

# **Freedom of Information Bill, 2008**

## **Preliminary Comments of Consumer Rights Commission of Pakistan (CRCP)**

Consumer Rights Commission of Pakistan (CRCP) has been working for the strengthening of legal and institutional framework for freedom of information (FOI) in Pakistan since 1998. CRCP believes that the proposed Bill is worth it only if it is able to remove the shortcomings and weaknesses of the existing FOI laws, and is in line with the universal FOI principles and best practices.

Based on this understanding, the objective of these comments is to appreciate the strengths of the 2008 FOI Bill, identify the weaknesses and suggest improvements for removing the weaknesses. These are the preliminary comments on the 2008 FOI Bill. At the same time, we have highlighted some questions and issues that need in-depth consultations with civil society, academia, jurists and the government. For this purpose, CRCP has scheduled a consultation on the Bill on July 14, 2008 to collect feedback of important stakeholders and create an interface with the government for improvement of the Bill. Moreover, CRCP has requested feedback of some international experts on it.

Keeping in view the findings of our initial review, CRCP believes that the 2008 FOI Bill should NOT be enacted into an Act of the legislature unless the shortcomings in the Bill are removed.

### **1. Background**

Recognition of FOI as a legal right of people has had been a daunting challenge in Pakistan. From the initial steps to have FOI legislation in the 1990s to the development of FOI policies for selected government departments in 2008, Pakistan has made significant progress on this front with contributions from civil society organizations, parliamentarians, the government and other stakeholders.<sup>1</sup> The major breakthrough was the promulgation of Freedom of Information Ordinance, 2002, in fulfillment of the policy actions committed by the government under Access to Justice Program. This law received a plethora of criticism from the civil society for its limited scope because it applied to the federal public bodies only, long list of vaguely defined exemptions, cumbersome mechanism for processing of information requests, poor implementation, and so on. Despite the criticism, information requests filed under this law to the federal ministries and attached departments were successful to a large extent, though not without intervention of the Federal Ombudsman in most of the cases.

In addition to the civic initiatives of awareness, capacity building, and advocacy for improvement of FOI legislation, a number of important legislative developments have taken place since the promulgation of the Ordinance. These include enactment of

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<sup>1</sup> Analysis of historical developments in FOI in Pakistan is provided in Access to Justice Program's 'Freedom of Information in Government Departments: An Assessment'. June 2007. Islamabad.

Balochistan Freedom of Information Act (2005), Sindh Freedom of Information Act (2006), and development of departmental FOI policies for Establishment Division and its attached departments, Services and General Administration Departments (S&GADs), and police departments.<sup>2</sup>

A parallel development took place with the initiative of Ms. Sherry Rehman of Pakistan Peoples Party (PPP) who proposed an FOI Bill in 2004. The underlying motivation was to repeal the Freedom of Information Ordinance, 2002, and enact a national FOI law with lot of improvements including the whistleblower protection. The Bill was submitted to the National Assembly as a private member bill, but it could not be debated. In the aftermath of PPP coming into power, Ms. Sherry Rehman (Federal Minister for Information) has proposed Freedom of Information Bill 2008, which is basically a modified version of the 2004 Bill. It is expected that the Bill would be tabled in the Parliament very soon.

CRCP has been working for strengthening of legal and institutional framework for FOI in Pakistan since 1998. CRCP believes that the proposed Bill is worth it only if it is able to remove the shortcomings and weaknesses of the existing FOI laws, and is in line with the universal FOI principles and best practices. Based on this understanding, the objective of these comments is to appreciate the strengths of the 2008 FOI Bill, identify the weaknesses and suggest improvements for removing the weaknesses.

## **2. Summary of Comments on 2008 FOI Bill**

- 2.1 The Bill contains a number of improvements, as compared to the existing FOI laws in Pakistan. National jurisdiction due to coverage of public bodies at the federal, provincial, and local level; improvements in definitions of the terms of ‘public record’ and ‘public body’; additions in the list of public records to be published and made available by public bodies for public access; provision for recording reasons for exclusion and classification of record; disclosure of classified records after 20 years, and reduction of the processing time from 21 days to 14 days, and over-riding powers are some of the strengths of the Bill, as compared to the existing FOI laws.
- 2.2 There are a number of provisions in the proposed Bill that prima facie appear as strengths, but they entail serious implications. These provisions include inclusion of correspondence, summaries and notes in the definition of ‘public record’ and summary conviction of a designated official who, without reasonable excuse, fails or refuses to provide inspection or disclose records under the Act. These provisions need to be debated and thoroughly researched for their implications on the FOI regime.
- 2.3 A number of provisions of the 2008 FOI Bill are either same as that of the Freedom of Information Ordinance (which this Bill aims to repeal), or the

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<sup>2</sup> The formulation of these FOI policies under Access to Justice Program is in process.

difference is insignificant to be considered as an improvement. These provisions include definition of the complainant; maintenance and indexing of records; computerization of records, institutional mechanism for processing of information requests and grievance redress, and general provisions of indemnity, power to remove difficulties, etc. These features that have not been improved in the 2008 FOI Bill call into question the very rationale for a new law.

- 2.4 Some definitions given in the Bill are very restrictive. For instance, the definition of “complainant” includes only a requester or any person acting for and on behalf of a requester. It does not explicitly cover legal entities and voluntary associations that might have a legitimate locus standi on public records. There are examples where voluntary groups had to undergo a legal process to establish their locus standi. Therefore, it is important to make the draft categorically clear on such issues. Similarly, the definition of ‘public records’ is restrictive in the sense that access to internal working documents (e.g. proposals, for Cabinet decisions, proposals relating to the management of national economy, etc.) is conditional upon implementation of the final decisions. That is to say, internal working documents cannot be requested under the law unless the final decisions based on these documents has been implemented. Making a decision is one thing, and having it implemented is another. In a country like Pakistan where decisions beg implementation, this provision can be used to exclude a lot of important information that should otherwise be accessible.
- 2.5 A noteworthy point is that the 2008 FOI Bill does not provide a better mechanism for processing of information requests and complaint redress. As a result, there is great likelihood that the procedure for accessing information will continue to remain cumbersome when the rules are made.
- 2.6 According to the Bill, complaints can be lodged to the Federal Ombudsman appointed under President’s Order No. 1 of 1983, after failing to get a satisfactory response from head of the public body. The Bill appears to be ignorant of the jurisdiction of the Federal Ombudsman who can entertain complaints related to the federal public bodies only.<sup>3</sup> As the 2008 FOI Bill covers the federal as well as the provincial and municipal public bodies, recourse to the Federal Ombudsman only is not a legal option. The Federal Ombudsman cannot process the complaints related to maladministration in provincial and local government departments.
- 2.7 The 2008 FOI Bill is different from the 2004 Bill. A matter of concern is that the provision of whistleblower protection has been taken out in the 2008 Bill. Instead, indemnity has been provided to government officials for any act done in good faith under this law, without providing a test to determine the good faith. This change calls into question the government’s commitment to eradicate corruption and promote good governance. The 2008 FOI Bill must include the whistleblower protection if it aims to be better than the existing FOI laws.

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<sup>3</sup> Section 2 (1) of President’s Order No. 1 of 1983.

- 2.8 There are a number of issues on which the 2008 FOI Bill is silent. These include, for example, the definition of ‘requester’; public interest test; what would happen to the provincial FOI laws after the Bill is enacted by the Parliament; and time within which the head of the public body should respond to the complaint.

Overall, the 2008 FOI Bill is not as good as the 2004 FOI Bill, and is somewhat better than the Freedom of Information Ordinance 2002 and provincial FOI laws. There is no point in enacting this Bill in its present form, as it contains very few substantive improvements vis-à-vis the existing FOI laws. Much like the existing FOI laws, it fails to eliminate the possibility of misinterpretation due to vague exemptions. Failure of the Bill to make a reference to the provincial FOI laws indicates that it has been drafted without a situation analysis of the ground realities. A large number of improvements were obviously needed, but only some of them have been introduced into the Bill. This is not to say that the Bill has no strengths, the whole point is that it misses out a number of important provisions without which it cannot make much difference.

### **3. Detailed Comments on Provisions of the Bill**

In the following sections, a critical analysis of the 2008 FOI Bill is presented. Comments are made on only those articles and clauses that need a substantive improvement.

#### **Page 9, Statement of Objects and Reasons**

- i. The Statement of Objects and Reasons of the 2008 FOI Bill refers to the Freedom of Information Ordinance, 2002 and terms it as “one of the nightmares of the despotic rule of strangulation of information and denial of fundamental rights to the people of Pakistan” and that it “served as a suppressor and blocker of the information hand has thus failed to achieve its declared objectives”.

CRCP believes that the 2008 FOI Bill’s reference to the FOI Ordinance, 2002, is based on unexamined assumptions and factually incorrect statements. There is convincing evidence available to suggest that, despite several shortcomings and deficiencies, the Ordinance has been used to access information from government departments, though only with proactive role of the Federal Ombudsman. Information requests filed by CRCP and other civil society organizations provide the best example. There is hardly any known case where the Ordinance has been used to suppress or block the information. This is not to say that the Ordinance is perfect; its deficiencies and shortcomings are well recognized.

#### Suggestion

The whole point is that the Statement of Objects and Reasons should not give a factually incorrect statement that the law has served as suppressor and blocker of information. Instead, it should refer to the deficiencies and shortcomings of the Ordinance as a reason for enacting the 2008 FOI Bill.

- ii. The Statement of Objects and Reasons intends to “substitute the black and anti-information “Freedom of Information Ordinance, 2002 (XCVI of 2002)” .....

It appears that the Bill has been drafted without an in-depth analysis of the existing legal and institutional framework for freedom of information in Pakistan. The Bill does not refer to the two provincial FOI laws, i.e. Balochistan Freedom of Information Act (2005) and Sindh Freedom of Information Act (2006). These laws are almost replica of the FOI Ordinance, 2002. The 2008 FOI Bill intends to repeal the FOI Ordinance, 2002, but does not even slightly touch upon these two provincial laws. It is silent about what would happen to these laws after enactment of the Bill.

#### Suggestion

Before enacting the Bill, a thorough analysis of current situation of FOI legislation should be undertaken, and how this legislation has worked. Particularly, the analysis should look into the following:

- a. FOI Ordinance( 2002)
- b. Balochistan Freedom of Information Act (2005)
- c. Sindh Freedom of Information Act (2006)
- d. Rules for FOI Ordinance and Balochistan Freedom of Information Act
- e. Local Government Ordinance (2001) [Sections 18, 57, 76, 42 (7), 69 (7) 89 (6), and 114]
- f. Model Freedom of Information Act (2001) proposed by CRCP
- g. The Official Secrets Act (1923)
- h. The Evidence Act (1984)
- i. Rules of Business of the Federal and Provincial Governments
- j. Cabinet Division’s rules for “Security of Classified Matter in Government Departments”
- k. Assessment of FOI in Government Departments done under Access to Justice Program of the Ministry of Law
- l. Draft FOI policies for government departments

#### **Article 2 Definitions**

Article 2 (a) The term “complainant” has been defined as “a requester or any person acting for and on behalf of a requester.”

This definition is restrictive, as it tends to exclude legal entities and voluntary associations to act on behalf of the requester. A designated official is likely to interpret this definition in its narrow sense to apply only to the individuals, and thus create problems in establishing the *locus standi* of research institutions, associations, non-governmental organizations, etc in access to public records.

### Suggestion

After the word “person”, “a legal entity and voluntary association” should be added.

- Article 2 (b) The term “complaint” was defined more clearly in the 2004 FOI Bill, as it entitled the requester to complain where “access to and/ or correction of information relating to him has been wrongfully denied to a requester by a public body having custody or control of the record” [Article 2 (b) ii of 2004 FOI Bill]. Thus, it explicitly covered the right to complain against wrongful denial to personal information. This clause has been replaced in the 2008 FOI Bill with the following: “access to the requisite documents, information or record has been wrongfully denied to a requester by a public body having custody or control of the record”. This substitution does not expressly mention the right of complaint where access to personal information has been denied. The purpose that this clause serves is already covered in Article 2 (b) i, and as such there is duplication.

### Suggestion

Article 2 (b) ii of the 2008 FOI Bill should be replaced with 2 (b) ii of 2004 FOI Bill to explicitly guarantee the right to file a complaint where access to personal information has been wrongfully denied.

- Article 2 (d) Definition of the term “information” has been added in the 2008 FOI Bill; this term was not defined in 2004 Bill. The term, however, is not clear as far as reference to the personal information is concerned.

### Suggestion

The reference to the disclosure of personal information should be qualified by adding “third party”. A document or record that may infringe upon the right of privacy of any individual should not be disclosed to “third party”.

- Article 2 (e) The term “Mohtasib” is defined as the Federal Ombudsman. It means that complaints under this law could be filed to the Federal Ombudsman or Federal Tax Ombudsman, after failing to get a satisfactory response on complaint filed with head of the public body.

The Bill appears to be ignorant of the jurisdiction of the Federal Ombudsman who can entertain complaints related to the federal public bodies only. As the 2008 FOI Bill covers the federal as well as the provincial and municipal public bodies, recourse to the Federal Ombudsman only is not a legal option. The Federal Ombudsman cannot process the complaints related to maladministration in provincial and local government departments.

### Suggestion

The powers to handle the complaints should be delegated to the provincial as well as district ombudsmen, where these forums are available. Keeping in view the fiscal space available, other complaint redress mechanisms may also be considered such as independent information commissioners (such as in India) or a dedicated FOI ombudsman (such as in Tasmania).

- Article 2 (i) The term “public record” has been dealt at length. There are some clauses that tend to restrict the definition, and therefore, need to be modified.

### Suggestions

- Clause i (i) It enumerates forms of public records that can be accessed. Although it mentions any form of public record, but enumerates six forms map, diagram, photograph, film, video, and microfilm. A narrow interpretation of this clause may exclude some other forums such as audio cassette.

Therefore, the word “etc.” should be added at the end of the clause.

- Clause i (iv) It includes “correspondence, summaries and notes relating to any of the above matters” in the definition of public record. This has twofold implications: First, it provides access to the process involved in transactions, licenses, approvals, allotments, etc., and therefore, can be helpful in scrutinizing the matters and ensure the transparency. On the other side, it is likely to prompt the government officials to avoid written communication, and settle the matters verbally.

Due to far reaching implications of this clause, there is a need to debate it in light of the practices adopted in other countries.

- Clause i (v) This clause has a typographical mistake. The word “my” before the words “benefit or advantage” should be replaced with “any”.

- Clause i (vi) This clause a excludes “ all internal working documents of a public body, including proposals for Cabinet decisions, proposals relating to management of the national economy, and other affairs of the Government, till such time that a final decision has been taken and implemented by the public body”

This clause highly restricts the definition of public records. By implication, it means that information related to any matter on which the final decision has not yet been made can be withheld. Thus, access to proposals that might have immediate and vital effects on the public can be denied. For instance, if there is a proposal to increase the power tariff by 20 percent, a government official can easily turn down the request for access to this proposal. As a result, public participation and informed

policy debate would be precluded on important matters at the proposal stage.

This clause ties the disclosure of internal working documents to two conditions: (1) final decision has been taken, AND (2) the decision has been implemented. The second reason makes no sense, as it might take years to implement a decision. One must have the right to ask about the progress in implementation of a decision even at the initial stage. If “implementation” is a condition for disclosure, then one cannot access much information about public sector development program (PSDP) under this law.

The clause should be debated at length keeping in view the international practices.

Clause i (b)(i) It exempts the information related to “investigative reports undertaken by agencies for the prevention and detection of crime, and for the collection and assessment of taxes, including any information obtained or received in the course of any investigation”.

The phrase “and for the collection and assessment of taxes” is either out-of-context and should be deleted.

Article 2 (i) The public bodies have a lot of discretion to judge whether or not certain document is a public record. Although the Bill provides that reasons shall be given for exclusion of certain record, but it is silent on whether these reasons shall be available for public scrutiny. As a result, a designated official might record any reasons and declare that the record has been classified.

#### Suggestion

The definition of ‘public record’ should also include: (1) the reasons for exclusion and classification of a certain record, (2) the guidelines for government officials to classify a document titled as “Security of Classified Matter in Government Departments”.

Article 2 (j) The term “public body” has been elaborated to cover federal, provincial as well as local government entities, statutory corporations, courts, tribunals, commissions, etc. The Bill does not apply to the private sector entities even those involved in delivery of public services such as health, education, insurance, banks, etc. Notwithstanding the sensitivity of commercial information, a citizen must have the right to access information about the public services being provided by a private company. For example, a person who has contracted a disease due to poor quality of bottled water for which he paid high price, he must have the right to ask about the arrangements made by the company to comply with

safety standards, or to ask about the laboratory test results of the brand undertaken by the company.

Another example is that a bank customer is not entitled under the rules of State Bank of Pakistan to access his/her Credit Worthiness Report, but other banks and financial institutions can. This means that personal information of a customer is accessible to a third party, but not to the individual itself. Such practices infringe upon the right of individuals to freedom of information.

#### Suggestion

The law should be applicable to those private sector companies that are involved in delivery of public services and where larger public interest is involved such as commercial banks, insurance companies, private hospitals, food companies, etc.

### **Terms not Defined**

The Bill does not define the term “requester”. It does not describe who can submit an information request for access to records; only citizens of Pakistan or any individual or any legal entity?

#### Suggestion

The Bill should define the term of “requester”. The Bill should clearly state as to who can file an information requested under the law.

### **Article 4 Maintenance and Indexing of Records**

The Bill provides for maintenance and indexing of records in the title of Article 4, but in the description, it does not oblige the public bodies to do indexing.

#### Suggestions

- i. The word “and indexed” should be added at the end of the article.
- ii. The article should mandate the public bodies, at least to the federal and provincial public bodies and district governments, to make available their index available on websites within 3 years of the enforcement of the law.

### **Article 5 Publication and Availability of Records**

The article specifies the public records that shall be proactively disclosed and made available for public access. This list does not mention the Year Books/Annual Reports to be published by each division under Section 25 (2) of the Rules of Business of Government of Pakistan. Similarly, provincial departments and some local government bodies are also obliged to develop performance reports on annual basis under the law. Most of the public bodies, however, do not publish these reports.

Suggestion

This article should also include Year Books/Annual Reports in the list of documents to be published and made available for public access.

**Article 11 Functions of designated official**

This article obliges the designated official to provide the information contained in any public record, or a copy of such record.

Suggestion

The law is silent on a situation where the requisite information does not belong to the public body where the request has been made. It should be the duty of the designated official to (i) re-route the information request to the concerned department, if possible, or (2) intimate the requester that the information does not belong to the department.

**Article 12 Application for Obtaining Information, etc.**

The Bill does not propose any improvement in the application procedure. There are two main issues in the Freedom of Information Rules, 2004: (1) The procedure for deposit of prescribed fee is complex and troublesome, (2) Photocopying charges of Rs.5 per page are too high as compared to the market rates. The proposed Bill does not address these issues.

Suggestion

- i. The Bill should provide for multiple and convenient options for deposit of prescribed fee in the rules to be made for the law.
- ii. The Bill should clearly provide that photocopying charges per page should not exceed, in any case, than the market rates.

**Articles 14-18, 8, 2 (i) (vi) Exclusion and Exemption of Certain Records**

In the first reading of the Bill, the scheme of exclusion and exemption of certain records looks more or less similar to the Freedom of Information Ordinance, 2002, and the provincial FOI laws. However, in-depth analysis reveals that there are some differences. The main differences are the following:

- a. The 2008 FOI Bill declares correspondence, summaries and notes in certain matters as public record, whereas these were excluded from public records in the FOI Ordinance, 2002.
- b. The FOI Ordinance gave discretionary powers to the Federal Government to declare a record classified, which was then excluded from public records after such declaration. The Bill has not given these powers to the Federal government.

- c. The Bill requires the public bodies to record the reasons for all exclusion and classification, whereas no such provision was made in the FOI Ordinance, 2002.
- d. The Bill provides that all documents, notwithstanding any thing contained in any law for the time being in force” will become public record after 20 years of their initiation, whereas the FOI Ordinance had no such provision.

Despite these improvements in the Bill, it appears to be equally restrictive (if not more) than the FOI Ordinance, 2002 and the two provincial laws. Reasons? The latter declared the final decisions as public records that could be accessed only after they are “implemented by the public body”. The Ordinance, however, did not condition the access to the final decisions with their implementation.

#### Suggestions

- i. Access to final decisions should be allowed immediately after the decision has been taken or notified. The condition of implementation should be done away with.
- ii. Access to intermediary opinions, notes, and correspondence should be debated and researched.
- iii. The exclusions and exemptions have been described in different places and do not give a clear picture. An ordinary reader finds it difficult to differentiate between exclusions and exemptions. There should be a single list of exclusions and exemptions in the law. An ordinary reader should be able to easily identify:
  - the records and information that cannot be accessed, as these are already excluded from the definition of public record under this law;
  - the records and information that are not excluded from the definition of public record under this law, but it is the prerogative of the public body to judge whether access should be provided or not
  - the records and information that cannot be accessed now, but will be accessible after 20 years;
  - the records and information that shall not be declared public record even after the passage of 20 years

**Article 19 Recourse to the Mohtasib and Federal Tax Ombudsman and the Judiciary**

The number of days within which the designated official should respond to the information request is 14 days in the FOI Bill, as compared to 21 days in the Freedom of Information Ordinance, 2002. This provision is appreciated but on the whole, the Bill does not appear to resolve the issue of cumbersome procedure, which is more or less same as in the Ordinance.

Suggestions

- i. The time for processing of information request might take more than the stipulated time because the designated officer is authorized to turn down the application for even a minor omission in the particulars. Time should be reduced for response in case the application form is incomplete. A designated official should scrutinize the application on receiving it and intimate the requester within one week if (i) the application is incomplete, and (ii) the requested record is already excluded from the definition public record and no internal deliberations are required to decide whether or not the record is public record. For this purpose, a standard proforma can be used to intimate the requester.
- ii. The Bill does not specify a time for the Principal Officer or head of the body to respond to the complaint filed by a requester. Thus, head of the concerned public body may take even months to respond to the complaint. The Bill should prescribe maximum 10 days for the response to the complaint.
- iii. Also see 2.6 in Summary of Comments on 2008 FOI Bill

**Article 23 Indemnity (formerly dealing with Whistleblowers' protection)**

Article 23 dealt with whistleblowers' protection in the 2004 FOI Bill, whereas in 2008 FOI Bill, this provision has been replaced with indemnity. It is important to note that the initiator of the Bill had included whistleblowers protection (a legal instrument to curb corruption) when she was in opposition, but after coming into power after the general elections held in February 2008, this provision has been deleted. This indicates that the interplay of political forces and vested interests have taken over the larger public interest of transparency and elimination of corruption from the government departments.

Removal of whistleblower protection from the Bill is likely to raise numerous questions about the integrity of the ruling elite.

Suggestion

Whistleblower protection must be added to the 2008 FOI Bill.

**Article 25      Repeal**

The article repeals the Freedom of Information Ordinance, 2002 (XCVI of 2002). The Bill does not repeal the Balochistan Freedom of Information Act, 2005 and Sindh Freedom of Information Act, 2006. Because the Bill would apply to the whole of Pakistan and to all public bodies, there is no question that these two provincial laws should exist if the Bill is enacted into an Act of the Parliament. The failure to repeal the provincial laws appears to be due to the ignorance of the drafters about the very existence of these laws.

Suggestion

The FOI Bill should also provide for repeal of the provincial FOI laws.