exempt information. Best practice supports the inclusion of a provision which enables public authorities to sever sensitive segments of documents and then release non-exempt information. It is recommended that such a provision be included within the proposed Act. In such circumstances, a decision notice should be sent in the same terms as recommended under paragraph 28 above.

#### **Recommendations**

- *Insert a new clause providing for the partial disclosure of information, in the following terms:*

*“Where a request for access to information is rejected on the ground that it contains information which is exempt from disclosure, then, notwithstanding anything contained in this Act, access may be provided to that part of the record which does not contain any information which is exempt from disclosure under this Act and which can reasonably be severed from any part that contains exempt information.”*

*[NB: A decision notice should be sent in the same terms as recommended under paragraph 28 above]*

## **NEW: PART 5 – PENALTIES**

### **Sections 8-13 and section 24 – Enforcement regime: Offences and punishments under the Act**

42. It is excellent that sections 8 to 13 lay down stringent penalties for officials who fail to comply with their duties to supply information under the Act. The Act is substantially strengthened by the provision of comprehensive offences and penalties on officials for - refusing access to information (s.8), failing to publish information proactively (s.9), supplying false information (s.10), willfully delaying supplying information (s.11) and failing to comply with any order passed by the Information Tribunal or Information Appellate Tribunal under the Act. The catch-all penalty provision under s.13 is particularly powerful as it provides for the imposition of a separate penalty where there has been a contravention of any of the provisions of the law for which a penalty has not been separately provided under the Act. Experience from other jurisdictions has shown that sanctions for non-compliance are particularly important incentives to timely disclosure in jurisdictions where the bureaucracy is unused to hurrying at the request of public. These provisions will ensure that officials think twice before refusing a request for information without a legitimate legal basis.

#### Provide for personalized penalties

43. It is positive that sections 8 -13 envisage personal penalties payable by the defaulting official. In reality, without personalised penalty provisions, many public officials may be content to shirk their duties, safe in the knowledge that it is their employer that will suffer the consequences of paying a fine. It is therefore important in combating entrenched cultures of secrecy that individual officers are faced with the threat of personal sanctions if they are non-compliant. Notably however, any fines should be big enough to act as a real deterrent. When the wrongful gains from bribery and corruption can result in huge windfalls for bureaucrats, fines need to be large enough to be a disincentive to misbehaviour. In this context, one would query whether the current fines of Taka 1,000 to 10,000 are a big enough punishment.

44. The relevant provisions need to be carefully drafted though, to make it clear ensure that defaulting officers, at whatever level of seniority, are the ones who will be penalised. It is not appropriate for penalty provisions to assume that penalties will always be imposed on officers dealing with requests. If the Information Officer has genuinely attempted to discharge their duties but has been hindered by the actions of another official, the Information Officer should not be made a scapegoat. Instead, the official responsible for the non-compliance should be punished.

45. To remove any ambiguities from the law, it should be clear that the Information Tribunal , the Information Appellate Tribunal and courts are all empowered to impose sanctions under the Act.

#### Recovery of Penalty and Compensation

46. It is positive that s.24 of the proposed Act envisages that personal penalties will be recovered in the form of arrears of land revenue. However, it is recommended that additionally, the option of the penalty being directly deducted from the salaried account of public officials be made available. This would prevent public officials from simply defaulting on their payments. This is the approach taken in the new Indian *Right to Information Act 2005*.

#### **Recommendations**

- *Reconsider whether the fines imposed are sufficiently large to act as a deterrent to non-compliance. Consider setting a minimum fine, rather than a maximum fine so that in all*



*cases the punishment will fit the crime.*

- *Enable sanctions to be imposed personally on any individual found guilty of an offence under the Act, including individuals whose assistance was requested by an Information Officer.*
- *Make it clear that the Information Tribunal, the Information Appellate Tribunal and courts can all impose sanctions under the Act.*
- *Amend s.24 to include a provision for payment of penalties/compensation from the salary of public officials.*

#### **NEW: PART 6 – APPEALS**

47. Best practice international standards require that an effective access to information law include an appeals mechanism which is independent of government, as well as cheap, quick and procedurally simple. The current Working Paper proposes a two stage appeals redressal mechanism - s.14(1) allows for an initial appeal to an “Information Tribunal” at the district level; and s. 17(1) allows for a second appeal against the decision of the Information Tribunal to the “Information Appellate Tribunal”.
48. It is not clear why the Working Paper envisages setting up two different tiers of Tribunals to handle complaints. If it is to ensure that people have a first appeal mechanism which is geographically more accessible, this is commendable. However, there may be genuine resistance on efficiency grounds to setting up a host of new Tribunals at the district level. Is such a large amount of bureaucracy really necessary to enforce the new law? Will each district Tribunal have enough work to do? In many countries, a single Information Tribunal or Information Commission or Commissioner is created under their access law to handle all appeals. That Commission may then locate staff throughout the country in sub-offices as necessary to handle the case load. In Mexico, for example, with a population of 100 million, a single Information Commission has been established led by 5 Commissioners. In the United Kingdom, a country of 60 million people, the UK Information Commissioner has sub-offices in Wales and Northern Ireland. This may be more cost-effective and will also ensure more stream-lined decision-making.

#### **Recommendations**

*Reconsider whether a two-stage appeal process is necessary. Accordingly, consider merging the provisions relating to the Information Tribunals and Information Appeal Tribunal to create a single Information Tribunal or Information Commission.*

#### **Insert new provision - Clarify Tribunal members’ appointment and removal procedures**

49. The procedure for appointing members of the Information Tribunal must be impartial and independent of government interference, to ensure that the Information Tribunal is seen as non-partisan and can act as an independent body. The present Act, does not clearly detail the composition of the Tribunals beyond stating that the person appointed should be competent as a District Judge (s.14(2)) or Supreme Court Judge (s.17(2)). It is recommended that the Act clearly specify the criteria, procedure for appointment and discharge of persons appointed to the Information Tribunal. More generally, it is worth noting that the appointment process for most Information Commissioners and/or administrative tribunals responsible for handling freedom of information appeals throughout the world are designed to maximise independence of appointees – usually by requiring a committee comprising representatives of Government, the Opposition and the Chief Justice to nominate candidates, and often requiring those candidates to subsequently be endorsed by Parliament.
50. There are currently no provisions dealing with removal or replacement of a Tribunal member. This is problematic. While it is to be hoped that all members will do their jobs properly, nonetheless, some proviso needs to be included to deal with cases where a

member is misbehaves or performs poorly. CHRI is not aware of the provisions that ordinarily apply to removal of tribunal members in Bangladesh, but consideration could be given to replicated these.

### **Recommendations**

- *Insert a new provision that clarifies the constitution of the Information Tribunal, to be read as follows:*

- (1) *The [X] shall nominate a candidate or candidates to the Information Tribunal from persons qualified under the provisions of this Act and parliament by a special majority vote, shall confirm the said nomination.*
- (2) *The persons appointed to the Information Tribunal shall –*
  - (a) *be a person qualified to be appointed as a district judge of the High Court of Bangladesh;*
  - (b) *be publicly regarded as a person who can make impartial judgments*
  - (c) *have sufficient knowledge of the workings of Government;*
  - (d) *not have had any criminal conviction and not have been a bankrupt;*
  - (e) *be otherwise competent and capable of performing the duties of his or her office;*
  - (f) *not be the President, Vice President, a Minister or Deputy Minister, a serving public officer or a Member of Parliament; and*
  - (g) *not hold any other public office unless otherwise provided for in this Act.*
- (3) *Members of the Information Tribunal shall have budgetary, operational and decision-making autonomy and should be completely independent of the interference or direction of any other person or authority, other than the Courts.*
- (4) (a) *A person who is a member of the Information Tribunal may be removed from office before expiry of his or her term only for inability to exercise the functions of the office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour.*  
(b) *A person who is a member of the Information Tribunal shall be removed from the office [in accordance with the removal procedures usually adopted in Bangladesh]*

### **Sections 14(1), 17(1) and 18(1) – Appeal Remit of the Tribunals**

51. Sections 14(1), 17(1) and 18(1) all deal with the appeal remit of the two Tribunals. These clauses are all differently worded and this could cause confusion at the implementation stage. It is important to make it very clear exactly what cases the Tribunal(s) can adjudicate on. A catch-all provision should also be included which allows the Tribunal(s) to hear an appeal on “any issue related to disclosure”. This will ensure that the Tribunal(s) jurisdiction is not inadvertently limited, while at the same time simplifying the law. Section 88 of the Queensland (a State of Australia) *Freedom of Information Act 1992* and s.31 of the Canadian *Access to Information Act 1982* provide good models.

### **Recommendations**

*Amalgamate the provisions relating to the 2 Tribunals and replace them with the following:*

*“Subject to this Act, first the Information Tribunal, then the Information Tribunal and then the courts shall have the power to receive and investigate complaints from persons:*

- (a) *who have been unable to submit a request to an Information Officer, either because none has been appointed as required under the Act or because the Public Information Officer has refused to accept their application;*
- (b) *who have been refused access to information requested under this Act;*
- (c) *who have not been given access to information within the time limits required under this Act*
- (d) *who have been required to pay an amount under the fees provisions that they consider unreasonable, including a person whose wishes to appeal a decision in relation to their application for a fee reduction or waiver;*
- (e) *who believe that they have been given incomplete, misleading or false information under this act;*
- (f) *in respect of any other matter relating to requesting or obtaining access to records under this Act.”*

### **Insert new provision - Clarify appeals procedures**

52. The Working Paper currently does not specify the procedures that requestors need to follow when making an appeal to the Tribunals. It is recommended that the law lay down guidelines to be followed by requestors, in particular, time limits of at least 30 days within which an appeal can be made and a time limit of no more than 30 days for disposal of appeals by the Tribunals. Clarifying such procedural issues and making sure they are consistent between the Tribunals at this early stage, will prevent confusion and misapplication of the law at the time of implementation.

### **Recommendation**

- *Amend/insert time limits allowing appeals to be made within 30 days of receipt of a decision, although Tribunals should be given a discretionary power to extend those time limits where reasonable and/or necessary*
- *Amend/insert time limits requiring appeals to be disposed of within 30 days.*
- *Insert new clauses clarifying how the content of appeals notices from requestors and the procedure for submitting appeals.*

### **Section 15(1), 15(2) and 18(3) – Decision-making powers of the Tribunals**

53. In outlining the powers of the Information Tribunal, in addition to the latter's investigative powers, the Act must clearly set out the Tribunal's decision-making powers, to ensure that bureaucrats cannot sideline the Tribunal as only a mediator or arbitrator. In this context, s.15 should be amended to clarify that the Tribunal is an appeals body with powers to make binding decisions. The Tribunal is a new body, it is useful to specify the extent of the Tribunal's powers in more detail to ensure that all parties – the public, public authorities and Tribunal members themselves – clearly understand what the Tribunal can do.

54. In accordance with best practice evidenced in a number of jurisdictions (eg. the State of Queensland in Australia, Mexico), the Commission should have the power to make binding determinations, compel parties to take action, enforce compliance with orders and impose sanctions as appropriate. Without strong powers, the Commission could easily be ignored and sidelined by a bureaucratic establishment which is determined to remain closed. Section 88 of the Queensland *Freedom of Information Act 1992* (which is replicated in paragraph 55 above), as well as s.82 of the South African *Promotion of Access to Information Act* and ss.42-43 of the Article 19 Model FOI Law provide very useful examples.

### **Recommendations**

*Amend sections 15(1), 15(2) and 18(3) to clarify that the Tribunals have the power to make binding decisions on all parties, specifically:*

- (1) The Tribunals have the power to:
  - (a) require the public authority to take any such steps as may be necessary to bring it into compliance with the Act, including by;
    - (i) providing access to information, including in a particular form;*
    - (ii) appointing an information officer;*
    - (iii) publishing certain information and/or categories of information;*
    - (iv) making certain changes to its practices in relation to the keeping, management and destruction of records;*
    - (v) enhancing the provision of training on the right to information for its officials;*
    - (vi) providing him or her with an annual report, in compliance with section X;**
  - (a) require the public body to compensate the complainant for any loss or other detriment suffered;*
  - (b) impose any of the penalties available under this Act;*
  - (c) reject the application.**
- (2) The Tribunals shall serve notice of his/her decision, including any rights of appeal, on both the complainant and the public authority.*
- (3) Decisions of the Tribunals shall be notified to all parties within 30 days of the receipt of the appeal notice.*

### **Insert new section – Burden of Proof**

55. The law will need to make it clear that the burden of proof in any appeal hearings should be on the body refusing disclosure and/or otherwise applying the law to justify their decision. This is justified because it will be unfair and extremely difficult for members of the public – who will never have seen the document they are requesting – to be forced to carry the burden of proof. Section 61 of the Australian *Freedom of Information Act 1982* provides a useful model:

- (1) Subject to subsection (2), in proceedings under this Part, the agency or Minister to which or to whom the request was made has the onus of establishing that a decision given in respect of the request was justified or that the Tribunal should give a decision adverse to the applicant.*
- (2) In proceedings [relating to third parties], the party to the proceedings that opposes access being given to a document in accordance with a request has the onus of establishing that a decision refusing the request is justified or that the Tribunal should give a decision adverse to the applicant.*

### **Recommendation**

*Insert a new section clarifying that the burden of proof during the appeals process is on the body refusing disclosure and/or otherwise applying the law to justify their decision.*

### **Sections 20 and 23 – Barring of appeals to the courts**

56. The Working Paper currently bars appeals to the courts from decisions of the Information Appeal Tribunal. This is not appropriate. The right to information is a fundamental right which underpins all of the other rights in the Bangladesh Constitution. It is also implied as part of the right to freedom of expression and the right to life and liberty. Accordingly, legal issues relating to the exercise or enjoyment of the right to information should be justiciable by the Supreme Court, which is the forum where the content of constitutional rights is finally considered.

### **Recommendation**

*Delete sections 20 and 23 and make it clear that decisions of the Information Appeal Tribunal can be appealed to the Supreme Court.*

### **Section 21 – Right of legal representation**

57. Section 21 envisages that parties can invite lawyers to represent them at Tribunal proceedings. This is an unfortunate clause because it could turn the Tribunal into just another court-like forum which will be disempowering for ordinary people. In practical terms, the cost of a lawyer will also be a major disincentive for many requesters. Ideally, the Tribunals should discourage or even bar the use of lawyers. The Tribunals themselves should really operate more like commissions of inquiry searching for the truth rather than promoting adversarial hearings; hence the preference for Information Commissions in most other jurisdictions. At the very least, the Tribunal should offer legal services to appellants where the public authority brings its own lawyers, to ensure that the right decision about openness is made.

### **Recommendation**

*Delete s.21 and/or replace it with a provision barring the use of lawyers and/or requiring the Tribunal to offer legal representation to an appellant where the public authority decides to use a lawyer.*

### **Insert new section – Protection for bona fide disclosures**

58. Officials responsible for making decisions regarding disclosure of information may legitimately be concerned that wrong decisions on their parts, that is, decisions which result in the disclosure of information that their superiors believe should not have been released, could result in action being taken against them. Similar concerns could be harboured at an institutional level. In order to encourage openness and guard against this possibility, a new provision needs to be included to protect officials/bodies acting in good faith to discharge their duties under the law. Some model provisions are listed below:

- Section 89 of the South African *Promotion of Access to Information Act 2000*  
*No person is criminally or civilly liable for anything done in good faith in the exercise or performance or purported exercise or performance of any power or duty in terms of this Act.*
- Section 38 of the *Trinidad and Tobago Freedom of Information Act 1999*  
*(1) Where access to a document has been given in accordance with the requirements of this Act or in good faith, in the belief that it was required to be given in accordance with this Act, unless malice is proved –*
  - (a) no action for defamation, breach of confidence or infringement of copyright may be brought against the public authority or against the responsible Minister, or an officer or employee of the public authority as a result of the giving of access;*
  - (b) no action for defamation or breach of confidence may be brought, in respect of any publication involved in the giving of access by the public authority, against –*
    - (I) any person who was the author of the document; or*
    - (II) any person as a result of that person having supplied the document or the information contained in it to the public authority;*
  - (c) no person shall be guilty of an offence by reason only of having authorised, or having been involved in the giving of the access.*  
*(2) The giving of access to a document, including an exempt document, in consequence of a request shall not be taken for the purposes of the law relating to defamation, breach of confidence or copyright, to constitute an authorisation or approval of the publication of the document or its contents by the person to whom access is given.*  
*(3) Nothing in this Act affects any privilege, whether qualified or absolute, which may attach at common law to the publishing of a statement.*

### **Recommendations**

*Insert a new provision to protect officials/bodies acting in good faith to discharge their duties under the law.*

### **Insert new section – Whistleblower Protection**

59. 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. 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 up to legitimate scrutiny.

### **Recommendation**

*Insert an additional section dealing with whistleblower protection. Section 47 of the Article 19 Model FOI Law<sup>1</sup> provides a good model:*

*“(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 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 body.”*

## **NEW: PART 7 – MONITORING & PROMOTION OF THE ACT**

### **Insert new section – Education & Training**

60. It is increasingly common to include provisions in the law itself mandating a body not only to monitor implementation of the Act, but also to actively promote the concept of open governance and the right to information within the bureaucracy and amongst the public. Such provisions often specifically require that the government ensure that programmes are undertaken to educate the public and the officials responsible for administering the law. Sections 83 and 10 of the South African *Promotion of Access to Information Act 2000* together provide a very good model:

*South Africa: 83(2) [Insert name], to the extent that financial and other resources are available--*

- (a) develop and conduct educational programmes to advance the understanding of the public, in particular of disadvantaged communities, of this Act and of how to exercise the rights contemplated in this Act;*
  - (b) encourage public and private bodies to participate in the development and conduct of programmes referred to in paragraph (a) and to undertake such programmes themselves; and*
  - (c) promote timely and effective dissemination of accurate information by public bodies about their activities.*
- (3) [Insert name of body] may--*
- (a) make recommendations for--*
    - (i) the development, improvement, modernisation, reform or amendment of this Act or other legislation or common law having a bearing on access to information held by public and private bodies, respectively; and*

<sup>1</sup> <http://www.article19.by/publications/freedominfo/law/>

- (ii) procedures by which public and private bodies make information electronically available;
  - (b) monitor the implementation of this Act;
  - (c) if reasonably possible, on request, assist any person wishing to exercise a right [under] this Act;
  - (d) recommend to a public or private body that the body make such changes in the manner in which it administers this Act as [insert name of body] considers advisable;
  - (e) train information officers of public bodies;
  - (f) consult with and receive reports from public and private bodies on the problems encountered in complying with this Act;
- 10(1) The [Information Commission] must, within 18 months...compile in each 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 contemplated in this Act.
- (2) The guide must, without limiting the generality of subsection (1), include a description of--
- (a) the objects of this Act;
  - (b) the postal and street address, phone and fax number and, if available, electronic mail address of:
    - (i) the information officer of every public body; and
    - (ii) every deputy information officer of every public body...;
  - (d) the manner and form of a request for...access to a record of a public body...[or] a private body...;
  - (e) the assistance available from [and the duties of] the Information Officer of a public body in terms of this Act;
  - (f) the assistance available from the [Information Commission] in terms of this Act;
  - (g) all remedies in law available regarding an act or failure to act in respect of a right or duty conferred or imposed by this Act, including the manner of lodging--
    - (i) an internal appeal; and
    - (ii) an application with [the Information Commission and] a court against a decision by the information officer of a public body, a decision on internal appeal or a decision of the head of a private body;...
  - (i) the provisions...providing for the voluntary disclosure of categories of records...;
  - (j) the notices...regarding fees to be paid in relation to requests for access; and
  - (k) the regulations made in terms of [under the Act].
- (3) The [Information Commission] must, if necessary, update and publish [see the discussion re the meaning of "publish" at paragraph 20 above] the guide at intervals of not more than two years.

### **Recommendation**

- Insert a new section placing specific responsibility on a body(s) – preferably the new Information Commission - to promote public awareness, including through the publication of a Guide to RTI, and provide training to bodies responsible for implementing the Act, and requiring resources to be provided accordingly.

### **Insert new section – Annual Reporting**

61. It is increasingly common to include provisions in access laws mandating a body to monitor and promote implementation of the Act, as well as raise public awareness about using the law. Monitoring is important - to evaluate how effectively public bodies are discharging their obligations and to gather information which can be used to support recommendations for reform.
62. Different monitoring models are found in various jurisdictions. Some countries require every single public body to prepare an annual implementation report for submission to parliament, others give a single body responsibility for monitoring – a particularly effective approach because it ensures implementation is monitored across the whole of government and allows for useful comparative analysis – and still others prefer a

combination of both. Section 40 of the Trinidad & Tobago *Freedom of Information Act 1999* and s.48 and 49 of the United Kingdom *Freedom of Information Act 2000* provide useful models of potential monitoring approaches:

Trinidad & Tobago: (1) *The Minister shall, as soon as practicable after the end of each year, prepare a report on the operation of this Act during that year and cause a copy of the report to be laid before each House of the Parliament.*

(2) *Each responsible Minister shall, in relation to the public authorities within his portfolio, furnish to the Minister such information as he requires for the purposes of the preparation of any report under this section and shall comply with any prescribed requirements concerning the furnishing of that information and the keeping of records for the purposes of this section.*

(3) *A report under this section shall include in respect of the year to which the report relates...:*

- (a) *the number of requests made to each public authority;*
- (b) *the number of decisions that an applicant was not entitled to access to a document pursuant to a request, the provisions of this Act under which these decisions were made and the number of times each provision was invoked;*
- (c) *the number of applications for judicial review of decisions under this Act and the outcome of those applications;*
- (d) *the number of complaints made to the Ombudsman with respect to the operation of this Act and the nature of those complaints;*
- (e) *the number of notices served upon each public authority under section 10(1) and the number of decisions by the public authority which were adverse to the person's claim;*
- (f) *particulars of any disciplinary action taken against any officer in respect of the administration of this Act;*
- (g) *the amount of charges collected by each public authority under this Act;*
- (h) *particulars of any reading room or other facility provided by each public authority for use by applicants or members of the public, and the publications, documents or other information regularly on display in that reading room or other facility; and*
- (i) *any other facts which indicate an effort by public authorities to administer and implement the spirit and intention of this Act.*

United Kingdom: 49(1) *The Commissioner shall lay annually before each House of Parliament a general report on the exercise of his functions under this Act.*

(2) *The Commissioner may from time to time lay before each House of Parliament such other reports with respect to those functions as he thinks fit*

48(1) *If it appears to the Commissioner that the practice of a public authority in relation to the exercise of its functions under this Act does not conform with that proposed in the codes of practice under sections 45 and 46, he may give to the authority a recommendation (in this section referred to as a "practice recommendation") specifying the steps which ought in his opinion to be taken for promoting such conformity.*

(2) *A practice recommendation must be given in writing and refer to the particular provisions of the code of practice with which, in the Commissioner's opinion, the public authority's practice does not conform.*

**Recommendation** *Insert a new section making the Information Appellate Tribunal responsible for monitoring of implementation of the Act, including overseeing annual reports from bodies covered by the Act and submitted a summary annual report to Parliament.*

### **Insert new section – Ad Hoc Investigations and Reporting**

63. Some right to information laws permit Information Commissions or Tribunals to initiate their own investigations where they suspect that a department of performing poorly and/or that the government generally is not complying with the law. They can then publish ad hoc reports pertaining to specific information topics or departments and submit them to parliament for consideration. For example, the Canadian Information Commissioner has the power to commence his own investigations, even in the absence



of a complaint from the public, and to then publish a report on his findings if he chooses. This power recognises that oversight bodies should have the power to investigate patterns of non-compliance as well as individual complaints. Consideration should be given to similarly empowering the Tribunal(s).

**Recommendation**

*Insert a new provision empowering the Tribunal(s) to commence its own investigations, in particular in cases disclosing a pattern of non-compliance with the law and submit ad hoc reports to parliament accordingly*

**Insert new section – Regular Parliamentary Review of the Act**

64. To ensure that the Act is being implemented effectively, it is strongly recommended that the law provides for a compulsory parliamentary review after the expiry of a period of two years from the date of the commencement of the Act, plus regular 5 year reviews after that. Internationally, such reviews of legislation have shown good results because they enable governments, public servants and citizens to identify stumbling blocks in the effective implementation of the law. Identified areas for reform may be legislative in nature or procedural. In either case, a two year review would go a long way in ensuring that the sustainability, efficacy and continued applicability of the law to the changing face of Bangladesh. It would enable legislators to take cognizance of some of the good and bad practice in how the law is being used and applied and enable them to better protect the peoples right to information. Section 38 of the Jamaican *Access to Information Act 2002* provides a useful model.

**Recommendation**

*Insert a new clause to provide for a parliamentary review of the Act after the expiry of two years from the date of the commencement of this Act and then every five years after that.*

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**For more information, please contact:**

Mr Jeet Mistry, Programme Officer  
Right to Information Programme, CHRI  
Ph: +91 11 2685 0523 / 2652 8152  
Fax +91 11 2686 4788  
Email: [jeet@humanrightsinitiative.org](mailto:jeet@humanrightsinitiative.org)