

Analysis of the Government of the Republic of Namibia

Revised Information Policy 2006

Recommendations

"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



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Commonwealth Human Rights Initiative
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For more information or to discuss this paper, please contact:

Mrs Maja Daruwala, Director or Ms Claire Cronin, Programme Officer
Right to Information Programme
Commonwealth Human Rights Initiative (New Delhi)
Email: claire@humanrightsinitiative.org
Phone: +91-11 2686 4678 / 2685 0523; Fax: +91-11 2686 4688

GENERAL COMMENTS ON THE REPUBLIC OF NAMIBIA'S REVISED INFORMATION POLICY

1. The Namibian chapter of the Media Institute of Southern Africa (MISA) forwarded the Commonwealth Human Rights Initiative (CHRI) the Government of the Republic of Namibia's Revised Information Policy 2006 for comment. It is understood that the Government of Namibia intends on finalising the policy paper before drafting a Freedom of Information Bill based upon recommendations adopted at the 1998 Conference on the Promotion of Ethics and Combating of Corruption, and reviewing existing laws, regulations and procedures that affect accessibility of information.
2. The Revised Information Policy Paper is a very positive step towards the creation of a free and pluralistic media in Namibia and the implementation of an effective freedom of information regime. It is lasting evidence of the Government's increasing commitment to good governance through transparency, accountability and public participation that play an integral role in achieving a successful society, economy and democratic environment.
3. Based on CHRI's experience in drafting and reviewing access to information legislation across the Commonwealth, this paper suggests some amendments to the Revised Information Policy to ensure that the final legislation which is drafted on its basis is in line with recent international best practice on access to information. CHRI would like to offer its assistance in reviewing both the Namibian policy recommendations on access to or freedom of information mentioned in section 7.3 of the paper, as well as the draft Freedom of Information Bill when it is available, so recommendations for improvement can be made to the specific provisions.
4. As the Information Policy is primarily a *media* policy document, this critique will focus exclusively upon those areas that are directly concerned with, or impact upon the right to information.
5. CHRI would like to recommend that as soon as possible, an additional policy document be drafted that addresses the right to information as a separate issue in its own right and that clearly identifies roles, strategies and timelines for the drafting and implementation of the Freedom of Information or Right to Information Bill.

Summary of major concerns with the Policy Paper

6. Overall, the Policy Paper is a highly progressive and commendable step by the Namibian Government. CHRI's primary concern is that the right of people to access information held by public bodies in Namibia is addressed within the overarching scope of Namibia's information policy. Although access to information is an effective means of ensuring that a country's media remains informed and independent, it is crucial to recognise that the right to information is much broader than this. If well drafted and implemented, a right to information law can be a key tool for the public at large to participate directly in the democratic processes of their government and hold public bodies and their functionaries accountable to their actions.
7. It is indeed commendable that the information policy vests the responsibility of amending the Namibian Constitution and instituting Access to Information (ATI) legislation with high Constitutional functionaries like the Prime Minister and the Minister of Justice and the Attorney General. While this may serve the initial objectives of this policy it is necessary to place the responsibility of entrenching a properly legislated information access regime with a single body at a later date. It is international best practise to identify a 'nodal' agency that will take the lead in the implementation of an access regime. It is common practice in

countries with ATI legislation to designate key ministries such as the Ministry of Information or the Ministry of Administrative Reforms for planning and overseeing the implementation of information access regimes. In addition to this, it is important that the Government provide for the creation of the office of an independent Information Commissioner or a multi-member Information Commission to be responsible for monitoring the compliance with the requirements of transparency under the proposed ATI law and for handling public complaints and appeals where people are denied access to information.

8. Throughout the Policy there is a commendable emphasis on the proactive disclosure of information. Proactive disclosure is a crucial element of an access regime and is a key mechanism for increasing government transparency and accountability, promoting efficient public sector records management and aiding public participation in government. However unequivocal reference to this crucial feature of ATI legislation is missing in section 7.4 of this paper. The emphasis is more on disseminating information that the Government believes the people should know. Proactive disclosure of information is much more than what the Government decides to make available in the public domain. A good ATI law must provide for specific categories of information that public bodies will make known to people on a regular basis without waiting to be asked. At the very least, the proposed Namibian ATI legislation should mandate public bodies to provide information about the services they provide, the powers, duties and responsibilities of their functionaries, decision-making processes and channels of supervision, the criteria and norms that should inform their functioning and the budgets placed at their disposal. A properly implemented proactive disclosure regime has the potential to considerably reduce the number of formal requests that people will be required to make for accessing information from public bodies in its absence.
9. However, it is also important to bear in mind that proactive disclosure is only one element of a right to information regime. The other prerequisite crucial for the success of the information access regime is the creation of systems that will ensure easy, inexpensive and timely access to information for requestors. In recognition of this, the Policy should place greater emphasis on the Government's duty to provide information to the public and the public's corresponding right to request information.

ANALYSIS OF THE REPUBLIC OF NAMIBIA'S REVISED INFORMATION POLICY 2006

Terminology

10. The paper rightly recognises that major international human rights instruments such as the International Covenant on Civil and Political Rights and the African Human Rights Charter have recognised the right to information as a fundamental human right. Consideration should be given to amending the relevant terminology in the document so that it refers to the 'right to information' as opposed to 'access to information' or 'freedom of information'. Although such a focus on terminology may seem pedantic, the legislation should ensure that implementing bodies are clear that access to information is not a discretionary gift granted to the people by a benevolent government, but rather it is an internationally mandated obligation on the Government, which must implement the corresponding right.

Scope and Objectives of the Policy

11. The paper primarily focuses on media strategies and the Policy Goals state that the primary objective of the Information Policy is to create and maintain a *media* environment in which 'public, community and commercial *media* stakeholders operate to produce and exchange information for all without hindrance.' CHRI recommends that the policy goal be envisaged more broadly than this by removing the specific references to the media. These limit the scope of the policy and restrict its applicability to other civil society organisations and members of the public who also have a right to access information from the Government.

12. The paper emphasises the role of the media as 'watchdogs' for the public good, for example in the closing statements of section 2. Although it is commendable that the Government recognises how important a free and independent media is in distributing public information, it is crucial to recognise that the primary responsibility for the distribution of public information lies with the Government itself. It goes without saying that Government and all other bodies with a public function collect and maintain information about the people by spending funds sourced from the tax payer. Therefore it is the responsibility of the public bodies themselves to provide access to such information to the people in the first instance. As such, consideration should be given to amending the paper to explicitly state that it is the primary responsibility of the Government, and not just the media to ensure that the public have access to accurate and timely information.

13. As stated in paragraph 5, CHRI recommends that consideration be given to addressing the issue of right to information in a separate policy document. This would recognise the fact that it is a separate issue that must be considered in its own right. It is therefore imperative that the Government includes a clear strategy for the establishment of an independent Right to Information Unit within the nodal agency that may be set up in accordance with paragraph 7 above that could take responsibility for this document.

Recommendations:

- *Amend the title of the proposed law to Right to Information Act.*
- *Review the Policy Paper to ensure that its provisions are drafted in language which makes it clear that the public have the right to access information and the government a duty to ensure they can obtain such access.*

- *Broaden the scope of the Policy Goals section by expanding beyond the specific references to the media so that it reads: 'The main goals is to create and maintain an environment and economy in which public, media, civil society organisations and commercial stakeholders operate to produce and exchange information for all without hindrance.'*
- *Insert a statement that acknowledges that it is the primary responsibility of the Government itself to ensure that all people have access to accurate and timely information about its policies, decision-making and public spending.*
- *Consider issuing an additional policy paper that addresses the right to information as a separate and independent issue and that lays out in more detail the Government's implementation plan for its access to information regime.*

ACCESS TO INFORMATION POLICY

Drafting Right to Information Legislation

14. Section 7.4 states that the proposed access legislation will be drafted on the basis of the recommendations adopted at the 1998 Government Conference of the Promotion of Ethics and Combating of Corruption. It is commendable that the Government of Namibia recognises how crucial a right to information law can be in overcoming corruption. However it is important that the draft law is informed by principles that go beyond combating corruption. Any right to information legislation should be drafted on the basis on the international best practice principles endorsed by the United Nations. These are: Maximum disclosure, minimum exemptions, simple, inexpensive and quick access procedures and the establishment of independent appeals mechanisms and provision of penalties for erring officials. These are addressed in greater detail at Annex 1 and should form the basis of Namibia's draft Right to Information Bill.
15. CHRI commends the Namibian Government on their commitment to civil-society participation in law drafting and policy making and would like to recommend that a wide range of media, human rights and civil-society organisations are consulted in the drafting process of the proposed freedom of information Bill. 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. The need to consult widely is reflective of the fact that the right to information belongs to every person rather than being a privilege afforded to the media. Implementation of an access law is strengthened if it is 'owned' by both the Government and the public.
16. The Government can proactively engage civil society groups in a variety of ways, for example, by: setting up a committee of stakeholders (including officials and public representatives) to consider and provide recommendations on the draft Bill; inviting submissions from the public before Parliament votes on the Bill; convening public meetings to discuss the proposed law; and strategically and consistently using the media to raise awareness and keep the public up to date on progress.

Recommendations:

- Amend section 7.4 to state that the Right to Information Bill will be drafted on the basis of the international best practise principles endorsed by the United Nations which are: Maximum disclosure, minimum exemptions, simple access procedures, an independent appeals mechanism and the monitoring and promotion of open governance.
- Include clear timeframes for each stage of the drafting process and for when the law will be enacted.
- Insert a paragraph stating that the Government will consult widely with civil society organisations in order to draft a Right to Information Bill that reflects the public's needs and concerns.
- Amend Section 8 'Civil society and community organisations' so that it reads 'NGOs may provide inputs into annual activities in the implementation of the policy.' By expanding beyond the specific reference to 'media' ngos you will assure that all civil society organisations with an active interest in the right to information, including human rights, social justice and community based organisations will be to input into the implementation of the policy.

Constitutional and Legislative Review

17. It is extremely commendable that that Namibian Government intends to amend the Constitution to safeguard people's right to information. The Government of Sierra Leone has recently made a similar commitment to amend its Constitution in response to a civil society campaign spearheaded by the Society for Democratic Initiatives and the Sierra Leone Association of Journalists.
18. It is imperative that clear timelines are stipulated for the intended amendments, preferably a maximum of six months from the release of the Revised Information Policy.
19. Many Constitutions around the world include a guarantee to the right to information. Explicitly guaranteeing the right by enshrining it in the Constitution:
 - accords it sufficient importance as being inherent to democratic functioning and a precondition to the realisation of all other human rights;
 - satisfies Namibia's international obligations as a signatory to the ICCPR;
 - ensures that the right cannot be narrowed or ignored by any Government that may gain power; and
 - reinstates the citizen as a sovereign by giving control of information to the people of Namibia.
20. Some examples of African countries that constitutionally guarantee the right to information are: Botswana, Lesotho, Malawi, Mozambique, Uganda, Tanzania and South Africa. Section 32 of the South African Constitution states that:

(1) Everyone has a right of access to –
any information held by the state; and any information that is held by another person and
that is required for the exercise or protection of any rights.

21. This wording captures the right to information as a fundamental human right in and of itself, without enshrining explicit exemptions in the Constitution. It also recognises the role that access to all forms of information can play in realising other rights. It is recommended that Namibia consider this phrasing as a model for the Constitutional amendment.
22. A requirement for domestic legislation puts an undeniable obligation on the state to ensure the right to information is fulfilled and implemented appropriately. At the same time, it gives the Government an opportunity to undertake public consultation concerning the practical requirements of implementation, such as application processes, time limits, appeals mechanisms and penalty provisions for a law that will most appropriately fit Namibia's circumstances.
23. CHRI commends the Government's commitment to a review of any existing laws that militate against the right to information, it is also important to make a commitment to amending or repealing these laws. In addition to this, the Bill that is drafted should clarify that the new law takes precedence. Such a clause could be drafted like the clause in the Model Freedom of Information Law¹:
 - (1) This Act applies to the exclusion of any provision of other legislation that prohibits or restricts the disclosure of a record by a public or private body.
 - (2) Nothing in this Act limits or otherwise restricts the disclosure of information pursuant to any other legislation, policy or practice.'

Recommendations:

- *Amend the Policy Strategies in Section 7.4 to include clear timeframes for reviewing and amending the Namibian Constitution and existing legislation and policies that militate against the right to information.*
- *Include a sentence explicitly stating that all existing legislation and policies that are found to militate against the right to information will either be appealed or amended. Also state that the new legislation will in any case take precedence over these laws and policies.*

Roles and Responsibilities

24. As mentioned previously, there is a lack of clarity in the Policy over which agency will take the lead responsibility for the implementation of access regime. Section 7 suggests that responsibility will be shared by the Ministry of Information and Broadcasting, the Ministry of Justice and Attorney General and the Office of the Prime Minister. Section 7.3 suggests however that a new unit is to be established within the Ministry of Information to ensure increased and affordable access to information.
25. Although it is important to consult widely amongst government departments and civil society when considering a right to information policy and legislation, it is nevertheless crucial to identify a single nodal agency to take primary responsibility for implementation,

¹ The Model Freedom of Information Law was drafted by Article 19 and a number of other organisations in 2001 (including CHRI) and can be found at <http://www.article19.org/publications/law/standard-setting.html>.

public education, training and monitoring public authorities' compliance with the new regime.

26. The paper frequently mentions the role of Information Officers in facilitating the public's access to information but does not explicitly state what their roles and responsibilities would be. Would Information Officers be responsible, for example, for the dissemination of information and for handling information requests under the proposed right to information legislation? It is important to clarify what new designations would be established under the new legislation and the precise duties any newly created posts would be under the new access regime.
27. As mentioned above, it is best practise for each public authority to designate a Public Information Officer (PIO) and if necessary an Assistant Public Information Officer (APIO) to be responsible for carrying out the authority's obligations under the new legislation.
28. The paper makes no mention of the establishment of an independent mechanism for reviewing Government compliance with the new law once it is enacted and for handling public complaints and appeals. The establishment of such a mechanism is essential for the successful implementation of an access regime and it is common practice to appoint an Information Commission or Commissioner for this purpose.
29. The Information Commissioner should have the integrity and experience to be the champion of the move to open government and transparency, lead by example and implement the law effectively. Therefore, as it is essential that the Commissioners not only possess technical expertise but are also utterly impartial and well-respected by the public as an upstanding citizen who is pro-transparency and accountability.

Recommendations:

- *Include a paragraph clarifying what the duties and responsibilities of Information Officers will be under the new Act. Consider stating that each Public Authority will appoint a Public Information Officer and Assistant Public Information Officer in order to handle information requests from the public and be responsible for proactively disclosing information of general interest.*
- *Include a paragraph committing to give powers to an independent Information Commissioner or Commission to monitoring public authorities' compliance with the act and for handling public complaints and appeals. State that their decisions will be binding upon the public authority.*
- *Specify that the act will include an impartial appeals mechanism and penalties for non-compliance.*

Implementation Issues

30. The introductory paragraph suggests that information should be made available in both printed and electronic format. However, for the purposes of the draft legislation 'information' should be defined more broadly than this to include any material in any form , including: records , documents, memos, emails, opinions, advices, press releases, circulars, orders, logbooks, contracts, reports, papers , samples, models, data material

held in any electronic form 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 whether or not said data has been collated as requested.

31. Section 4 makes reference to the manner in which emerging information and communication technologies are shaping the way information is accessed and disseminated. The use of emerging technology can be an excellent means of proactively disseminating key information to the Namibian public. However, it is also important to remember that many members of society are not computer-literate or do not have access to computer facilities. Therefore conventional modes of providing access to or disseminating information proactively must be strengthened.
32. CHRI commends the policy's commitment to achieving equitable information access. In order to achieve this goal it is important that the Government proactively discloses information in a large variety of languages and formats. For example, in order to reach rural communities and bridge the technology divide, all public information should be translated into local languages and disseminated widely through noticeboards, local newspapers in addition to being included in reports and posted on the internet.
33. Under the access law, efforts should be taken to avoid discrimination against those with low literacy levels. The law should place an obligation on public functionaries to assist such people to make information requests and access information without much difficulty. Also, the applicant should have the right to receive the information in the form that it was requested as far as possible.
34. Experience has shown that, particularly in the early days of implementation and/or in relation to politically or bureaucratically sensitive issues, officials will often fail to comply with freedom of information provisions of a new act. Unless there are sanctions available to punish such conduct there is little deterrent to resistant officials who wish to flout the law. Consequently, it is important to provide for offences and penalties for the actual of acts of non-compliance that resulted in the issuing of a notice. Otherwise, there is no incentive for bodies subject to the law to comply with its terms, as they will be aware that the worst that can happen is simply that they may eventually be required to disclose the information if the applicants goes to the trouble of lodging an appeal. Section 20 of the Indian *Right to Information Act 2006*; Article 54 of the UK *Freedom of Information Act 2000*; Article 34 of the Jamaican *Access to Information Act 2002*; and Article 42 of the Trinidad & Tobago *Freedom of Information Act 1999* all provide useful models.
35. Offences should be created by the draft Bill for egregious criminal acts and negligent disregard for the law. This is important in a bureaucracy which is likely to be resistant to openness and may stop short of criminal acts, but may still delay and undermine the law in practice. Additional offences need to be created, for example:
 - unreasonable refusal to accept an application,
 - unreasonable delay, which in India incurs a daily fine,
 - unreasonable withholding of information,
 - knowingly providing incorrect, incomplete or misleading information,
 - concealment or falsification of records,
 - non-compliance with the Information Commissioner's orders, which in the UK is treated as a contempt of court.

Recommendations:

- In the Introductory section and in section 7.4 specify that all people have a right to access information from the Government in a variety of formats to include:
any material in any form , including: records , documents, memos, emails, opinions, advices, press releases, circulars, orders, logbooks, contracts, reports, papers , samples, models, data material held in any electronic form 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 whether or not said data has been collated as requested.
- Within the Policy Strategies in section 7.4 insert a statement saying that the law will place an obligation on public functionaries to assist such people to make information requests and access information without difficulty and that people will have the right to receive the information in the form in which it was requested.
- At the end of the paragraph concerning equitable access to information, insert a statement committing to make public information available not just in reports and on the internet but also on local community noticeboards and in local languages.
- Insert a new section on penalties to empower the Information Commissioner to impose sanctions on non-compliant officials and public authorities.
- Insert a comprehensive list of offences for example:
 - (1) Where any official has, without any reasonable cause, failed to supply the information sought within the period specified they will be fined a daily amount.
 - (2) Where it is found in appeal that any official has:
 - Refused to receive an application for information
 - Mala fide denied a request for information;
 - Knowingly given incomplete or misleading information,
 - Knowingly given wrong information, or
 - Destroyed information, without lawful authority;
 - Obstructed access to any record contrary to the Act;
 - Obstructed the performance of a public body of a duty under the Act;
 - Interfered with or obstructed the work of an Information Officer, the Information Commissioner or the Courts; or
 - Failed to comply with the decision of the Information Commissioner or Courts;
They have committed an offence and the Information Commissioner or the Courts shall impose a fine of a penalty of imprisonment or both.
 - (3) Any fines shall be recoverable from the salary of the concerned officer.
 - Any officer on whom a is imposed shall also be liable to appropriate disciplinary action under the service rules applicable to him or her.

36. Overall, CHRI commends the Namibian Government for their commitment to freedom of information clearly displayed in the Revised Information Policy Paper. However, we recommend that the right to information should be addressed more thoroughly and systematically in a separate policy document. This document should include clear timeframes for the drafting of the proposed Bill, the review of current legislation and each stage of the implementation process. It should also clearly define what the roles and

responsibilities of public officials will be under the new access regime and should be clearly grounded in the best practice principles detailed in Annex 1.

37. Further information is available in CHRI's right to information publications:

- *Open Sesame: Looking for the Right to Information in the Commonwealth*
- *Implementing Access to Information: A practical guide for operationalising freedom of information laws*

38. Both are available on our website at www.humanrightsinitiative.org.

Annex 1: Best Practice Freedom of Information Principles

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

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

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

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

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

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

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

- *Independent Appeals Mechanisms:* Effective enforcement provisions ensure the success of access legislation. Any body denying access must provide reasons. Powerful independent and impartial bodies must be given the mandate to review refusals to disclose information and compel release. The law should impose penalties and sanctions on those who wilfully obstruct access.

In practice, this requires that any refusal to disclose information is accompanied by substantive written reasons (so that the applicant has sufficient information upon which to appeal) and includes information regarding the processes for appeals. Any such process should be designed to include a cheap, timely, non-judicial option for mediation with review and enforcement powers. Additionally, final recourse to the courts should be permitted.

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

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

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