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# **Analysis of the Freedom of Information Act 2004 developed by the Pakistan People's Party**

**Submitted by the  
Commonwealth Human Rights Initiative, November 2006**

"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

1. The *Freedom of Information Act 2004 (FOI Act)* was originally submitted by the Pakistan People's Party (PPP) to the Pakistan National Assembly for consideration in May 2004. At the time, the Commonwealth Human Rights Initiative (CHRI) reviewed and commented on the Bill.
2. The Act has now been re-submitted to the National Assembly and is currently undergoing a clause-by-clause review. It appears that CHRI's original comments were not incorporated into the re-submitted FOI Act. Nonetheless, CHRI wishes to re-submit an analysis of the FOI Act for consideration by the PPP and the National Assembly, and has taken this opportunity to update the original critique of the FOI Act to incorporate best practices standards captured in laws passed since the Act was drafted, most notably the Indian *Right to Information Act 2005*.
3. Once again, we note that the FOI Act was not made available to the public for consideration and comment prior to its submission to the National Assembly in 2006. Experience has shown that a participatory law-making process can be a major factor in laying a strong foundation for an effective right to information regime. Implementation is strengthened if right to information laws are 'owned' by both the government and the public. Best practice requires that civil society groups and the public be proactively engaged in the legislative process. This can be done 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 Act; 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. Even now, participation could be encouraged by inviting submissions from the public on the Act before Parliament votes on it.

## **THE VALUE OF THE RIGHT TO INFORMATION**

4. At the outset, it is worth reiterating the benefits of an effective right to information regime:
  - *It strengthens democracy:* The right to access information gives practical meaning to the principles of participatory democracy. The underlying foundation of the democratic tradition rests on the premise of an informed constituency that is able to thoughtfully choose its representatives on the basis of the strength of their record and that is able to hold their government accountable for the policies and decisions it promulgates. The right to information has a crucial role in ensuring that citizens are better informed about the people they are electing and their activities while in government. Democracy is enhanced when people meaningfully engage with their institutions of governance and form their judgments on the basis of facts and evidence, rather than just empty promises and meaningless political slogans.
  - *It supports participatory development:* Much of the failure of development strategies to date is attributable to the fact that, for years, they were designed and implemented in a closed environment - between governments and donors and without the involvement of *people*. If governments are obligated to provide information, people can be empowered to more meaningfully determine their own development destinies. They can assess for

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themselves why development strategies have gone askew and press for changes to put development back on track.

- *It is a proven anti-corruption tool:* In 2003, of the ten countries scoring best in Transparency International's annual Corruption Perceptions Index, no fewer than nine had effective legislation enabling the public to see government files. In contrast, of the ten countries perceived to be the worst in terms of corruption, not even one had a functioning access to information regime. The right to information increases transparency by opening up public and private decision-making processes to scrutiny.
- *It supports economic development:* The right to information provides crucial support to the market-friendly, good governance principles of transparency and accountability. Markets, like governments, do not function well in secret. Openness encourages a political and economic environment more conducive to the free market tenets of 'perfect information' and 'perfect competition'. In turn, this results in stronger growth, not least because it encourages greater investor confidence. Economic equity is also conditional upon freely accessible information because a *right* to information ensures that information itself does not become just another commodity that is corralled and cornered by the few for their sole benefit.
- *It helps to reduce conflict:* Democracy and national stability are enhanced by policies of openness which engender greater public trust in their representatives. Importantly, enhancing people's trust in their government goes some way to minimising the likelihood of conflict. Openness and information-sharing contribute to national stability by establishing a two-way dialogue between citizens and the state, reducing distance between government and people and thereby combating feelings of alienation. Systems that enable people to be part of, and personally scrutinise, decision-making processes reduce citizens' feelings of powerlessness and weakens perceptions of exclusion from opportunity or unfair advantage of one group over another.

#### **WHAT A RIGHT TO INFORMATION LAW SHOULD CONTAIN**

5. *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.
6. 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.
7. 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.
8. In order to support maximum information disclosure, the law should also provide protection for "whistleblowers", that is, individuals who disclose information in contravention of the law and/or their employment contracts because they believe that such disclosure is in the public

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interest. Whistleblower protection is based on the premise that Individuals should be protected from legal, administrative or employment-related sanctions for releasing information on wrongdoing. It is important in order to send a message to the public that the government is serious about opening itself up to legitimate scrutiny.

9. 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.
10. 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.
11. 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.
12. 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.
13. 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.
14. 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.
15. 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.
16. Monitoring 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

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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.

17. 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.

### **ANALYSIS OF DRAFT BILL AND SUGGESTIONS FOR IMPROVEMENT**

18. It is generally well-accepted that there are basic minimum standards which all RTI legislation should meet. Chapter 2 of CHRI's Report, *Open Sesame: Looking for the Right to Information in the Commonwealth*<sup>1</sup>, provides more detailed discussion of these standards. The critique below draws on this work.<sup>2</sup> CHRI has suggested amendments, areas for improvement and issues for further consideration.
19. Overall, CHRI's assessment is that the Act is an improvement over the current *Freedom of Information Ordinance 2002*. However, amendments are still needed to bring the draft Act into line with international best practice and a number of provisions need to be reworked to ensure the efficacy of implementation.

### **Title & Statement of Objects and Reasons**

20. The introductory paragraphs setting out the objectives of the Act comprise a strong statement of purpose. Although such clauses are usually not binding, they remain important because they are often used to aid interpretation; in fact, s.3(ii) of the Act endorses this approach.
21. Consideration should be given to using the phrase "right to information" or "right to access information" throughout the Act, rather than "freedom of access to information" or "freedom of information", as is used in the second paragraph of the Statement of Objects and Reasons. Indeed, consideration could be given to renaming the law the "Right to Information Act". Although some may argue that such a focus on terminology is pedantic, it is a fact that international law as well as the Constitution of Pakistan recognises access to information as a RIGHT. This should be reflected in any legislation on the matter to 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 is a constitutionally mandated *obligation* on the government, which must implement the corresponding *right*.
22. Consideration should be given to rewording the last paragraph in this section; the statement that "citizens of Pakistan should have the fullest possible access to public records" reflects an unnecessarily narrow formulation of the right to information. Firstly, the right need not be restricted only to citizens (see paragraph 62 below for further discussion). Secondly, the focus on public records unnecessarily restricts access, as it removes information not already collated in a record from the scope of the Act and may also exclude some other forms of information, such as samples of materials (see paragraphs 28 and 29 below for further discussion). Further, the focus on public records removes from the scope of the Act information held by private bodies which is important for the exercise of a right (see paragraph 34 below for further discussion).
23. While it is positive that the section focuses on the right to information as a prerequisite to good and transparent government, consideration could be given to further mentioning the value of the right to information in terms of increasing public participation in development, governance and government, supporting economic development, reducing corruption and ensuring accountability.

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<sup>1</sup> [http://www.humanrightsinitiative.org/publications/chogm/chogm\\_2003/default.htm](http://www.humanrightsinitiative.org/publications/chogm/chogm_2003/default.htm)

<sup>2</sup> All references to legislation can be found on CHRI's website at

[http://www.humanrightsinitiative.org/programs/ai/rti/international/laws\\_&\\_papers.htm](http://www.humanrightsinitiative.org/programs/ai/rti/international/laws_&_papers.htm)

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## **Section 1 – Short title, extent and commencement**

24. Section 1(2) purports to apply the draft law to the “whole of Pakistan”. However, Pakistan has a federal system of government, with law-making powers divided between the Federal and Provincial Governments, such that is arguable whether the Federal Government has the power to pass a law on the right to information which attempts to cover provincial bodies. This view is supported by constitutional practice evinced in federations such as Canada, Australia and the United States, each of which has separate access laws for states and the federal government. Conversely however, the Central Government of India passed a national right to information law which covers central government and state government agencies. Notably, some provincial governments have already stated their intention to pass provincial access to information laws. It is recommended that specific legal advice be obtained as to the constitutionality of passing a right to information law to cover all of Pakistan.
25. It is positive that s.1(3) requires the Act to come into force “forthwith”. Some laws have not specified a date on which the law will come into force, with the result that the law has been on the books for months or even years without further action being taken to implement it. Consideration could be given to allowing a short period after passage of the Act to enable bodies covered by the Act to prepare for implementation. Experience suggests a maximum limit of one year between passage of the law and implementation should be sufficient. (For example, Mexico allowed one year for implementation and India allowed 120.)

## **Section 2 - Definitions**

26. Section 2(b) contains an unnecessarily narrow definition of “complaint”. It currently covers only wrongful rejection of a request or delay. While it is positive that delay is a ground for complaint, consideration should be given to extending the definition and allowing complaints against partial exemptions, the imposition of fees, and the type of access provided (see paragraph 92 for further discussion).
27. Taking into account the analysis in paragraph 25 above, consideration may need to be given to redrafting the definition of “principal officer” to limit the scope of the definition only to officers employed by federal bodies.

### **Public record**

28. The current definition of “public record” is confusing and circular; the definition in s.2 refers to the definition in s.7 which simply states that all government records are so-called “public records”. This adds little in terms of clarifying the breadth of the Act application to information held by public bodies. Consideration should be given to deleting this definition and reconsidering the entire approach currently adopted towards defining information, records and public records.
29. Experience in other jurisdictions supports an approach whereby the law grants a specific right to information and/or records held by or controlled by public bodies, with the terms “information”, “record” and “public body” then being defined. It is recommended that the broader term, “information”, is adopted as has been done in India and New Zealand because this will mean that applicants will not be restricted to accessing only information which is already collated into a “record” at the time of the application. Also, the use of the term “record” can exclude access to items such as models or materials. This can be a serious oversight. It has been shown in many countries that the public’s ability to oversee government activities and hold authorities to account, in particular those bodies which deal with construction or road works, is enhanced by allowing them to access samples of materials and the like. At the very least therefore, definitions of “information” and “record” should specifically include physical materials and models, such as those used in construction/infrastructure activities. Sections 2(f) and 2(j) of India’s *Right to Information Act 2005* provide a good model:

Section 2(f): *“information” means 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 electronic form and information*

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*relating to any private body which can be accessed by a public authority under any other law for the time being in force.*

Section 2(j): *"right to information" means the right to information accessible under this Act which is held by or under the control of any public authority and includes the right to—*

- (i) inspection of work, documents, records;*
- (ii) taking notes, extracts or certified copies of documents or records;*
- (iii) taking certified samples of material;*
- (iv) obtaining information in the form of diskettes, floppies, tapes, video cassettes or in any other electronic mode or through printouts where such information is stored in a computer or in any other device;*

30. The current definition of "public record" is further complicated by the sub-clauses that follow the initial basic definition. The sub-clauses are not properly numbered. More problematically, all of the sub-clauses listed after the first three lines of the definition until clause (g) appear out of place because it is not clear how they relate to the definition of "public record".

31. It appears that sub-clauses (i)-(vi) may be intended to provide clarification on what will be included as a public record. In this context, sub-clauses (i)-(v) are appropriate, but sub-clause (vi) may actually operate in practice to restrict the definition. Sub-clause (vi) currently covers "information...in which members of the public may have a legitimate interest". The requirement for the public to demonstrate a "legitimate interest" to justify access does not accord with international best practice. An effective right to information laws should be based on the principle of maximum disclosure, whereby all information should be disclosed to the public, *unless* there is some specific, legitimate public interest reason for withholding it. This principle is reflected in the fact that access applications do not require requestors to give a reason for their application. In practice, such a requirement could prove a real obstacle to openness, as recalcitrant officials could abuse the provision and narrowly interpret "legitimate interest" to deny access to information for their own reasons. To neutralise this risk, many laws specifically state that no reasons need to be provided, for example:

Australia: Section 11(2): *Subject to this Act, a person's right of access is not affected by:*

- (a) any reasons the person gives for seeking access; or*
- (b) the agency's or Minister's belief as to what are his or her reasons for seeking access.*

India: Section 6(2): *An applicant making request for information shall not be required to give any reason for requesting the information or any other personal details except those that may be necessary for contacting him.*

32. Following sub-clauses (i)-(vi) are a number of additional incorrectly numbered sub-clauses. All of these sub-clauses [(i), (i)(a)-(c), (iii), (iv), (v) and (vi)] operate as exemptions. As such, it is not appropriate to include them in the definitions section. In any case, a number of the sub-clauses are unjustifiably broad and should be amended or deleted. Those which are legitimate should be moved to the body of the Act to sit with the other exemptions provisions.

- (a) Sub-clause (i) appears to be directed at protecting against premature disclosure of information related to decision-making. However, the current drafting of the provision is too broad because the opening phrase refers to "*all internal working documents of a public body, including...*" While some internal working documents may contribute to a decision-making process, others may support the policy development process or activity implementation. The latter type of information should not be exempt. Consideration should be given to redrafting the provision to clarify these ambiguities (see paragraph 90 below for further discussion).
- (b) Sub-clauses (i)(a)-(c) regarding information relating to law enforcement and public safety are largely replicated by the exemption in s.16. They should be deleted from this section and relevant clauses merged into s.16 (see paragraph 84 below for further discussion). It should be noted however, that the provisions suffer from the fact that they do not require any harm to be caused to law enforcement interests to justify non-disclosure. This is a major deficiency, particularly because the provisions are drafted very broadly to cover all

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“matters relating to law enforcement and public safety”. Consideration should be given to narrowing the scope of the exemption and introducing a harm test.

- (c) Sub-clause (iii) is an understandable exemption, but the interests it seeks to protect will likely be covered by the exemption in s.18 (see paragraphs 87-89 below for further discussion) which seeks to protect economic and commercial affairs and the exemption for national security currently found in sub-clause (vi).
- (d) Sub-clause (iv) seeks to protect legitimate interests under the law.
- (e) Sub-clause (v) is incredibly broad and could operate in practice to severely undermine the objects of the Act. A catch-all exemption which allows non-disclosure “in the public interest”, without any further guidance and which is to be applied by officials rather than an independent oversight body cannot be justified. One can too easily imagine that bureaucrats, resistant to openness, will simply interpret the public interest broadly and withhold any information they choose to on the basis of their own interpretation of the public interest. This catch-all clause overlooks the fact that the exemptions provisions in the Act are already based on the notion of withholding information in the public interest, but are specifically designed to give guidance to officials on the practical content of this concept and to narrow their opportunity to act in their own interests instead of the public’s.
- (f) Sub-clause (vi) seeks to protect legitimate national security interests but suffers from not being made subject to a harm test. In accordance with international best practice, information should not be withheld simply because it relates to national security but rather because it will cause substantial harm or serious prejudice to national security (see paragraph 82 below for further discussion).
- (g) All legitimate exemptions should still be made subject to a public interest override (see paragraphs 80-81 below for further discussion).

#### Public bodies

- 33. While it is positive that the definition of “public bodies” in s.2(g) covers the legislature and the judiciary, it is problematic that it does not extend to the executive arm of government. This should be rectified. There is no legitimate reason in a democracy why the Executive should entirely be excluded from the application of a law designed to increase public sector accountability. The historical exemption of the Executive is a hangover from the days of monarchs and dictators. In a properly functioning democracy however, the people have the right to access information about executive decisions and discussions, as with any other arm of government, unless disclosure of such information would seriously prejudice legitimate interests. Notably, such legitimate interests are protected via exemptions provisions, such that a broad exclusion from the coverage of the Act for an entire arm of government is unnecessary and unjustifiable. The Indian *Right to Information Act 2005* for example, covers the President of India.
- 34. It is positive that ss.2(g)(iii) and (iv) extend coverage of the Act to some bodies “funded” by the Government. However, it is not clear how broadly this provision is intended to apply – will it cover all bodies receiving money from the government, including private bodies executing contracts for the government, or only bodies receiving grant funding from the government? Best practice supports the broadest coverage. In fact, consideration should be given to extending the provision further to cover “*private bodies performing public services*”. Read together, these clauses would then ensure that the public is not prevented from scrutinising the implementation of key public services simply because they have been outsourced or privatised.
- 35. Consideration should also be given to extending the scope of the Bill to cover information held by private bodies which is necessary to exercise or protect a person’s rights. Private bodies are increasingly exerting significant influence on public policy. Furthermore, throughout the world there has been an increase in the outsourcing and privatisation of important government functions and services. It is unacceptable however, that bodies which

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have such a huge effect on the right of the public should be exempted from public scrutiny simply because of their private status. As one commentator aptly observed, the scope of a right to information law needs to be “resolved by reference to its role in protecting the fundamental interests of citizens, and not by reference to the provenance or structural characteristics of the institution holding the contested information.”<sup>3</sup> South Africa’s law is the most progressive, but a number of other formulations could also be considered:

- (1) *South Africa s.50: Information held by or under the control of a private body where access to that information is necessary for the exercise or protection of any right.* [NB: if this formulation is too broad, consideration could be given to limiting the application of the law to private bodies over a certain size, determined according to turnover or employee numbers]
- (2) *India s.2(h): Any other body (i) owned, controlled or substantially financed or (ii) non-Government organization substantially financed, directly or indirectly by funds provided by the appropriate Government;*
- (3) *Jamaica s.5(3): Bodies which provide services of a public nature which are essential to the welfare of society can be covered by the Act by Order.*
- (4) *United Kingdom s.5(1): Bodies which appear to exercise functions of a public nature, or are providing any service whose provision is a function of an authority under a contract made with that public authority can be covered, by Order of the Secretary of State*

### **Section 3 – Access to information not to be denied**

36. It is very positive that s.3(1) makes it clear that the Act is paramount and that information can only be denied to requestors under the provision of the Act and no other. Likewise, it is positive that s.3(2) requires the Act to be interpreted to promote the key objectives of the law.
37. To strengthen the Act and to make absolutely certain that the right to information is clearly entrenched in the law, consideration should be given to including a further clause in this section which specifically recognises every person’s right to access information. This will provide the foundational framework around which the remainder of the Act will be built. Such provisions are commonly included in access laws and can usefully be coupled with a broad definition of what the right covers. The provisions in the South African *Promotion of Access to Information Act 2000* and s.11(1) of the Trinidad & Tobago *Freedom of Information Act* provide good models:

*South Africa: Subject to this Act, every person has a legally enforceable right to obtain access in accordance with this Act to information held by or under the control of:*

- (a) *A public authority [as defined in s.2 taking into account the recommendations made in paragraphs 32-33 above];*
- (b) *A private body where access to that information is necessary for the exercise or protection of any right.*

*Trinidad & Tobago: Notwithstanding any law to the contrary and subject to the provisions of this act, it shall be the right of every person to obtain access to [information].*

### **Section 4 – Maintenance and indexing of records**

38. The huge volume of information in governments’ hands requires that information be carefully managed so that authorities can locate and provide requested information in a timely and efficient way. The key is to ensure a comprehensive framework is in place which is capable of supporting the objectives of access legislation. In this context, it is positive that s.4 requires all public authorities to properly maintain their records. However, consideration should be given to redrafting s.4 to require that appropriate record keeping and management systems are in place which have been designed to specifically ensure the effective implementation of the law.

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<sup>3</sup> Lewis, D. (2003) “The need and value of access to information from no-state agencies”, CHRI unpublished, p.9.



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39. Consideration should also be given to empowering an appropriate body to develop guidelines or a Code on records management to this end. Notably, this has been done in the United Kingdom where, under s.46 of the *Freedom of Information Act 2000*, the Lord Chancellor is actually made responsible for developing a Code of Practice or other such regulation to provide guidance to bodies covered by the Act on how to keep, manage and dispose of their records.

### **Section 5 – Publication and availability of records**

40. It is positive that s.5 sets up a basic framework which requires bodies to proactively publish and disseminate documents of general relevance to the public. In particular, the publication of the laws of the country – which constitute the framework for governance and national law and order – is essential. Proactive disclosure clauses are commonly included in right to information legislation on the basis that the public has a right to automatically be provided with basic information without having to spend their own time and money requesting it.
41. While it is positive that s.5(1)(i) requires the publication and sale of the nation’s laws and regulations at a reasonable price, consideration should be given to extending this provision and making such legislation available free of charge, on the internet. This is becoming increasingly common practice throughout the world. It recognises that citizens have a right to know the laws of their country and should not be required to pay to access them. At the very least, consideration should be given to requiring all local libraries to hold copies of the laws and regulations of the country for free inspection.
42. It is positive that s.5(1)(ii) requires key information to be made available for inspection at public bodies’ offices *and* branches. This evinces a commendable commitment to ensuring that the information is genuinely available as widely as possible. To reinforce this requirement, consideration should be given to explicitly including a requirement under the Act that public bodies should publish the required information “*widely and in a manner easily accessible to the public*”, with a minimum obligation that the information is also published in the local language on every body’s website.
43. Notably, the requirement that the information be published in the Official Gazette is of questionable value; one must query how many ordinary people have access to and/or read the Gazette. Certainly, consideration should be given to additional dissemination/publication mechanisms. The initial effort will be worth the investment of time and money as it will reduce requests in the long run because people will be able to more easily access routine information without having to specifically apply to public bodies. Consideration could also be given to broadening out the current categories of information required to be proactively disseminated. The following list of provisions is drawn from the Mexican and Indian Acts:

*“(1) Every public body shall*

- (a) publish before the commencement of this Act:*
  - (i) the particulars of its organisation, functions and duties;*
  - (ii) the powers and duties of its officers and employees;*
  - (iii) the procedure followed in the decision making process, including channels of supervision and accountability;*
  - (iv) the norms set by it for the discharge of its functions;*
  - (v) the rules, regulations, instructions, manuals and records, held by it or under its control or used by its employees for discharging its functions;*
  - (vi) a statement of the categories of documents that are held by it or under its control;*
  - (vii) the particulars of any arrangement that exists for consultation with, or representation by, the members of the public in relation to the formulation of its policy or implementation thereof;*
  - (viii) a statement of the boards, councils, committees and other bodies consisting of two or more persons constituted as its part or for the purpose of its advise, and as to whether meetings of those boards, councils, committees and other bodies are open to the public, or the minutes 'of such meetings are accessible for public;*
  - (ix) a directory of its officers and employees;*

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- (x) *the monthly remuneration received by each of its officers and employees, including the system of compensation as provided in its regulations*
  - (xi) *the budget allocated to each of its agency, indicating the particulars of all plans, proposed expenditures and reports on disbursements made;*
  - (xii) *the manner of execution of subsidy programmes, including the amounts allocated and the details of beneficiaries of such programmes;*
  - (xiii) *particulars of concessions, permits or authorisations granted by it;*
  - (xiv) *details in respect of the information, available to or held by it, reduced in an electronic form;*
  - (xv) *the particulars of facilities available to citizens for obtaining information, including the working hours of a library or reading room, if maintained for public use;*
  - (xvi) *the names, designations and other particulars of the Public Information Officers;*
  - (xvii) *such other information as may be prescribed;*  
*and thereafter update these publications within such intervals in each year as may be prescribed;*
- (b) *publish all relevant facts while formulating important policies or announcing the decisions which affect public;*
  - (c) *provide reasons for its administrative or quasi judicial decisions to affected persons;*
  - (d) *before initiating any project, or formulating any policy, scheme, programme or law, publish or communicate to the public in general or to the persons likely to be affected thereby in particular, the facts available to it or to which it has reasonable access which in its opinion should be known to them in the best interest of natural justice and promotion of democratic principles.*
  - (e) *Upon signing, public authorities must publish all contracts entered into, detailing at a minimum for each contract:*
    - (i) *The public works, goods acquired or rented, and the contracted service, including any sketches, scopes of service and/or terms of reference;*
    - (ii) *The amount;*
    - (iii) *The name of the provider, contractor or individual to whom the contract has been granted,*
    - (iv) *The periods within which the contract must be completed.*
- (2) *It shall be a constant endeavour of every public authority to take steps in accordance with the requirements of clause (b) of sub-section (1) to provide as much information suo moto to the public at regular intervals through various means of communications so that the public have minimum resort to the use of this Act to obtain information.*
- (3) *All materials shall be disseminated taking into consideration the cost. Effectiveness, local language and the most effective method of communication in that local area and the information should be easily accessible, to the extent possible in electronic format with the Public Information Officer, available fee or at such cost of the medium or in print cost price may be prescribed."*

- 44. Consideration should be given to including a maximum time limit for updating the information required to be published under s.5(1)(ii), preferably every 3 months – though some information may need to be updated more regularly to ensure that it is current, for example, staff contact details and contracts when they are signed – and no more than annually. (See the South African *Promotion of Access to Information Regulations 2002*, ss.2-3 for more.) Otherwise, people could be relying on outdated information, which will be of little value to the populace.
- 45. In line with the observations in paragraph 43 above, regarding the accessibility of the Official Gazette to ordinary people seeking information, consideration should be given removing the exception at the end of s.5(1)(ii) for dissemination of information already published in the Gazette. If the information is considered important – as the list of information under s.5(1)(ii) is – it should be disseminated as widely as possibly, via as many different media as is feasible.

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### **Section 6 – Computerisation of records**

46. This is an excellent provision and constitutes best practice.

### **Section 7 – Declaration of public records**

47. In accordance with the analysis in paragraphs 28 and 29 above and the suggestions contained in paragraph 36 above, consideration should be given to deleting s.7(1). The current focus in the Act on records versus public records is confusing and circular. Focusing instead on the right to access information and/or records is simpler and will therefore be easier to implement.

48. Section 7(2) should be retained, although in accordance with international best practice, all information should be considered for declassification after 10 years, rather than 20 years.

### **[Merge with ss.14-18]: Section 8 – Exclusion of certain record**

49. While keeping in mind the overarching principle of maximum disclosure, it is nevertheless well-accepted that there can be a small number of legitimate exemptions in any access regime to protect against disclosures which would result in serious harm to important interests. There is often disagreement however, about where to draw the line regarding the competing interests of disclosure and non-disclosure. Exemptions to the rule of maximum disclosure should be kept to an absolute minimum and should be narrowly drawn. The key principle underlying any exemption is that its purpose must be to genuinely protect and promote the public interest.

50. International best practice requires that overarching ALL exemptions, there should be a blanket “public interest override” whereby a document which falls within the terms of a *general* exemption provision should still be disclosed if the public interest in the *specific* case requires it (see paragraphs 80-81 below for further discussion).

51. Currently, s.8 purports to set limits on disclosure. As noted in paragraph 31 above, the definition of public records also seeks to set limits on what kind of information can be accessed under the Act. Sections 15-18 also seek to exempt certain information from disclosure. Consideration should be given to collecting all the exemption clauses together in one section. This will assist with implementation; officials will benefit from being able to consider all possible exemptions together. Consideration should then be given to merging, amending and deleting some of the current exemptions. In this context, the analysis in paragraph 31 above and paragraphs 52-55 and 79-91 below should be considered together to inform the drafting of the final set of exemptions.

52. Section 8(a) seeks to exempt entirely customer account information held by banks. There is no need to include such a specific exemption in the Act. Such information will ordinarily be covered by a general exemption which would protect against the unreasonable disclosure of personal information (see paragraph 85 below for further discussion). Consideration should be given to deleting this exemption.

53. Section 8(b) attempts to provide protection to information the disclosure of which would seriously harm national security. This is a legitimate and important exemption. Consideration should be given to moving this provision to sit with the exemptions at ss.15-18 and merging it with the national security exemption currently included in the definition of “public records”. The final drafting of the exemption should ensure that non-disclosure will only be justified where “a serious threat to national security can be demonstrated”.

54. Section 8(c) attempts to provide protection against disclosures which would undermine personal privacy rights. Consideration should be given to merging this provision with the personal privacy exemption in s.17. Notably however, both provisions require reconsideration as they are drafted too broadly. While it is legitimate that a certain level of protection be accorded to the privacy rights of third parties, such rights often need to be balanced against

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the public's right to know, particularly in instances where public officials are themselves asserting the right to privacy to protect against disclosure on their own behalves (see paragraph 85 below for further discussion).

55. Section 8(d) is unnecessary as well as being unjustifiably broad. Private documents can legitimately either be covered by the privacy and person information exemption at s.17 or the commercial and economic affairs exemption at s.18, such that consideration should be given to deleting this exemption. In the event that this exemption is retained, consideration should be given to merging it with s.17 and narrowing its scope. Currently, the drafting of the provision leaves too much room for abuse. For example, what type of information will officials be able to exclude because it is in a "private document"? And why, just because a third party has determined that a document is "confidential", should a public body be required to accept that determination and refuse to disclose information on that basis? Under the current provision, it appears to be open to a private company to submit an environmental report to the government advising of serious environmental hazards but requiring the document to be considered confidential, such that the government may not legally release the information to the public, even if to do so would protect them. This is not justifiable.

### **Section 9 – Duty to assist requestors**

56. It is positive that s.9 imposes a duty on public bodies to assist requestors. However, consideration should be given to deleting the requirement that the type of assistance be "prescribed" in further regulations. This could result in public bodies refusing to assist requestors *until* such steps are prescribed. While it may be appropriate to allow for additional steps to be prescribed, the Act itself should specify a general duty on public officials to assist any requestor under this Act to better exercise their rights under the Act. Sections 18(3) and 19 of the South African *Promotion of Access to Information Act 2000* provide a useful model provision:

- 18(3) (a) *An individual who because of illiteracy or a disability is unable to make a request for access to a record of a public body in accordance with section 18(1) [the section dealing with making requests], may make that request orally.*  
(b) *The information officer of that body must reduce that oral request to writing in the prescribed form and provide a copy thereof to the requestor.*
- 19 (1) *If a requestor informs the information officer of--*  
(a) *a public body that he or she wishes to make a request for access to a record of that public body; or*  
(b) *a public body...that he or she wishes to make a request for access to a record of another public body,*  
*the information officer must render such reasonable assistance, free of charge, as is necessary to enable that requestor to comply with s.18(1).*
- (2) *If a requestor has made a request for access that does not comply with section 18(1), the information officer concerned may not refuse the request because of that non-compliance unless the information officer has—*  
(a) *notified that requestor of an intention to refuse the request and stated in the notice:*  
(i) *the reasons for the contemplated refusal; and*  
(ii) *that the information officer or another official identified by the information officer would assist that requestor in order to make the request in a form that would remove the grounds for refusal;*  
(b) *given the requestor a reasonable opportunity to seek such assistance;*  
(c) *as far as reasonably possible, furnished the requestor with any information (including information about the records, other than information on the basis of which a request for access may or must be refused...held by the body which are relevant to the request) that would assist the making of the request in that form; and*  
(d) *given the requestor a reasonable opportunity to confirm the request or alter it to comply with section 18(1).*

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## **Section 10 – Designation of officials**

57. It is positive that s.10 requires that officers be designated within public bodies to be responsible for receiving requests and ensuring access to information. This can be a useful way of raising awareness of a new access law within a public body and ensuring that the law is effectively implemented and such implementation is properly monitored. For clarity and consistency, consideration could be given to specifically naming these officers Public Information Officers; this is common practice and may make it easier for the public to identify who exactly they need to get in contact with regarding their applications.
58. Consideration should also be given to amending s.10 to explicitly require designated officers to be nominated at the local level, and not just at the headquarters of a public body. This is important to ensure that people in outlying areas and provinces distant from the capital are able to lodge and follow up requests locally. To be effective, access laws should include decentralised procedures. Section 17 of the South African *Promotion of Access to Information Act 2000* provides a good example:

South Africa: s.117(1) *For the purposes of this Act, each public body must, subject to legislation governing the employment of personnel of the public body concerned, designate such number of persons as deputy information officers as are necessary to render the public body as accessible as reasonably possible for requestors of its records.*

- 2) *The information officer of a public body has direction and control over every deputy information officer of that body.*
  - 3) *The information officer of a public body may delegate a power or duty conferred or imposed on that information officer by this Act to a deputy information officer of that public body.*
  - 4) *In deciding whether to delegate a power or duty in terms of subsection (3), the information officer must give due consideration to the need to render the public body as accessible as reasonably possible for requestors of its records.*
  - 5) *Any power or duty delegated in terms of subsection (3) must be exercised or performed subject to such conditions as the person who made the delegation considers necessary.*
  - 6) *Any delegation in terms of subsection (3)--*
    - a) *must be in writing;*
    - b) *does not prohibit the person who made the delegation from exercising the power concerned or performing the duty concerned himself or herself; and*
    - c) *may at any time be withdrawn or amended in writing by that person.*
  - 7) *Any right or privilege acquired, or any obligation or liability incurred, as a result of a decision in terms of a delegation in terms of subsection (3) is not affected by any subsequent withdrawal or amendment of that decision.*
59. It is acceptable that the designated officer be made responsible for processing applications, because the public should have a clear contact within government that they can pin responsibility on in terms of the prompt processing of their application. However, within the public body itself, it is important that the designated officer is provided with all the assistance he/she requires to discharge his/her obligations under the Act. It is not fair that the designated officer should carry the entire burden of processing applications, particularly if the Act imposes fines for non-compliance. Consideration should be given to including an additional clause in the Act specifically requiring other officials in the relevant public body to assist the designated officer if requested. In the event that they do not provide such assistance, their non-compliance with the Act should be sanctioned (see paragraph 108 below for further discussion). Sections 5(4) and (5) of India's *Right to Information Act 2005* provides a good example:
- (4) The Central Public Information Officer or State Public Information Officer, as the case may be, may seek the assistance of any other Officer as he or she considers necessary for the proper discharge of his or her duties.*

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*(5) Any Officer, whose assistance has been sought under sub-section (4), shall render all assistance to the Central Public Information Officer or State Public Information Officer, as the case may be, seeking his or her assistance and for the purposes of any contravention of the provision of this Act, such other officer shall be treated as a Central Public Information Officer or State Public Information Officer, as the case may be.*

### **Section 11 – Functions of designated officials**

60. Section 11 should be amended to take account of the analysis in paragraphs 27-28 and 36 above which recommend a shift away from the focus on public records to one which focuses on access to information and/or records and broadly defines those concepts. Specifically, consideration should be given to rewording s.11 to take account of the many different forms of information that can be accessed under the Act and the fact that some requestors may simply want to inspect the information that they have requested.

### **Section 12 – Applications for obtaining information**

61. Section 12 which sets out how a request is made is a crucial provision. Best practice requires that access procedures should be as simple as possible and designed to be user-friendly for all members of the community, whether illiterate, disabled or geographically distant from centres of power. The current drafting of the provision is unnecessarily vague and introduces unjustifiable limits on access.

#### **Form of application**

62. Consideration should be given to removing the requirement in s.12(1) that only citizens of Pakistan can make an application under the Act. Many jurisdictions throughout the world actually allow any person to request information under their access law, for example, Antigua and Barbuda, Australia, Belize, the United States, United Kingdom, South Africa and Sweden. In Pakistan, this is particularly important because of the number of non-citizens the country accommodates as asylum-seekers and long-term residents. These people may be in the country for a long time and should not be restricted from accessing information which may be of serious importance to their welfare or rights simply because they do not have citizenship.

63. It is also problematic that s.12(1) leaves most of the details of the application form and process to be determined in regulations to be prescribed following promulgation of the Act. This could delay the implementation of the law. In any case, it is unnecessary to require a specific application form to be developed. In practice this requirement may prove an obstacle to access as some people may not have easy access to said forms, for example because they cannot download it from the internet or because they are not proximate to a government office where they can be obtained. As long as the requestor provides sufficient particulars to allow the relevant information to be identified and located, that should be sufficient. Furthermore, it should be possible for applications to be made electronically (see for example, the UK *Freedom of Information Act 2000*, s.8(2)), as well as orally, if coupled with the requirement that the designated officer must render assistance to reduce the application to writing. Consideration should be given to redrafting s.12(1) take account of these issues. Section 6(1) of the Indian *Right to Information Act 2005* provides a useful model:

*A person, who desires to obtain information under this Act, shall make a request in writing or through electronic means in English or Hindi or in the official language of the area in which the application is being made, accompanying such fee as may be prescribed, to-*

*(a) the Central Public Information Officer or State Public Information Officer, as the case may be, of the concerned public authority;*

*(b) the Central Assistant Public Information Officer or State Assistant Public Information Officer, as the case may be,*

*specifying the particulars of the information sought by him or her:*

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*Provided that where such request cannot be made in writing, the Central Public Information Officer or State Public Information Officer, as the case may be, shall render all reasonable assistance to the person making the request orally to reduce the same in writing.*

#### Fees

64. Section 12(1) assumes that some fee will be paid at the time an application for information is submitted. Best practice requires that no fees should be imposed for accessing information, particularly government information, as costs should already be covered by public taxes. At the very least, no application fee should be levied because the initial work required to locate information and determine its sensitivity to disclosure is a routine and expected task of government. This is the case in Trinidad & Tobago where s. 17(1) of the *Freedom of Information Act 1999* specifically states that no fees shall be imposed for applications. Consideration should be given to amending s.12(1) to abolish the imposition of an application fee.
65. If any fees *are* to be imposed, the rates should be determined with a view to ensuring that the costs imposed for access are not so high as to deter potential applicants. At the most, fees should be limited only to cost recovery and a maximum limit should still be set. This approach has been adopted in Scotland for example. Charges should be imposed only to cover reproduction costs, not for search time. Imposing fees in respect of the latter could easily result in prohibitive costs and defeat the intent of the law, particularly if bureaucrats deliberately drag their heels when collating information in order to increase fees. The examples of Jamaica and India should also be followed, where the laws state that *“Notwithstanding the imposition of fees, applicants shall be provided the information free of charge where a public authority fails to comply with the time limits specified in the Act”*. At the very least, consideration should be given to explicitly requiring that any fees imposed should not be prohibitively high, so as to defeat the intention of the law.
66. Consideration should also be given to including an additional clause permitting the waiver of any fees levied under the Act where that is in the public interest, such as where a large group of people would benefit from release/dissemination of the information or where the objectives of the Act would otherwise be undermined (for example, because poor people would be otherwise excluded from accessing important information). Such provisions are regularly included in access laws in recognition of the fact that fees may prove a practical obstacle to access in some cases. A definition of “public interest” may be included to provide direction to officials implementing the law. Section 11(6) of the *Canadian Access to Information Act*, s.29(5) of the *Australian Freedom of Information Act* and s.11 of the Article 19 Model FOI Law provide useful models:

Canada: *The head of a government institution to which a request for access to a record is made under this Act may waive the requirement to pay a fee or other amount or a part thereof under this section or may refund a fee or other amount or a part thereof paid under this section.*

Australia: *Without limiting the matters the agency or Minister may take into account in determining whether or not to reduce or not to impose the charge, the agency or Minister must take into account:*

- (a) whether the payment of the charge, or part of it, would cause financial hardship to the applicant, or to a person on whose behalf the application was made; and*
- (b) whether the giving of access to the document in question is in the general public interest or in the interest of a substantial section of the public.*

67. Considering that so few people have access to the Official Gazette, consideration should be given to deleting or at least amending s.12(2). If people request information already published in the Gazette, it can simply be provided for the same fee that would be required if the person were to access the Gazette themselves.

#### Languages

68. In order to ensure maximum ease for users of the law, consideration should be given to including a further proviso in s.12(1) making it clear that applications may be made in any of

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Pakistan's recognised regional languages (see paragraph 63 above for a good example) . It should be the duty of the relevant public body to translate the request. The alternative, that requestors be required to submit an application only in Urdu or English, could in practice exclude some groups from effectively utilising the law.

#### No reasons to be given

69. Consideration should be given to inserting an additional clause under s.12 clarifying that applications must not require requestors to state a reason for their applications. Paragraph 31 above refers to a useful model clause. Although some bureaucrats argue that requestors should provide reasons to ensure that their applications are not frivolous, s.20 should be sufficient to protect against this. Most Acts in the Commonwealth specifically provide that no reasons need to be provided by an applicant.

#### **Insert new section – Transferring applications**

70. The Act currently does not contain any provisions to deal with a situation where a requestor submits their request to the wrong body. Best practice requires that such applications be transferred to the correct body by the public body which first received the request. Section 8 of the *Jamaican Access to Information Act 2002* provides an example of such a provision:

- 8.—(1) *Where an application is made to a public authority for an official document—*
- (a) which is held by another public authority; or*
  - (b) the subject matter of which is more closely connected with the functions of another public authority,*
- the first mentioned public authority shall transfer the application or such part of it as may be appropriate to that other public authority and shall inform the applicant immediately of the transfer.*
- (2) A transfer of an application pursuant to subsection (1) shall be made as soon as practicable but not later than [X] days after the date of receipt of the application.*

#### **Section 13 – Procedure for disposal of applications**

71. It is positive that s.13 sets short time limits for disposing of applications. However, consideration could still be given to including an additional clause requiring applications for information which relate to life and liberty to be responded to within 48 hours. This requirement has been included in s.7(1) of the *Indian Right to Information Act 2005* and serves an important role in facilitating timely access to information in cases of extreme urgency.

72. It is important that notices advising of the approval or rejection of a request contain sufficient information to enable a requestor to clearly understand their rights and obligations. Thus, consideration should be given to amending s.13(1) to require that positive responses to requests should contain information advising when, where, how and at what cost the requestor can access the document, as well as appeals procedures available in terms of fees and the type of access being provided. Section 25(2) of the *South African Promotion of Access to Information Act 2000* provides a useful model for consideration:

*If the request for access is granted, the notice in terms of subsection (1)(b) must state--*

- (a) the access fee (if any) to be paid upon access;*
- (b) the form in which access will be given; and*
- (c) that the requestor may lodge an [appeal], as the case may be, against the access fee to be paid or the form of access granted, and the procedure (including the period) for lodging the [appeal], as the case may be.*

73. Section 13(2) is confusingly drafted and should be reworked entirely. It appears to attempt to set out the procedures for refusing an application, but this is not specifically stated; the clause is very ambiguously worded.

- Section (2)(a) appears to permit rejection of an application where the application has not furnished sufficient particulars. However, in accordance with the analysis in paragraph 56



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above, assistance should be provided to rectify deficiencies in the application and only if this assistance is not availed should the application then be rejected. To reject deficient applications without giving requestors an opportunity to fix them would unnecessarily increase the costs for requestors who will be required to pay a new fee for each amended application they submit.

- Section (2)(a) also appears to permit rejection of an application where the required fees have not been paid. This is not appropriate. Rather, in practice a time limit should be included for payment of the fee, after which the application may lapse.
- Sections 2(b) and (c) both refer to the same information, namely information which is exempt under the Act. The provisions should be merged and this should then be made explicit; the provision should refer to the specific exemptions provisions on which a rejection can be based (once the exemption provisions have been merged, amended and clarified, as suggested throughout this paper).

74. Once the grounds for rejection are clarified and properly reflected in the wording of s.13(2), consideration should be given to clarifying the required contents of the relevant rejection notice. Where an application is rejected, it is important that the decision is promptly conveyed to the requestor along with details regarding the reason(s) the request has been rejected (so that the applicant has sufficient information upon which to appeal) and how the requestor can appeal the decision, the time limits and the cost. Section 26 of the Australian *Freedom of Information Act 1982* provides a useful model provision:

*Where, in relation to a request, a decision is made relating to a refusal to grant access to a document in accordance with the request or deferring provision of access to a document, the decision-maker shall cause the applicant to be given notice in writing of the decision, and the notice shall:*

- (a) state the findings on any material questions of fact, referring to the material on which those findings were based, and state the reasons for the decision;*
- (b) where the decision relates to a document of an agency, state the name and designation of the person giving the decision; and*
- (c) give to the applicant appropriate information concerning:*
  - (i) his or her rights with respect to review of the decision;*
  - (ii) his or her rights to make a complaint to the Ombudsman in relation to the decision; and*
  - (iii) the procedure for the exercise of the rights referred to in subparagraphs (i) and (ii); including (where applicable) particulars of the manner in which an application for review under section 54 [dealing with internal reviews] may be made.*

75. The certification required under s.13(3) is a good innovation, but the wording of the provision should be reconsidered to take account of the fact that information may not just be contained in a written record. How such information and/or records are to be certified needs to be clarified.

### **Insert new section – Partial disclosure**

76. The draft Act does not currently include any provisions allowing for partial disclosure of information. Consideration should be given to including such a provision to ensure that bodies do not deny disclosure if it is at all possible to sever exempt information from a document and release the remainder. Section 10 of the Indian *Right to Information Act 2005* provides a useful example:

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

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(2) Where access is granted to a part of the record under sub-section (1), the Central Public Information Officer or State Public Information Officer, as the case may be, shall give a notice to the applicant, informing,-

- (a) that only part of the record requested, after severance of the record containing information which is exempted from disclosure, is being provided;
- (b) the reasons for the decision, including any findings or any material question of fact, referring to the material on which those findings were based;
- [(c) the name and designation of the person giving the decision;
- (d) the details of the fees calculated by him or her and the amount of the fee which the applicant is required to deposit; and
- (e) his or her rights with respect to the review of the decision regarding non-disclosure of part of the information [see paragraph 74 above for further discussion], the amount of fee charged or the form of access provided, including the particulars of the senior officer specified under sub-section (1) of section 19 or the Central Information Commission or the State Information Commission, as the case may be, time limit, process and any other form of access.

### **Insert new section – Deemed refusal**

77. Experience with implementation of access to information regimes has shown that many officials avoid the application of the law by simply ignoring requests. In this context, consideration should be given to including a “deeming” provision, which would operate to treat a failure to respond to a request in time as a refusal. Experience has shown that the absence of such a deeming provision can result in confusion over whether and when appeals can be lodged and dealt with. A deeming provision will ensure that inaction will equate to active refusal, thereby allowing appeal provisions to be invoked. Section 27 of the South African *Promotion of Access to Information Act 2000* provides one model:

*If an information officer fails to give the decision on a request for access to the requestor concerned within the period contemplated in [section X], the information officer is, for the purposes of this Act, regarded as having refused the request.*

### **Insert new section – Form of access**

78. Consideration should be given to including a specific provision dealing with the forms of access that can be requested/provided. Section 18(3) from the Trinidad and Tobago *Freedom of Information Act 1999* is a general provision commonly found in access laws. Sections 20(4)-(6) from the Ugandan *Government Access to Information Act 2005* are more interesting, particularly ss.(6) which specifically provides for the provision of information in forms which will facilitate access to information by disabled people. Likewise, s.12 of the Canadian *Access to Information Act 1985* provides for the provisions of translations where that would be in the public interest.

Trinidad & Tobago: 18(3) *Subject to this section and to section 16(2), where the applicant has requested access in a particular form, access shall be given in that form.*

(4) *If the form of access requested by the applicant -*

- (a) *would interfere unreasonably with the operations of the public authority;*
- (b) *would be detrimental to the preservation of the document or having regard to the physical nature of the document, would not be appropriate; or*
- (c) *would involve an infringement of copyright subsisting in a person other than the State, access in that form shall be refused but access may be given in another form.*

Uganda: 20(4) *Where a person has requested access in a particular form and for a reason referred to in subsection (3), access in that form is refused but access is given in another form, the fee charged may not exceed what would have been charged if the person had been given access in the form requested.*

(5) *Where a person with a disability is prevented by that disability from reading, viewing or listening to the record concerned in the form in which it is held by the public body concerned, the information officer shall, if that person so requests, take reasonable steps*

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to make the record available in a form in which it is capable of being read, viewed or heard by that person.

- (6) Where access to a record is to be given to a person with a disability and the person requests that access to be given in an alternative format, a copy of the record shall be given in an alternative format -
- (a) immediately, if the record exists in the alternative format that is acceptable to that person; or
  - (b) within a reasonable period to allow the public body to prepare or cause to be prepared the alternative format, unless the making of the alternative format is considered outrageously expensive compared to the information required.

Canada: (1) A person who is given access to a record or a part thereof under this Act shall, subject to the regulations, be given an opportunity to examine the record or part thereof or be given a copy thereof.

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

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

#### **Section 14 – Exempt information from disclosure**

79. This section is satisfactory. However, as noted previously, consideration should be given to moving all the exemptions in the Act – in the definitions section, s.8 and ss.14-18 – to sit together and comprise an exemptions chapter. This will improve readability and practical implementation.

#### **Insert new section – Public interest override**

80. As discussed in paragraph 50 above, in accordance with international best practice, consideration should be given to including a public interest override in the Act, to which all exemptions will be subject. This recognises the fact that in practice, even though certain information might legitimately fall within a legal exemption, in the specific circumstances of the case, there still may be overriding public interest reasons which nevertheless justify disclosure. The test for exemptions is in 3 parts:

- (i) Is the information covered by a legitimate exemption?
- (ii) Will disclosure cause substantial harm?
- (iii) Is the likely harm greater than the public interest in disclosure?

81. The current exemptions contained in the Act are seriously problematic because none of them are tempered by a public interest override. This is a major deficiency. Consideration should be given to including a public interest override provision in the Act as a matter of priority, in accordance with best practice. Section 8(3) of the *Indian Right to Information Bill 2004* and s.32 of the *Ugandan Access to Information 2004* provide examples of such clauses:

India – s.8(3): *Notwithstanding anything in the Official Secrets Act, 1923 nor any of the exemptions permissible in accordance with sub-section (1), a public authority may allow access to information, if public interest in disclosure outweighs the harm to the protected interests.*

Uganda - s.32: *In determining whether disclosure is justified in the public interest, the public authority shall have regard to considerations, including but not limited to, obligations to comply with legal requirements, the prevention of the commission of offences or other unlawful acts, miscarriage of justice, abuse of authority or neglect in the performance of an official duty, unauthorised use of public funds, the avoidance of wasteful expenditure of public funds or danger*

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*to the health or safety of an individual or the public, or the need to prepare and protect the environment, and the need to improve public participation in, and understanding of, public policy making.*

### **Insert new section – National security**

82. In line with the recommendations in paragraph 31 above, consideration should be given to including a specific, tightly-drawn national security exemption in the Act. Section 30 of the *Model Freedom of Information Act*<sup>4</sup>, developed by the well-respected international NGO, Article 19, provides a good model:

*A body may refuse to indicate whether or not it holds a record, or refuse to communicate information, where to do so would, or would be likely to, cause serious prejudice to the defence or national security of [insert name of State].*

### **Section 15 – International relations**

83. This type of exemption is commonly found in right to information legislation. It is appropriate that the exemption sets a sufficiently high threshold of harm which is required to justify non-disclosure.

### **Section 16 – Disclosure harmful to law enforcement**

84. This type exemption is commonly found in right to information legislation. However, this particular provision has been drafted too broadly and should be amended. Specifically:

- Section 16(c) should be reconsidered to make it clear that it only refers to confidential police sources, rather than sources of any and all confidential information held by public bodies;
- Section 16(e) should be narrowed; in its current form it could be used to deny the public important information, particularly because it is not coupled with a public interest override. While it is understandable that protection needs to be afforded against the undermining of security systems designed to protect personal property, at the same time it is possible that legitimate requests regarding public works construction contracts or the location of certain public assets may be unfairly denied by recalcitrant officials on the basis of this provision.

### **Section 17 – Privacy and personal information**

85. This type exemption is commonly found in right to information legislation, but the current provision is too broad and unequivocal. Best practice usually requires a request can only be denied if access would involve the “unreasonable disclosure” of private information. As noted in paragraph 54 above, while the protection of personal privacy rights is legitimate, there may still be instances where private should still be in the public interest. Section 26 of Uganda’s *Access to Information Act 2005* provides a very useful model to draw on when formulating a provision to protect third parties’ privacy rights:

- (1) *Subject to subsection (2), an information officer shall refuse a request for access if its disclosure would involve the unreasonable disclosure of personal information about a person, including a deceased individual.*
- (2) *A person may be granted access to a record referred to in subsection (1) in so far as the record consists of information -*
  - (a) *about a person who has consented in writing to its disclosure to the person requesting the record;*
  - (b) *that was given to the public body by the person to whom it relates and the person was informed by or on behalf of the public body, before it is given, that the information belongs to a class of information that would or might be made available to the public;*
  - (c) *already publicly available;*

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<sup>4</sup> See <http://www.article19.by/publications/freedominfoaw/> for a copy of the Model FOI Law.

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- (d) about a person who is deceased and the person requesting the information is -
    - (i) the person's next of kin; or
    - (ii) making the request with the written consent of the person's next of kin; or
  - (e) about a person who is or was an official of a public body and which relates to the position or functions of the person, including, but not limited to -
    - (i) the fact that the person is or was an official of that public body;
    - (ii) the title, work address, work phone number and other similar particulars of the person;
    - (iii) the classification, salary scale or remuneration and responsibilities of the position held or services performed by the person; and
    - (iv) the name of the person on a record prepared by the person in the course of employment.

86. In the context of this exemption, consideration should be given to including additional provisions in the Act which allow for third parties to make representations to the designated officer when the disclosure of their personal information is being considered. Section 11 of India's *Right to Information Act 2005* provides a good example:

*(1) Where a... Public Information Officer...intends to disclose any information or record, or part thereof on a request made under this Act, which...has been supplied by a third party and has been treated as confidential by that third party, the...Public Information Officer...shall within five days of the receipt of the request, give a notice to such a third party of the request and of the fact that the Public Information Officer... intends to disclose the information or record, or part thereof, and invite the third party to make a submission in writing or orally, regarding whether the information should be disclosed, and such submission of the third party shall be kept in view while taking a decision about disclosure of information... (2) Where a notice is served by the... Public Information Officer ...under sub-section (1) to a third party in respect of any information or record or part thereof, the third party shall, within ten days from the date of receipt of such notice, be given the opportunity to make representation against the proposed disclosure.*

*(3) Notwithstanding anything contained in section 7, the... Public Information Officer... shall within forty days after the receipt of the request under section 6, if the third party has been given the opportunity to make representation under sub-section (2), make a decision as to whether or not to disclose the information or record or part thereof and give in writing the notice of his decision to the third party.*

*(4) A notice given under sub-section (3) shall include a statement that the third party to whom the notice is given is entitled to prefer an appeal under section 19 against the decision.*

### **Section 18 – Economic and commercial affairs**

87. This exemption is commonly found in right to information legislation, but it is not clear why in this instance different tests of harm have been required when judging whether non-disclosure of information is permissible. Consideration should be given to adopting a consistent harm test.

88. Consideration should also be given to deleting s.18(c) because the efficacy of the provision in practice is doubtful. To work, s.18(c) would require the designated officer to make a decision about the competitive standing of the requestor in relation to the public body. It is not clear how the designated officer would be in a position to make this judgement, particularly when one notes that a key principle of access laws is that the motives and identity of requestors should not be a determining factor in deciding on disclosure, except where personal privacy is at issue. In any case, in reality it will be possible for a competitor to simply ask a third party who is not a competitor of the public body to make the request and pass the information on.

89. To ensure comprehensive protection of the State's legitimate economic interests, consideration should be given to including an additional clause exempting information the disclosure of which could cause substantial harm to the economic interests of the State or the

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ability of the government to manage the economy. Section 31 of Article 19's Model FOI Law provides a useful model:

*(1) A body may refuse to indicate whether or not it holds a record, or refuse to communicate information, where to do so would, or would be likely to, cause serious prejudice to the ability of the government to manage the economy of [insert name of State].*

**Insert new section – Premature disclosure**

90. In accordance with the analysis in paragraph 31(a) above, consideration should be given to including an additional provision to protect against premature disclosure of key information. Section 32(1) of Article 19's Model Freedom of Information Law provides a useful model:

*A body may refuse to indicate whether or not it holds a record, or refuse to communicate information, where to do so would, or would be likely to: -*

- a. cause serious prejudice to the effective formulation or development of government policy;*
- b. seriously frustrate the success of a policy, by premature disclosure of that policy...*

**Insert new section – Health and safety exemption**

91. Consideration could be given to including an additional exemption to protect against disclosures which might cause harm to an individual. Section 28 of the Article 19 Model FOI Law provides a good example:

*A body may refuse to indicate whether or not it holds a record, or refuse to communicate information, where to do so would, or would be likely to, endanger the life, health or safety of any individual.*

**Section 19 – Recourse to Mohtasib and Federal Tax Ombudsman and the Judiciary**

92. It is very positive that the Act allows for appeals to independent oversight bodies, namely the Mohtasib/Tax Ombudsman and the courts. Best practice international standards require that access regimes include an appeals mechanism which is independent of government, as well as cheap, quick and procedurally simple. Reading the current appeals provisions as a whole, the appeals regime appears to consist of one internal appeal, followed by an appeal to the Mohtasib or Tax Ombudsman and then an appeal to the courts. This is satisfactory, but the actual provisions should be redrafted for clarity, as the current clauses contain some ambiguities and gaps.

**Types of complaints**

93. In accordance with the analysis in paragraph 26 above regarding the definition of "complaint", consideration should be given to clarifying in s.19(1) that complaints can be made to the appeals bodies in respect of both full *or partial* refusals of access, as well as delays and decisions regarding forms of access and the fees to be charged for access. Appeals should also be allowed in relation to the imposition of fines under s.20, unless that provision is deleted as recommended (see paragraph 106 below for further discussion). The wording of the provision also needs to be amended to take into account the fact that in practice appeals complaints will be made to the appeals bodies not only from actual decisions, but also from deemed decisions (ie. where no decision was made within time). Consideration should be given to replicating the provisions in the Indian *Right to Information Act 2005* which includes a "catch all" complaint provision at s.18(1)(f):

*18(1) Subject to the provisions of this Act, it shall be the duty of the Central Information Commission or State Information Commission, as the case may be, to receive and inquire into a complaint from any person,—*

- (a) who has been unable to submit a request to a Central Public Information Officer or State Public Information Officer, as the case may be, either by reason that no such officer has been appointed under this Act, or because the Central Assistant Public*

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*Information Officer or State Assistant Public Information Officer, as the case may be, has refused to accept his or her application for information or appeal under this Act for forwarding the same to the Central Public Information Officer or State Public Information Officer or senior officer specified in sub-section (1) of section 19 or the Central Information Commission or the State Information Commission, as the case may be;*

- (b) who has been refused access to any information requested under this Act;*
- (c) who has not been given a response to a request for information or access to information within the time limit specified under this Act;*
- (d) who has been required to pay an amount of fee which he or she considers unreasonable;*
- (e) who believes that he or she has been given incomplete, misleading or false information under this Act; and*
- (f) in respect of any other matter relating to requesting or obtaining access to records under this Act.*

#### Appeal steps

94. Currently the internal appeal and the independent appeal to the Mohtasib/Tax Ombudsman are both described in s.19(1). Consideration should be given to separating out the steps of the appeals process into separate clauses to enhance clarity and make the each step of the appeals process clearer.
95. Section 19(1) currently requires the time by which internal appeals must be disposed off to be prescribed in regulations. However, this is an essential element of the appeals regime; it is not appropriate that it be left to be regulations. The appeals regime should be developed holistically, so that each step of the process works with the next and combines to produce a process which is simple, quick and effective. Consideration should be given to requiring the internal appeal to the head of the public body to be disposed off within 14 days.
96. Taking into account the discussion in paragraph 95 above, consideration should be given to extending the time for disposals of appeals to the Mohtasib/Tax Ombudsman under s.19(2) to 30 days. This will allow the Mohtasib/Tax Ombudsman sufficient time to investigate the case if necessary. This will be particularly important in respect of appeals from provincial offices – getting hold of the necessary records and interviewing officials may take more time.
97. It is not clear whether fees or the lodgement of specific applications will be required to initiate the appeals process. As noted in paragraph 64 above, ideally no such fees should be imposed, but if they are, any fees under the Act should be determined with a view to ensuring that fees are not set so high as to effectively bar ordinary people from effectively utilising the provision of the Act.
98. In relation to complaints forms, consideration should be given to the discussion in paragraphs 63 above which notes that the imposition of application forms can prove a practical obstacle for people who are illiterate, indigent and/or simply do not have easy access to such documentation.

#### Investigative powers

99. Section 19(2) currently makes no mention of the Mohtasib's/Tax Ombudsman's powers to investigate complaints. Although the Mohtasib/Tax Ombudsman may have some investigatory powers under their own constituent Acts, in order to ensure that the Mohtasib/Tax Ombudsman can perform their appeal functions under this Act effectively, it is imperative that they are explicitly granted the powers necessary to undertake a complete investigation and ensure enforcement of their orders (see paragraphs 106-109 below for more re enforcement). The powers granted to the Canadian Information Commissioner under s.36 of the *Canadian Access to Information Act 1982* provide a useful model:

*(1) The Information Commissioner has, in relation to the carrying out of the investigation of any complaint under this Act, power:*

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(a) to summon and enforce the appearance of persons before the Information Commissioner and compel them to give oral or written evidence on oath and to produce such documents and things as the Commissioner deems requisite to the full investigation and consideration of the complaint, in the same manner and to the same extent as a superior court of record;

(b) to administer oaths;

(c) to receive and accept such evidence and other information, whether on oath or by affidavit or otherwise, as the Information Commissioner sees fit, whether or not the evidence or information is or would be admissible in a court of law;

(d) to enter any premises occupied by any government institution on satisfying any security requirements of the institution relating to the premises;

(e) to converse in private with any person in any premises entered pursuant to paragraph (d) and otherwise carry out therein such inquiries within the authority of the Information Commissioner under this Act as the Commissioner sees fit; and

(f) to examine or obtain copies of or extracts from books or other records found in any premises entered pursuant to paragraph (d) containing any matter relevant to the investigation.

(2) Notwithstanding any other Act of Parliament or any privilege under the law of evidence, the Information Commissioner may, during the investigation of any complaint under this Act, examine any record to which this Act applies that is under the control of a government institution, and no such record may be withheld from the Commissioner on any grounds.

100. Consideration should also be given to including an additional provision in the Act replicating s.30(3) of the Canadian *Access to Information Act 1982*, which gives the Information Commissioner the power to initiate his/her own investigations. In practice, this will be particularly useful in allowing the Mohtasib/Tax Ombudsman to investigate delays in providing information, because these cases will often not reach the Mohtasib/Tax Ombudsman as a complaint if the information is finally handed over, but may still be worthy of review and the imposition of a penalty, particularly if the Mohtasib/Tax Ombudsman uncovers a pattern of non-compliant behaviour.

#### Decision-making powers

101. In addition to the Mohtasib's/Tax Ombudsman's investigative powers, it is also useful to clearly set out their decision-making powers, to ensure that bureaucrats cannot attempt to ignore their decisions as recommendatory only. It should be clear that the Mohtasib/Tax Ombudsman have the power to make binding determinations in respect of this Act, compel parties to take action, enforce compliance with orders and impose sanctions as appropriate. Section 88 of the Queensland *Freedom of Information Act 1992*, s.82 of the South African *Promotion of Access to Information Act* and s.19(8) of the Indian *Right to Information Act 2005* provide very useful examples:

Queensland: (1) *In the conduct of a review, the Commissioner has, in addition to any other power, power to—*

(a) *review any decision that has been made by an agency or Minister in relation to the application concerned; and*

(b) *decide any matter in relation to the application that could, under this Act, have been decided by an agency or Minister;*

*and any decision of the Commissioner under this section has the same effect as a decision of the agency or Minister.*

(2) *If it is established that a document is an exempt document, the Commissioner does not have power to direct that access to the document is to be granted.*

South Africa: *The [appeal body] hearing an application may grant any order that is just and equitable, including orders--*

a) *confirming, amending or setting aside the decision which is the subject of the application concerned;*

b) *requiring from the information officer or relevant authority of a public body or the head of a private body to take such action or to refrain from taking such action as the court considers necessary within a period mentioned in the order;*

c) *granting an interdict, interim or specific relief, a declaratory order or compensation; or*



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d) as to costs.

India: *In its decision, the Central Information Commission or State Information Commission, as the case may be, has the power to—*

- (a) *require the public authority to take any such steps as may be necessary to secure compliance with the provisions of this Act, including—*
  - (i) *by providing access to information, if so requested, in a particular form;*
  - (ii) *by appointing a Central Public Information Officer or State Public Information Officer, as the case may be;*
  - (iii) *by publishing certain information or categories of information;*
  - (iv) *by making necessary changes to its practices in relation to the maintenance, management and destruction of records;*
  - (v) *by enhancing the provision of training on the right to information for its officials;*
  - (vi) *by providing it with an annual report in compliance with clause (b) of sub-section (1) of section 4;*
- (b) *require the public authority to compensate the complainant for any loss or other detriment suffered;*
- (c) *impose any of the penalties provided under this Act;*
- (d) *reject the application.*

102. At a minimum consideration should be given to including an additional provision making it explicit that the internal appeal body, the Mohtasib/Tax Ombudsman and the courts have the power to impose the fines permitted under s.21.

103. Consideration should be given to including a deeming provision in s.19 to require that failure by the internal appeal body and/or by the Mohtasib/Tax Ombudsman to deal with the complaint in time will be treated as a refusal such that remaining appeals processes can then be availed. It is important that inaction at any stage of the process will not limit the complainant's right to invoke the remaining appeals processes.

#### Notification of decisions

104. In accordance with the analysis in paragraph 74 above, decisions of the internal appeal body and the Mohtasib/Tax Ombudsman should be notified to all parties and such notices should detail the grounds for the decision, as well as providing information regarding the remaining avenues for appeal and time limits.

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

105. Consideration should be given to including an additional provision in the Act which sets out the burden of proof in any appeal under the Act. In accordance with best practice, the burden of proof should be placed on the body refusing disclosure and/or otherwise applying the law to justify their decision. This is justified because it will be unfair and extremely difficult for members of the public – who will never have seen the document they are requesting – to be forced to carry the burden of proof. Section 19(5) of the Indian Right to Information Act 2005 provides a useful model:

*In the appeals proceedings, the onus to prove that a denial of request was justified shall be on the Central Public Information Officer or State Public Information Officer, as the case may be, who denied the request.*

#### **Section 20 – Dismissal of frivolous, vexatious and malicious complaint**

106. While some freedom of information laws permits summary dismissal of frivolous, vexatious and malicious complaints, it is virtually unheard of to impose a fine on applicants whose requests are summarily dismissed. In practice, the threat of such a fine will likely act as a major disincentive to using the Act. People may be reluctant to run the risk that an official will classify their application as frivolous. More problematically, there is considerable room for corrupt officials to abuse this provision to discourage applications; there are no guidelines for what will be deemed frivolous or vexatious and there is no oversight for the imposition of such fines. In any case, there is no real cost in processing such applications, such that it is not clear why such a strong disincentive has been included in the Act. The time taken to consider

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such applications is minimal as they can usually be dismissed *prima facie* without first spending time searching for the documents. Consideration should be given to deleting this provision.

### **Section 21 – Offences**

107. It is very positive that the draft Act contains offence and penalties for non-compliance with the Act; rights must have remedies. Penalties for unreasonably delaying or withholding information and for deliberate non-compliance are crucial if an access law is to have any real meaning. Lack of penalties weakens the whole foundation of an access regime. Sanctions for non-compliance are particularly important incentives to timely disclosure in jurisdictions where the bureaucracy is unused to hurrying at the request of public.
108. It is a good start that s.21(1) makes it an offence to destroy a record and s.21(2) makes it an offence to unreasonably fail to disclose records. However, consideration should be given to extending the list of offences as there are many additional ways for a resistant bureaucrat to undermine the objectives of the Act. The offences provisions should be comprehensive and identify all possible offences committed at all stages of the request process – for example, delays in processing requests, obstruction of the appeals process, failure to response to a request for assistance by a designated officer and non-compliance with appeal decisions. Most Acts contain offences and penalty provisions. Two have been replicated for consideration below, namely: s.49 of the Article 19 Model Law, s.54 of the UK *Freedom of Information Act 2000* and s.20 of the Indian *Right to Information Act 2005*:

Article 19: (1) *It is a criminal offence to wilfully: -*

- a. *obstruct access to any record contrary to this Act;*
- b. *obstruct the performance by a public body of a duty under this Act;*
- c. *interfere with the work of the [appeals and/or monitoring body]; or*
- d. *destroys records without lawful authority...or*
- e. *conceals or falsifies records.]*

(2) *Anyone who commits an offence under sub-section (1) shall be liable on summary conviction to a fine not exceeding [insert appropriate amount] and/or to imprisonment for a period not exceeding two years.*

United Kingdom: (2) *If a public authority has failed to comply with [a notice of the appeals body, the appeals body] may certify in writing to the court that the public authority has failed to comply with that notice.*

(3) *Where a failure to comply is certified under subsection (1), the court may inquire into the matter and, after hearing any witness who may be produced against or on behalf of the public authority, and after hearing any statement that may be offered in defence, deal with the authority as if it had committed a contempt of court.*

India: (1) *Where the Central Information Commission or the State Information Commission, as the case may be, at the time of deciding any complaint or appeal is of the opinion that the Central Public Information Officer or the State Public Information Officer, as the case may be, has, without any reasonable cause, refused to receive an application for information or has not furnished information within the time specified under sub-section (1) of section 7 or malafidely denied the request for information or knowingly given incorrect, incomplete or misleading information or destroyed information which was the subject of the request or obstructed in any manner in furnishing the information, it shall impose a penalty of two hundred and fifty rupees each day till application is received or information is furnished, so however, the total amount of such penalty shall not exceed twenty-five thousand rupees:*

*Provided that the Central Public Information Officer or the State Public Information Officer, as the case may be, shall be given a reasonable opportunity of being heard before any penalty is imposed on him:*

*Provided further that the burden of proving that he acted reasonably and diligently shall be on the Central Public Information Officer or the State Public Information Officer, as the case may be.*

(2) *Where the Central Information Commission or the State Information Commission, as the case may be, at the time of deciding any complaint or appeal is of the opinion that the*

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*Central Public Information Officer or the State Public Information Officer, as the case may be, has, without any reasonable cause and persistently, failed to receive an application for information or has not furnished information within the time specified under subsection (1) of section 7 or malafidely denied the request for information or knowingly given incorrect, incomplete or misleading information or destroyed information which was the subject of the request or obstructed in any manner in furnishing the information, it shall recommend for disciplinary action against the Central Public Information Officer or the State Public Information Officer, as the case may be, under the service rules applicable to him.*

109. It is commendable that penalties are also provided in s.21 to sanction non-compliance. Penalties are an important tool for combating bureaucratic resistance to disclosure which could operate to undermine the objectives of the Act, particularly where the exposure of corrupt practices is involved. In this context, fines need to be sufficiently large to act as a serious disincentive to bad behaviour. Corruption – the scourge that access laws assist to tackle – can result in huge windfalls for bureaucrats. The threat of fines and imprisonment can be an important deterrent, but to serve this purpose, they must be large enough to balance out the gains from corrupt practices. Consideration should therefore be given to removing the maximum limit set on the fine that may be imposed under s.21(2).
110. It is positive that s.21 envisages penalties being imposed on individual officers, rather than just their department. This is a novel step, but it is one that is appropriate in its context. In reality, without personalised penalty provisions, many public officials may be content to shirk their duties, safe in the knowledge that it is their employer that will suffer the consequences, rather than themselves. It is therefore important in combating entrenched cultures of secrecy that individual officers are faced with the threat of personal sanctions if they are non-compliant. It should be noted however, that the relevant provisions need to be carefully drafted to ensure that defaulting officers, at whatever level of seniority, are penalised. Thus, it will not be appropriate for penalty provisions to assume that penalties will always be imposed on the designated officer. If the designated officer has genuinely attempted to discharge their duties but has been hindered by the actions of another official, the designated officer should not be made a scapegoat. Instead, the official responsible for the non-compliance is the one who must be punished.

### **Section 22 – Access not to constitute an offence**

111. It is very positive that the Act includes protection to ensure that officials applying the new law will not be penalised if their bona fide attempts to implement the Act result in the inadvertent disclosure of sensitive information. Breaking down bureaucratic resistance to a new open government law is, in any case, a difficult process because many officials will not be comfortable disclosing information which has traditionally been closely guarded. They will be even less inclined to implement the law if they are worried that they might still be penalised, for example under a still-operative Official Secrets Act. In that context, a provision like s.22 provides officials with much-needed reassurance.

### **Section 23-7 – Whistleblowers; Act to override other laws; Miscellaneous**

112. These sections accord with good practice.

### **Insert new section – Monitoring**

113. Many laws now include specific provisions empowering a specific body, such as an existing National Human Rights Commission or Ombudsman, to monitor and support the implementation of the Act. These bodies are usually required to submit annual reports to Parliament and are often empowered to make recommendations to Parliament on improving implementation of the Act and breaking down cultures of secrecy in practice. Consideration should be given to including an additional provision in the Act placing the responsibility on a specific body for monitoring the Act and reporting to Parliament on its efficacy. Sections 38 and 39 of the *Canadian Access to Information Act 1982* and section 40 of the *Trinidad & Tobago Freedom of Information Act 1999* provide useful examples:

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Canada: 38. *[Insert name of body] shall, within three months after the termination of each financial year, submit an annual report to Parliament on the activities of the office during that financial year.*

39. (1) *[Insert name of body] may, at any time, make a special report to Parliament referring to and commenting on any matter within the scope of the powers, duties and functions of the [the body] where, in the opinion of [the body], the matter is of such urgency or importance that a report thereon should not be deferred until the time provided for transmission of the next annual report of [the body] under section 38.*

Trinidad & Tobago: 40.(1) *The Minister shall, as soon as practicable after the end of each year, prepare a report on the operation of this Act during that year and cause a copy of the report to be laid before each House of the Parliament.*

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

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

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

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

114. To ensure that the Act is being implemented effectively, it is strongly recommended that the law provides for a compulsory parliamentary review after the expiry of a period of two years from the date of the commencement of the Act, plus regular 5 year reviews after that. Internationally, such reviews of legislation have shown good results because they enable governments, public servants and citizens to identify stumbling blocks in the effective implementation of the law. Identified areas for reform may be legislative in nature or procedural. In either case, a two year review would go a long way in ensuring that the sustainability, efficacy and continued applicability of the law to the changing face of the Maldives. It would enable legislators to take cognizance of some of the good and bad practice in how the law is being used and applied and enable them to better protect the people's right to information. Section 38 of the *Jamaican Access to Information Act 2002* provides a useful model, because it requires that "(1) *This Act shall be reviewed from time to time by a committee of both Houses of Parliament appointed for that purpose. (2) The first such review shall be conducted not later than two years after the appointed day.*"

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

115. It is increasingly common to include provisions in the law mandating a body to promote the Act and the concept of open governance. Such provisions often specifically require that the

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government ensure that programmes are undertaken to educate the public and the officials responsible for administering the law. Consideration should be given to including an additional provision in the Act which places the responsibility on a specific body(s) for public awareness and training on the Act. Section 20 of the Article 19 Model FOI Law and section 83 of the South African *Promotion of Access to Information Act 2000* provide good models:

Article 19: *Every public body shall ensure the provision of appropriate training for its officials on the right to information and the effective implementation of this Act.*

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

- (a) *develop and conduct educational programmes to advance the understanding of the public, in particular of disadvantaged communities, of this Act and of how to exercise the rights contemplated in this Act;*
- (b) *encourage public and private bodies to participate in the development and conduct of programmes referred to in paragraph (a) and to undertake such programmes themselves; and*
- (c) *promote timely and effective dissemination of accurate information by public bodies about their activities.*

(3) *[Insert name of body] may--*

- (a) *make recommendations for--*
  - (i) *the development, improvement, modernisation, reform or amendment of this Act or other legislation or common law having a bearing on access to information held by public and private bodies, respectively; and*
  - (ii) *procedures in terms of which public and private bodies make information electronically available;*
- (b) *monitor the implementation of this Act;*
- (c) *if reasonably possible, on request, assist any person wishing to exercise a right contemplated in this Act;*
- (d) *recommend to a public or private body that the body make such changes in the manner in which it administers this Act as [insert name of body] considers advisable;*
- (e) *train information officers of public bodies;*
- (f) *consult with and receive reports from public and private bodies on the problems encountered in complying with this Act;*

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