

# **Freedom of Information Bill, 2008 of Pakistan**

## **Preliminary Analysis and Recommendations**

Submitted by

**Ms. Maja Daruwala  
Venkatesh Nayak  
James Ferguson**



**Commonwealth Human Rights Initiative (CHRI)**

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

**Tel: 011-2685 0523 / 2686 4678**

**Fax: 011-2686 4688**

**Email: [chriall@nda.vsnl.net.in](mailto:chriall@nda.vsnl.net.in)**

**[majadhun@vsnl.com](mailto:majadhun@vsnl.com)**

**[venkatesh@humanrightsinitiative.org](mailto:venkatesh@humanrightsinitiative.org)**

**[james@humanrightsinitiative.org](mailto:james@humanrightsinitiative.org)**

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The *Freedom of Information Bill, 2008* is scheduled to be tabled for consideration in the Pakistan National Assembly on June 16, 2008. The Consumer Rights Commission of Pakistan (CRCP) has scheduled a consultation on the draft Act on July 14, 2008 to collect feedback of important stakeholders and create an interface with the government for improvement of the draft Act.

CRCP has requested feedback of some international experts on the draft Act. To this end has forwarded a copy of the draft Act to the Commonwealth Human Rights Initiative (CHRI) for review and comment.

A preliminary analysis of the contents of the Bill indicates that it is better than the Freedom of Information Ordinance, 2002, in some ways, but needs considerable improvement in order to conform to international best practice standards. This submission contains several recommendations for strengthening the law and smoothening the process of its implementation. A more detailed analysis will be submitted along with alternative formulations in the near future.

<b>Opportunity for Improvement</b>	<b>Comments</b>
<b>Broaden and strengthen the Preamble</b>	<p>In its present form the preamble of the Bill is weak. It states that the Act is meant for access to public records and documents only. The Statement of Objects and Reasons has bolder language, some of which should be incorporated into the Preamble. The appellate bodies and Courts will depend on this part of the law to define its spirit and construction of meanings when faced with grey areas.</p> <p>The Preamble should say this law is meant to do the following: granting access to information (not merely official records or documents); engendering transparency in government, State agencies and public bodies; and to enable people to hold the Government and its instrumentalities accountable for their actions. The Preamble could also state clearly the two methods of providing access to information to people given in the law – voluntary disclosure by bodies covered by this law and disclosure upon a formal request.</p>
<b>Alter the title of the Act and the enforcement date</b>	<p>It is better to change the title to <i>Right to Information Act</i> or <i>Access to Information Act</i> in keeping with international trends.</p> <p>As the rules for the implementation of this law will be made after the enactment it is not wise to state that all provisions will become</p>

	<p>operational at once. It is better to have staggered implementation, giving between 4-6 months for making all necessary preparations for implementing this law including the drawing up of subordinate legislation. In the absence of rules, Designated Officials (DOs) are likely to refuse to receive information requests stating that they have not been advised on how to implement this law.</p>
<p><b>Questions regarding operational jurisdiction</b></p>	<p>It is uncertain whether the National Assembly has the power to pass such a law for the entire country given its federal set-up. Only two provinces have RTI laws in Pakistan. These cannot be repealed by and the current Bill does not purport to do so. So it is presumed that the National Assembly's competence to pass such a law for the whole country is questionable. (CHRI is doing the research to ascertain the competence of the National Assembly to pass such a law for the Provincial Governments as well.) However, in the interest of installing a uniform regime of access to information, it is desirable to have a single law for the entire country if the constitutional questions can be answered favourably.</p>
<p><b>Improve definitions</b></p>	<p><b>Complaints:</b> The definition is restricted to just 3 grounds for filing a complaint. This is not adequate. It should be possible to file complaints against the absence of a designated official (equivalent to the Indian PIO); refusal of the designated official (DO) to receive and process information requests; absence of any response from the DO in respect of an information request; charging of exorbitant fees; furnishing of false, misleading and incomplete information and any other matter that relates to obstruction to the right of access to information. This definition may amended accordingly.</p> <p><b>Information:</b> This definition is extremely restrictive. It indicates that only such information that a citizen of Pakistan has right of access under this law will be covered by this definition. In other words, information that is excluded from the coverage of this law in section 8 is not even considered to be 'information'. The definition should cover all kinds of information held by a public body in material form. The definition should indicate what kinds of records, documents and materials constitute information. This should include records, documents, emails, memos, advice and opinions given by officers on file, samples of materials used in public bodies, information held in electronic form etc.</p> <p><b>Public Record:</b> The meaning of public record is given in this section but it conflicts with section 7 that declares records created by the Federal Government and Provincial Governments as being public records. Records excluded under section 8 are not said to be public records. At the same time the definition of public record also identifies several types of records as not being 'public records' namely, records of internal deliberations and Cabinet papers (before a decision is taken and implemented), records relating to investigation of offences and law enforcement, intelligence information, intellectual property rights, defence related. There is no reference to these excluded categories in section 8. This will create nightmares for appellate bodies and courts while interpreting what is excluded and what is not.</p>

	<p>It is advisable to go in for a simple and comprehensive definition of 'information' and then only define what constitutes a 'record' as in section 2(i) of the Indian RTI Act. This whole section should be scrapped. Instead the sections relating to exemptions to disclosure (sections 14 -18) should be expanded to provide for protection to Cabinet papers, law enforcement-related work and protection of an individual's privacy.</p> <p><b>Public Body:</b> Clause (iv) of this section states that any body incorporated or unincorporated or a legal entity functioning under the control or authority of the Federal or Provincial Government or a body over which such a Government may have ownership or a controlling interest or which may be funded by such Government has a direct obligation to give information under this law. This implies that all bodies in the private sector will be duty-holders for people's RTI.</p> <p>The fact that any body that is under the 'authority' of a government is adequate for the purpose of covering all kinds of NGOs and actors in the private sector. 'Authority' in this section will include regulatory authority as well. This may make it very difficult to implement the law considering how many bodies are subject to government control in society. It is better to follow the Indian model with some qualifications (such as inclusion of private bodies that perform a public service of public function). If Pakistan wants to follow the South African model then this definition will have to be split to define public and private bodies separately.</p> <p><b>Right of access must be defined:</b> The definitions section must include a definition of the scope of the right of access granted – certified copies, samples, inspection, copies of electronic records, videographing or copying at requestor's own costs etc.</p>
<p><b>Access to Information not to be denied</b></p>	<p>It is better to have a positive formulation for section 3 instead of the current negative one. This section should also state that information from state agencies will be given without seeking reasons from the requestor. This provision is missing from the law. In its absence DOs are likely compel the requestor to disclose reasons for seeking information.</p>
<p><b>Maintenance and indexing of records</b></p>	<p>It is better to incorporate section 4 with section 6 that requires every public body to computerise its records and network them throughout the country. It is also better to link this to a time-bound commitment without which hardly any steps will be taken towards its fulfilment as is the case in India in many States.</p>
<p><b>Improve proactive disclosure requirements</b></p>	<p>Section 5, which mandates proactive disclosure, is good but not adequate. Information about budgets and financials of all bodies covered by this law should be proactively disclosed. This is currently missing. So is information about categories of documents and records held by public bodies.</p>

	<p>Furthermore the method of dissemination is unsatisfactory. The law calls for only printing, computerisation through internet websites. These may not be the best ways for dissemination in small offices in remote areas without easy access to modern technology. A majority of the requestors may not be computer savvy. Therefore the information proactively disclosed should be made available to people through a variety of methods including inspection of such information in files at public places in offices covered by this Act free of cost.</p> <p>The law should also state that it would not be necessary to file applications for accessing such information or wait for the mandatory 14 days mentioned in section 13. Only reproduction costs may be collected from the requestor if he/she seeks hard or soft copies. The law should also state that the DO will be the custodian of this information. It should require the public bodies to make these kinds of information available to people in the local language. The responsibility to develop disclosure schemes for all public bodies and monitor compliance with voluntary disclosure should be vested with the Mohtasib (Federal Ombudsman).</p> <p>Clause 2 indicates the possibility of amendment to the list of proactively disclosed information. It is presumed that this kind of an amendment can be made only by Parliament as it would involve altering the statute which no executive authority has the power to tamper with. This should be clearly mentioned in the law to avoid confusion.</p>
<p><b>Avoid class exclusions</b></p>	<p>This Draft Bill excludes a wide range of information in section 7 and also earlier in the <b>Definitions</b> section. Blanket exclusion is bad practice. No information should be barred from disclosure completely. Only exemptions from disclosure subject to strict harm tests are permissible according to international best practice. This must also be subject to a public interest test. This entire section may be dropped and the categories of information included here may be carried over to the sections relating to exemptions (sections 14-18) after taking care to avoid duplication.</p>
<p><b>Expand upon duty to assist requesters</b></p>	<p>Section 9 should not leave the kinds of assistance to be filled in by subordinate legislation. This will rarely get done. It is better to state that the DO will assist the requestor to narrow down the request to specific kinds of information; unlettered people and disabled people will be given reasonable assistance not only to file requests but also to access the requested information.</p>
<p><b>Designate more officials</b></p>	<p>Considering the popularity of the RTI Act in India and the ever increasing number of requests it is unwise to have only one DO as required under section 10. It is better to amend this provision to state as many officers as may be necessary will be made DO (not 'appointed' as that term carries the sense of 'new recruitment' with it.) It is worthwhile to have Assistant DOs like the Assistant Public Information Officers (APIOs) in India whose only duty is to accept</p>

	<p>information requests from people and transfer them to the Public Information Officer of the concerned public body. This will be useful for people who may want information from offices that are not located in their hometowns. Section 5(2) of the Indian RTI Act may be looked at as an example of this system. Assistant DOs will not be responsible for making a decision on the access request. That responsibility will be with the DO. Assistant Dos will be like a one way post office in the manner of APIOs in India.</p>
<p><b>Functions of designated officials</b></p>	<p>Section 11 states that Rules will be made to delineate the functions of the DO. The Rules must be made within a specific time period and should be in sufficient detail to serve as useful guidelines for the DO.</p>
<p><b>Improve procedures relating to applications for obtaining information</b></p>	<p>Section 12 states that this law can be used only by citizens of Pakistan. This goes against the very first para of the statement of objects and reasons which recognises RTI as an inalienable and universally recognised birthright. By logic of this connection any person in Pakistan ought to be able to make use of this law to seek and obtain information. Again by restricting access only to citizens the law ignores that artificial juridical entities will also have use for this law. In India many PIOs decline information requests which are made on behalf of CSOs, companies and other corporate bodies. As corporate bodies also require human intercession for making information requests the law should clearly state that the right of seeking information is available to any person who is a legal entity. If this change is not incorporated DOs are likely to refuse access to information stating that lawyers are seeking information on behalf of their clients, office-bearers of trade unions and staff associations are seeking information for the bodies they represent. There is no reason why such an unreasonable ground for denial of information should be created by the law.</p> <p>This provision also states that forms will have to be filled up to seek information. This is not a user-friendly approach. When forms become scarce people will be denied the opportunity of seeking information on the grounds that they have not filled up the relevant forms. This is an unreasonable denial of the right of access. In order to avoid this situation the law should not insist on forms. It should allow filing of requests on plain paper. As this is the electronic age electronic requests should also be accepted (email, floppy/CD based requests etc.). As Pakistan has a large segment of unlettered people the law should place an obligation on the DO to reduce oral requests from such people into writing, read it back to them and give them a copy immediately.</p> <p>Sub-section 2 of this section states that the procedure for making formal requests does not apply to documents published in the Gazette or priced publications or information uploaded on websites. While it is commendable that the law will not compel people to put in formal requests and wait for 14 days to get these categories of information this provision is likely to be</p>

	<p>misinterpreted to deny access to all such information. The above categories of information are also included within the definition of information as recommended above [see points #4(b) and (c)]. Access to Gazette notifications is not easy for every person. Similarly a large majority of people in Pakistan are not internet literate. People should not be denied access to this information on the grounds that they have been published earlier. Often copies of old gazette notifications are not easy to come by. Copies of priced publications may run out of print. In all such instances the public body having custody of the information should have an obligation to furnish such records and documents on demand. The law should clearly provide for such a facility.</p>
<p><b>Improve procedure for disposal of applications</b></p>	<p>Section 13 provides for disposal procedures. Clause be needs to deleted in view of our arguments that <b>a)</b> this law should grant access to information and not merely to copies of records and <b>b)</b> the definition of 'public record' is flawed and fit to be replaced [See point # 4(c) and 4(b) above].</p> <p><b>Transfer of requests:</b> There is no provision for transfer of an information request from one public body to another. A requestor may not be thoroughly aware of the functions and duties of every public body. Therefore he/she may not be in a position to pinpoint the exact public body that is likely to have the required information. Furthermore some parts of the required information may be held by more than one public body. In such instances the law should place an obligation on the DO to transfer the application wholly or partially depending upon the availability of information to the public body that is most likely to have it. The voluntarily disclosed information under section 5(ii) will be useful in such cases. Such transfers should be completed within a minimum period (5 days in India) and the applicant should be informed in writing about such transfer.</p> <p>Clause 13(2)(c) empowers the DO to deny information requests which are excluded under section 8. As we have already recommended deletion of this section (see point #10) this clause will now be applicable to information exempted from disclosure under section 16. It is important that the DO give detailed reasons for denial of access to information under this clause and the law should place an obligation to do so. Such orders should be in the form of speaking orders explaining what harm is likely to be caused if the information were to be disclosed.</p>
<p><b>Tighten exemptions to disclosure</b></p>	<p>The language of section 14 that pertains to exempt information has the effect of excluding this information from disclosure completely except for the application of the 20-year bar mentioned in section 7(2). This is not in tune with international best practices. This section should only provide discretionary powers to the public body receiving a request to refuse access if the information is covered by one or more clauses in this section. Even exempt information should be subject to a public interest override clause</p>

	<p>which is sorely missing in this Draft Bill.</p> <p>The language of section 15 which exempts information relating to international relations is poorly drafted and colloquial in nature. The wording can be tighter and there is no need repeat reference to explanation underlying denial of information as it is already covered under section 13 (see point #15 above).</p> <p>Section 16 pertains to denial of information relating to law enforcement. This topic is mentioned in section 2 under <b>Definitions</b>. It should be removed from section 2 and brought in to section 16 as that is the rightful place for laying down exemptions to disclosure.</p> <p>Similarly section 17 pertains to disclosure of personal information. This topic is mentioned in section 2 under <b>Definitions</b>. It should be removed from section 2 and brought in to section 17 as that is the rightful place for laying down exemptions to disclosure.</p> <p>The reference to internal working documents and Cabinet papers contained in section 2 under <b>Definitions</b> should be moved to the sections relating to exemptions with suitable modifications. The current formulation has the effect of creating blanket exclusion for all such documents before a decision is taken and implemented. In a democracy this is not a desirable practice. In several countries access to such documents is denied only if disclosure will severely frustrate the outcomes of the decision-making process or unreasonably hamper internal deliberations of officers. This is the harm test to which such an exemption is subjected in international best practice standards. It is advisable to subject this clause to a similar harm test while moving into the section relating to exemptions.</p> <p>There is no provision in this Draft Bill that protects the <b>sanctity of competitive examinations</b> for recruitment or promotion in services. Theoretically speaking, such information cannot be denied under the existing provisions of the Draft RTI Bill. It is important to introduce such a provision as one of the grounds for exemption.</p>
<p><b>Subject exemptions to public interest override clause</b></p>	<p>It is international best practice to include a public interest test to decide whether there is a case to disclose even exempt information or not. It should be remembered that exemption to disclosure is allowed by the law because it is in the public interest to keep information secret under demanding circumstances. Exemptions are not meant to serve vested interests either inside or outside government. Therefore the public interest in disclosure should be weighed against the public interest in keeping sensitive information secret. The law should provide for such a clause requiring not only the public body to make such a quasi-judicial</p>



	<p>decision but also empower the appellate body to disclose exempt information in the larger interest of the public. Certain FOI laws even mention the grounds that may be considered to arrive at such a decision (Antigua and Barbuda, Bangladesh etc.) These grounds include disclosure in the interests of maintaining public safety, public order, public health, protection of the environment and exposure of wrongdoing or illegal activities. However this provision should be of inclusive nature so that newer grounds to determine public interest may be identified in future. This clause should not restrict the ability of the public body or the appellate body to only a handful of public interest grounds. "The categories of public interest are not closed" (Lord Hailsham, UK, 1978).</p>
<p><b>Strengthen the complaints procedure</b></p>	<p>Section 19 provides for filing of complaints against non-disclosure or wrongful denial first within the public body where the request was made and then before the Mohtasib or the Federal Tax Ombudsman. It is better to split this provision into two indicating the two levels of complaints separately for greater clarity.</p> <p>First, the law should provide for condoning delays in justified cases at both stages.</p> <p>Second, the law should clearly state the additional grounds for filing complaints which are mentioned at point #4(a) above.</p> <p>Third, where the DO happens to be the Head of the public body because another official has not been designated DO under section 19(2), there will be a conflict with the principles of natural justice if the complaint is to be filed before the same person. It is advisable for the law to allow for the formation of a multi-member body of senior officials to decide upon complaints against the decision of the Head of the public body.</p> <p>Fourth and most important, the law should provide for only one independent authority that will inquire into complaints against the decisions of the DO. Ordinarily it is advisable to create an Information Commission (Commissioner) for this purpose. However if there are concerns about inflating the bureaucracy with another body that is likely to increase demands on the resources of the State it is advisable to make only one authority responsible for inquiring complaints. Ideally speaking the Mohtasib should be made solely responsible for receiving and making decisions on all complaints. There is no need to involve the Federal Tax Ombudsman as the matter to be decided is not about taxes or revenues but about access to information regarding these records and documents. Having multiple authorities with concurrent jurisdiction is likely to give rise to situations where conflicting decisions may be given on similar matters.</p> <p>Fifth, the Mohtasib draws his powers from P.O. 1983. These are</p>

	<p>extensive and include the power to punish for contempt. However the Mohtasib does not have the power to enforce his/her decisions. This is very important if his/her writ is to be imposed. Therefore, the law should provide for empowering the Mohtasib to impose monetary penalties and recommend initiation of disciplinary action against erring officers. Any officer whose actions or omissions result in the inability of the DO to make a decision on an information request should also be liable for penalty under the law. [For example, section 5(4) and 5(5) of the Indian RTI Act.] Where such sanctions do not have the desired effect of disclosure, the Mohtasib should be empowered to approach the appropriate courts seeking a decree to enforce his/her decisions. (See the UK Freedom of Information Act, 2000 for similar provisions)</p> <p>Sixth, the Mohtasib should have the responsibility to prescribe disclosure schemes and better practices of records maintenance and management to public bodies under sections 4, 5 and 6 (for example, the UK Information Commissioner has such duties).</p> <p>Seventh, the Mohtasib should be responsible for monitoring compliance with the law in public bodies and reporting to the National Assembly annually on the progress made with regard to the aims and objectives of the law.</p> <p>Eighth, it is a good idea to prescribe a time limit for the Mohtasib to make decisions on complaints filed before him/her. However the time limit of 14 days appears to be impractical especially when the number of complaints increases owing to the resistance to disclosure from the bureaucracy. This time limit will remain a dead letter. It is advisable to increase it to 2-3 months.</p>
<p><b>Delete provision relating to vexations, frivolous and malicious complaints</b></p>	<p>Section 20 empowers the Mohtasib to impose fines on complainants who file vexatious, frivolous and malicious complaints. While it is difficult to define what may amount to vexation and frivolity to cover all possible circumstances it would be difficult to prove malice in most cases. This provision is likely to be misused to discourage people from approaching the Mohtasib. In other countries like Mexico, UK and Canada similar independent appellate bodies called the Information Commissioners are champions of transparency. Their FOI laws do not penalise people for filing any kind of complaints against a public body. Section 20 may be deleted.</p>
<p><b>Identify and penalise contraventions of the law in addition to Offences</b></p>	<p>Section 21 relates to punishment for offences. The law should also provide for imposition of monetary penalties for contraventions of the law that may not merit labelling as 'offences'. For example, acts such as refusal to receive an information request, wilful or <i>malafide</i> denial of information, delay in providing access to information without reasonable cause, knowingly providing false, misleading and incomplete information should also warrant some consequences for the officials concerned. It is advisable to</p>

	empower the Mohtasib to impose monetary penalties and recommend disciplinary action. The law should also empower the Mohtasib to award compensation to persons who have suffered demonstrable loss or detriment as a result of wrongful denial of access to information or delayed access without reasonable cause. The compensation should be paid by the public body while the penalty may be paid by the DO or other officer who is liable.
<b>Duty of public education and training of officers</b>	<p>The law should place an obligation on the Federal and Provincial Governments to educate people about their right to information with particular emphasis on disadvantaged sections of society. The Mohtasib should be made responsible to monitor whether the governments have done enough to spread awareness about this seminal law.</p> <p>Similarly, the law should place a clear obligation on the Federal and Provincial Governments to design and conduct training programmes for all officers to implement this law. Civil society organisations should be involved in all such public education and officer training programmes. In the absence of CSO participation in officer training programmes, there is a strong likelihood that the only training imparted will be about maximum use of the exemption clauses to deny information.</p>
<b>Include protection for whistleblowers</b>	Section 23 should also include another clause that will protect whistleblowers. Although whistleblower protection requires a comprehensive law of its own kind, such a clause in this law will ensure some protection to good faith disclosures of wrongdoing by government functionaries.
<b>Tighten the overriding clause</b>	Section 24 gives this law an overriding effect over all other laws. This is too broad and could be stretched to mean that this law overrides the Constitution of Pakistan as well (the Constitution being the fundamental law of the land would fall within the meaning of the term 'law' used in this provision). Such mischievous and undesirable interpretations may be avoided. The overriding effect of this law ought to be only to the extent of inconsistency with other laws and with regard to access to information issues only. Furthermore it would be useful to include a reference in this section stating that this law overrides the Official Secrets Act specifically so as to remove any doubt from the minds of officers implementing this law.
<b>Include a section on fees</b>	There is no reference to fees payable for accessing information under this law. The only reference is found in section 27 in connection with the rule making powers of the Standing Committee of the National Assembly. Ideally no fee should be charged for the exercise of a human right. However in order to ensure that there is no drain on the resources of the State due to the implementation of this law it is important to include fee related provisions in the law. Only such fees should be charged that are reasonable and cover only the cost of reproduction of the information. No fee should be charged for searching, collation or use of human and material resources. The law should allow

	disclosure of information that is of public interest and which will benefit society at large free of cost. Furthermore people from disadvantaged sections of society should be allowed access to information free of cost. Similarly, where the public body fails to give information within the specified time limits, it should be made liable to provide the information to the requestor free of cost. Any fee already collected in such cases should be refunded. The requestor should have the option of filing a complaint within the public body and with the Mohtasib seeking review of fees if the DO charges exorbitant fees for disclosure of information.
<b>Provide a procedure for dealing with requests for third party-related confidential information</b>	International best practice standards require that information relating to third parties of a confidential nature should be afforded adequate protection by FOI laws. The Draft Bill does not contain any such provision. It should provide for a detailed procedure for inviting objections from third parties when a request for such information is received. Third parties should have the right to file complaints against the DO's decision to disclose confidential information both within the body and with the Mohtasib. The law should provide for non-disclosure of disputed third party information until the matter is finally disposed of by the Mohtasib or the courts. (See section 11 of the Indian RTI Act)
<b>Provide for a procedure for severing exempt records</b>	The Draft Bill does not provide for severing exempt information from non-exempt records. All papers in a file may not attract the exemptions clauses. When a request is made for a record or papers contained in a file that has both exempt and non-exempt information the DO should be empowered to make a decision of partial disclosure. The exempt portions may be severed and access may be provided to the non-exempt portions of the record or document or file. (See section 10 of the Indian RTI Act)
<b>Include reference to open government</b>	<p>This Draft Bill does not contain any reference to the imperative of opening up government processes. The law should place an obligation on public bodies to hold open meetings and provide opportunities to people to participate in their decision-making processes. The Sunshine laws in the USA are examples of such requirements. Furthermore the law should place an obligation on the Federal and Provincial Governments to provide the following information to people proactively:</p> <ul style="list-style-type: none"> <li>all facts, figures and reports relating to policies and development projects that affect the larger public during the planning, before and after their execution;</li> <li>a) reasons behind quasi-judicial and administrative decisions to affected persons; and</li> <li>b) opportunities when people can participate in the decision-making processes of public bodies.</li> </ul>

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