
An analysis of the Uganda
draft Access to Information Bill 2004
(Developed by MP Abdu Katuntu)

**Submitted by the
Commonwealth Human Rights Initiative, March 2004**

"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. HURINET (Uganda) has forwarded a copy of the draft *Access to Information Bill 2004* to the Commonwealth Human Rights Initiative (CHRI) for review and comment. CHRI understands that the Bill has been prepared by Member of Parliament Abdu Katuntu, with a view to submitting it to parliament as a Private Member's Bill.
2. CHRI welcomes the opportunity provided to civil society to comment on the Bill. However, we note that we have been unable to ascertain whether the Bill in its current form was actually developed in consultation with civil society. Notably, 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. Participation in the legislative development process requires that officials proactively encourage the involvement of civil society groups and the public broadly. 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 development of legislation; inviting submissions from the public at all stages of legislative drafting; convening public meetings to discuss the impact of the law and how to use it; and strategically and consistently using the media to raise awareness and keep the public up to date on progress.

ANALYSIS OF DRAFT BILL AND SUGGESTIONS FOR IMPROVEMENT

3. CHRI has already presented a paper in Uganda (at the Workshop to Develop Guiding Principles on Freedom of Information hosted by the Ugandan Campaign for Freedom of Information on 30 January) on the value of the right to information in the Ugandan context. The paper set out key principles which should underpin any right to information law (see Annex 1). The current note focuses solely on providing an analysis of the draft Bill. 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*¹, provides more detailed discussion of these standards. The critique below draws on this work.² CHRI has suggested amendments, areas for improvement and issues for further consideration.
4. CHRI notes that the copy of the Bill that was received was a scanned version of the original document; some provisions were missing and/or their wording was garbled as a result of the scanning procedure. We therefore wish to caveat our analysis with the caution that we were unable to thoroughly critique the specific text of the Bill because the wording of the provisions was often jumbled.

¹ http://www.humanrightsinitiative.org/publications/chogm/chogm_2003/default.htm

² All references to legislation can be found on CHRI's website at http://www.humanrightsinitiative.org/programs/ai/rti/international/laws_&_papers.htm

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5. Overall, CHRI's assessment is that the Bill is quite comprehensive, although there are some key areas which CHRI suggests should be reconsidered – in particular the exemptions provisions. Clearly, a significant amount of research was undertaken before the Bill was drafted, a fact which is reflected in the detail of many of the provisions. Conversely however, there is some repetition in the Bill and some provisions could usefully be redrafted and/or synthesised for clarity and to ensure their effective implementation in practice. We have also suggested some restructuring, as related provisions are sometimes scattered in different parts of the draft Bill.

Memorandum to the Bill

6. Both the Memorandum and the objects section clearly state that the Bill attempts to give effect to the constitutional right to information in s.41. The extension of constitutional protection to a right is important because it enshrines an absolute minimum standard which cannot be violated by parliament. However, it should be recalled in this context, that while constitutional rights cannot be restricted (other than as permitted by the Constitution), they can be extended. Thus, in accordance with Article 41, it would still be legally permissible to develop legislation which covers not only state bodies, but also private bodies (as in South Africa, for example, where private bodies are covered if information is "required for the exercise or protection of any rights"). Likewise, it would be permissible to extend the right to information to non-citizens. Article 41 only requires that, *at a minimum, "every citizen has a right of access to information in the possession of the State or any other organ or agency of the State"*.
7. The parameters of the draft Bill should be reconsidered, with a view to entrenching the principle of maximum disclosure which should be at the heart of the all right to information legislation. In so doing, the drafters should take into account that the Constitution lays down only minimum standards for the right.

Part I - Preliminary

8. CHRI notes that the definitions section has not been scanned. This omission is troublesome, as the definitions of concepts such as "State agency", "record", "information", etc have a huge impact on the scope of the Bill. CHRI has analysed the Bill on the basis of our understanding of the definitions of these key terms taking into account the surrounding context of the Bill's other provisions.
9. Section 4, which deals with the application of the law, provides some assistance in setting out the coverage of the Act. It is positive that s.4(1) applies to "information" as well as "records". The inclusion of the previous term serves to broaden the application of the law because allowing access to "information" means that applicants are not 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 videos, models or materials. This can be a serious oversight because 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. The term information should be used throughout the law, unless a provision specifically deals with the form in which information is held. It should be clearly recognised in this context, that the two terms are *not* interchangeable (see in contrast, the headings in Parts II and III). The entire Bill should be reviewed with this critique in mind.
10. Section 4 also fails to clearly make the law applicable to all arms of government, executive, legislative and judicial, with s.4(2) even going further and including a blanket exemption for Cabinet and Cabinet Committee records.
- There is no reason why the executive, and Cabinet and its Committees specifically, should entirely be excluded from the application of the law. 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 (see paragraph 55 below for further discussion on this point), unless disclosure of such information would prejudice the protection of legitimate interests. Notably, such legitimate interests are protected via the exemptions provisions, such that a broad exemption for entire bodies is unnecessary and unjustifiable.

- Taking into account the exemptions that have been included in the Bill to ensure that disclosure of information does not prejudice a pending trial, the judiciary can legitimately (and explicitly) be brought within the purview of the law. Notably, it is a matter of public policy that the judicial system and the trial process are kept open to the public. In this context, care must be taken to ensure that the exemptions contained at s.4(2)(b) and (c) do not make unjustifiable inroads into judicial openness and exempt public access to trial/court information to which the public is currently entitled.
11. Taking into account the comments in paragraph 7 above regarding the extension of the constitutional right to information, consideration should be given to extending the coverage of the Act from public authorities only, to cover information held by private bodies which is necessary to exercise or protect a person's rights as well. This accords with the best practice example provided by Part 3 of the South African *Promotion of Access to Information Act 2000* (POAIA). Private bodies are increasingly exerting significant influence on public policy, especially as a result of the outsourcing of public functions, such that they should not be exempt from public scrutiny simply because of their private status. In the event that this broad extension of coverage is not acceptable, consideration should be given to including at least all of those bodies exercising public functions.
 12. In accordance with international standards, consideration should also be given to extending the Bill to require bodies not only to disclose information upon request, but also to be 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. Such 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. Consideration should be given to including provisions on proactive disclosure. Section 7(1) of the Trinidad & Tobago *Freedom of Information Act 1999* and s.4 of the Indian *Freedom of Information Act 2000* provide good examples:

Trinidad & Tobago: (a) *cause to be published in the Gazette and in a daily newspaper circulating in Trinidad and Tobago [and on their website and to keep copies for inspection at all of their offices] as soon as practicable after the commencement of this Act -*

- (I) *a statement setting out the particulars of the organisation and functions of the public authority, indicating, as far as practicable, the decision-making powers and other powers affecting members of the public that are involved in those functions and particulars of any arrangement that exists for consultation with, or representation by, members of the public in relation to the formulation of policy in, or the administration of, the public authority;*
 - (II) *a statement of the categories of documents that are maintained in the possession of the public authority;*
 - (III) *a statement of the material that has been prepared by the public authority under this Part for publication or inspection by members of the public, and the places at which as person may inspect or obtain that material;*
 - (IV) *a statement listing the literature available by way of subscription services;*
 - (V) *a statement of the procedure to be followed by a person when a request for access to a document is made to a public authority;*
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- (VI) a statement specifying the officer responsible within each public authority for the initial receipt of, and action upon, notices under section 10, requests for access to documents under section 13 and applications under section 36;
 - (VII) a statement listing all boards, councils, committees and other bodies constituted by two or more persons, that are part of, or that have been established for the purpose of advising, the public authority, and whose meetings are open to the public, or the minutes of whose meetings are available for public inspection;
 - (VIII) if the public authority maintains a library or reading room that is available for public use, a statement of that fact including details of the address and hours of opening of the library or reading room; and
- (b) during the year commencing on 1st January next following the publication, in respect of a public authority, of the statements under paragraph (a) that are the statements first published under that paragraph, and during each succeeding year, cause to be published in the Gazette and in a daily newspaper circulating in Trinidad and Tobago statements bringing up to date the information contained in the previous statements.

India: (b) publish [widely and in a manner easily accessible to the public]...

- (i) the particulars of its organisation, functions and duties;
 - (ii) the powers and duties of its officers and employees and the procedure followed by them in the decision making process;
 - (iii) the norms set by the public authority for the discharge of its functions;
 - (iv) rules, regulations, instructions, manuals and other categories of records under its control used by its employees for discharging its functions;
 - (v) the details of facilities available to citizens for obtaining information; and
 - (vi) the name, designation and other particulars of the Public Information Officer;
- (c) publish all relevant facts concerning important decisions and policies that affect the public while announcing such decisions and policies;
- (d) give reasons for its decisions, whether administrative or quasi-judicial to those affected by such decisions;
- (e) before initiating any project, publish or communicate to the public generally or to the persons affected or likely to be affected by the project 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 interests of natural justice and promotion of democratic principles.

Part II – Access to Records

13. There is some confusion between the interaction of s.4(1) and s.5. Both provisions deal with the issue of what bodies are covered by the Act but their definitions are differently worded. This could cause unnecessary confusion. Consideration should be given to including a definition of “public bodies” in s.2 (the Definitions clause), and then using this term throughout the Bill. Consideration should also be given to moving s.4 into Part II so that s.4, which places a duty on bodies to provide access, sits with s.5 which grants a corresponding right to people to obtain access.
14. Section 5 confers the right of access is “citizens” only. Taking account of the discussion in paragraph 7 above, consideration should be given simply to allowing all persons, whether citizens, residents or non-citizens, access to information under the law.
15. Sections 6 to 9 set up a good framework for accessing information. It is particularly positive that s.6(3) explicitly states that the purpose of the request is not relevant. It is commendable that ss.8 (2) and 9 implement best practice by specifically addressing access by the disabled and the making of translations. However, in a multilingual country like Uganda, it should be noted that the requirement in s.9 for translation to be in the public interest before it is undertaken may mean that, in practice, people may still not be provided with access information in a language they understand. Consideration should be given to including guidelines explaining what public interest means in this context of s.9.

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16. To enhance readability and practical implementation of the law, consideration should be given to moving ss.8 and 9 to sit with s.23 which deals with the form of access as these provisions all address similar subject matter.

Part III – Manner of Access to Information

17. Section 10 sets up a decentralised access regime which relies upon department-level Information Officers to implement the law. It is positive that the law places ultimate responsibility on the head of each agency, while allowing the day-to-day discharge of functions under the law to be delegated. One minor issue for consideration is the fact that s.10(1) places responsibility explicitly on Permanent Secretaries and CEOs only. Consideration should be given to a broader definition such as “the head of the body” to allow for differences in institutional structures.
18. Section 11 requires requests to be in writing but does not discuss whether such written requests can be submitted electronically (see for example, the UK *Freedom of Information Act 2000*, s.8(2)). Section 11(2) sets out what must be mentioned in an application. While ss.11(2)(a) and (d) are common minimum requirements, consideration should be given to making ss.(b) and (c) optional. Otherwise, a request may be rejected in accordance with s.6(1)(a) simply because the applicant did not specify the preferred form and/or language of access.
19. To improve readability and ensure similar obligations are grouped together, consideration should be given to moving the current ss.13(1)-(3), which deal with the duties of Information Officers to assist applicants with making applications, to sit after s.11.
20. Sections 12(1) and (3) overlap with s.19. To improve readability, it is proposed that ss.12(1) and (3) be moved and merged with s.19. The current provisions in both sections should be reconsidered for clarity:

- Section 12(1)(c) currently requires access to be provided within the same period as notice of access is to be given. Considering that the Bill envisages that fees may need to be paid prior to access, in practice it is not clear how this provision will be implemented. Commonly, such provisions are drafted so that the time between the fee notice being sent and the fee being paid is disregarded for the purpose of calculating the period between the request being made and access granted. Section 7 of the Indian *Freedom of Information Act 2002* provides a useful model.

s.7 - Provided further that where it is decided to provide the information on payment of any further fee representing the cost of providing the information, he shall send an intimation to the person making the request, giving the details of the fees determined by him, requesting him to deposit the fees and the period intervening between the despatch of the said intimation and payment of fees shall be excluded for the purpose of calculating the period of thirty days referred to above.

- Positive responses should not only advise when, where, how and at what cost the requester can access the document, but also what the options are for appealing against the fees decision. Section 25(2) of the South African *Promotion of Access to Information Act 2000* provides a useful example:

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 requester 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.*

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- It is positive that s.12(3) requires an Information Officer to provide specified information to the applicant if their request is rejected. However, best practice requires that the relevant notice also include information regarding the applicant's appeal rights, including the time for appeal, details of the appellate authority and the process for appealing. Section 26 of the Australian *Freedom of Information Act 1982* provides a useful example:

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.*

21. Section 12(2), which deals with extensions of time limits for responding to requests, largely duplicates s.20. It is proposed that s.12(2) be moved and merged with s.20.
22. As noted in paragraph 19 above, ss.13(1)-(3) should be moved to sit after s.11.
23. Consideration should be given to merging s.13(4) into s.14(1) as they both deal with transfers of request. The test for transfer in s.13(4) is looser than that in s.14(1). Further consideration will need to be given to how these provisions will work in practice and a single test decided upon. The current transfer provisions appear to be an amalgamation of transfer provisions from a number of jurisdictions, but the result of merging the various models is a test for transfer which is difficult to apply in practice.
 - The reference in the final line of s.14(1) to the “public body with the highest commercial interest” applies only where the information falls under s.14(1)(d), but has no useful meaning otherwise. A simpler test may be to separate out ss.14(1)(a)-(c) from s.14(1)(d) or to require that the request is transferred to “the public body with the closest connection, or in the case of s.14(1) (d) the highest commercial interest”.
 - In any case, consideration should be given to deleting s.14(1)(b) which appears to overlap with the concept that is captured in s.14(1)(c) – possession of information without a close connection to the body holding the information. This provision is designed to ensure that a request is transferred to the body which has the best understanding of the information requested, in order that the decision made based on a full understanding of the significance of the information.
 - It is proposed that s.13(4)(a) be deleted. To ensure certainty for the public and to minimise the risk of public officials shirking their responsibilities, there should be no room for officials to require applicants to redirect their requests. Public officials have access to the internal workings of government and can much more easily ensure effective transfers of requests. Further, if applicants are required themselves to transfer the request, they may also be required to pay a new fee by the new body receiving the request. This problem could be exacerbated if a request for one piece of information needs to be handled by multiple bodies.
24. There is no section 15 in the draft Bill.

25. Section 16 is laudable for requiring that records must be preserved if they are the subject of a request. However, best practice requires that consideration be given to including additional provisions on record keeping and records management:

- 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 the access legislation. Under s.46, United Kingdom *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. Consideration should be given to including an additional provision requiring that appropriate record keeping and management systems are in place to ensure the effective implementation of the law. For example, *"Every public body is under an obligation to maintain its records in a manner which facilitates the right to information as provided for in this Act."* Consideration should also be given to empowering an appropriate body to develop guidelines or a Code on records management.
- Consideration should be given to including a provision which allows for sanction on officials who are guilty of destroying records and/or obstructing legitimate access in any other way. Without remedies, s.16 will have little real deterrent effect on officials who are determined to ensure that certain information does not see the light of day. (See paragraph 67 below for a more detailed discussion on penalty provisions and examples of model provisions.)

26. Section 17 is a useful inclusion. However, it is not clear how s.17(3) will work in practice. Within what time period will an Information Officer be responsible for responding to a request which has previously been denied? How are Information Officers expected to keep track of such rejections and to know when previously lost information is found?

27. Section 18, which deals with deferring requests, is comprehensive. However, consideration should be given to expanding the test in s.18(3) to allow for disclosure to be permitted if the applicant can demonstrate that it is in the public interest. Also, it should be noted that the test of "substantial prejudice" which applicants must show is a high threshold for an individual to meet.

28. As discussed in paragraphs 20 and 21 above, ss.19 and 20 should be merged with s.12. Section 19 rightly imposes a time limit within which decisions must be made and notified. Consideration should 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 *Freedom of Information Act 2002* and serves an important role in facilitating timely access to information in cases of extreme urgency.

29. The draft Bill does not currently include any provisions allowing for partial disclosure of information. This option should be provided 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 *Freedom of Information Act 2002* provides a useful example:

(1) If 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 obtain any information that is exempted from disclosure under this Act and which can reasonably be severed from any part that contains exempted information.

(2) Where access is granted to a part of the record in accordance with sub-section (1), the person making the request shall be informed,--

(a) that only part of the record requested, after severance of the record containing information which is exempted from disclosure, is being furnished; and

(b) of the provisions of the Act under which the severed part is exempted from disclosure.

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30. Section 21 is an extremely useful provision. Experience with implementation of access to information regimes has shown that many officials avoid the application of the law by simply ignoring requests. This provision ensures that inaction will equate to active refusal, thereby allowing appeal provisions to be invoked.
31. Section 22 allows for the imposition of fees. Ideally, no fees should be imposed for accessing information, particularly government information, as such fees should already be covered by public taxes. However, if fees are permitted, consideration should be given to including explicit wording stating that any fees which are imposed should be reasonable and should 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.
32. Consideration should also be given to including in s.22 an explicit statement that fees may be waived in certain circumstances. Section 30A of the Australian *Freedom of Information Act 1982* provides a useful example:
- (1) *Where:*
- (a) *there is, in respect of an application to [a body] requesting access to a document or under subsection 54(1) requesting a review of a decision relating to a document, an application fee (whether or not the fee has been paid); and*
- (b) *[the body] considers that the fee or a part of the fee should be remitted for any reason, including either of the following reasons:*
- (i) *the payment of the fee or of the part of the fee would cause or caused financial hardship to the applicant or a person on whose behalf the application was made;*
- (iii) *the giving of access is in the general public interest or in the interest of a substantial section of the public;*
- the agency or Minister may remit the fee or the part of the fee.*
33. The provisions in s.23(1) which set out how records can be accessed entrench the limitations on access resulting from the focus on records instead of information. As noted in paragraph 9 above, people should be able to access information such as materials used in government construction. Such items constitute information in the broad sense, but are not covered when only records are considered. Despite the catch-all provision at s.23(f), it is suggested that the scope of s.23 should be reconsidered taking into account the discussion in paragraph 9 above. The comments in paragraph 16 above should also be taken into account.
34. CHRI does not have expertise in access to medical health records, a specific subject area which is often dealt with separately due to the special public policy issues that attach to the disclosure of such information. As such, CHRI has not attempted to critically analyse s.24. We recommend that this provision be discussed with medical professional bodies and NGO's working on the issues of patients' rights.

Part III [sic] – Exemptions from Access

35. 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. Exemptions to the rule of maximum disclosure should be kept to an absolute minimum and should be narrowly drawn.
36. The key principle underlying any exemption is that its purpose must be to genuinely protect and promote the public interest. Even where exemptions are included in legislation, they should not apply to documents more than 10 years old. Further, ALL exemptions should be subject to a blanket "public interest override", whereby a document which falls within the terms of a *general* exemption provision should still be disclosed if the public interest in the *specific* case requires it.

The test for exemptions (articulated by Article 19) 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? Section 37 of the draft Bill is an excellent public interest override provision. It is very positive that the override applies to all of the exemptions in Part IV. This accords with best practice and is to be commended. It is suggested however, that s.37 be moved to become the first provision in Part IV, so that the provision clearly overlays the reading of all the provisions that follow. This would reinforce the overriding importance of the section and send a clear message to officials responsible for applying the law that the public interest in disclosure should be a clear guiding principle in their decision-making. At the moment, the provision is embedded at the end of the Part, a fact which may diminish the importance it is accorded by officials. Consideration should also be given to removing the requirement in s.37(c) for the public interest to “clearly” outweigh the harm contemplated; the inclusion of the word “clearly” may be interpreted to unjustifiably restrict access which is in the public interest. Finally, consideration should be given to including risks to “public health” in s.37(b).

38. Notably, in practice, the public interest override is often applied by appeals bodies or higher authorities, because the official to whom day-to-day application of the law is delegated will often be reluctant to take on responsibility for determining what is in the public interest. In any case, public officials are well known to err on the side of caution and to favour an interpretation of the public interest which accords with the protection of the government interest. Taking into account these practical issues, even with the inclusion of a public interest override it remains important to ensure that the exemptions included in the law are tightly drawn and are the minimum required to protect legitimate interests. Currently, the list of exemptions included in the draft Bill is too long and too detailed. While it is laudable that the draft Bill has attempted to draft the exemptions in detail, presumably to ensure they are not so broad as to encourage misuse, this same detail may well allow lazy, ignorant or overly cautious bureaucrats to automatically exempt a wide range of information simply because it has been specifically mentioned in the law.
39. Section 25 is a common exemption dealing with disclosures which could affect international or intra-state relations. Currently, s.26 also attempts to deal with information affecting international relations (see s.26(1)(i), (e), (h) and (i)(i)). To ensure that similar subject matter is dealt with under the same provisions, consideration should be given to merging the references to international relations in s.26 with s.25. Further, s.25 should include a general clause at the outset stating that it applies to protect against disclosure of information which could cause serious prejudice to international or inter-state relations.
40. Section 26 is extremely detailed, covering a very broad range of information relating to the defence of the country, international relations (see the previous paragraph for comments) and the “suppression of subversive or hostile activities”. In relation to the last category of information, it is positive that an exhaustive definition of this phrase is included at s.26(2), to prevent its broad application and potential misuse. We note however, that CHRI has been unable to obtain a copy of the *Anti-Terrorism Act* referred to at s.26(2)(g) and we have therefore been unable to assess the appropriateness of the definition.
41. Section 26(1) sets a test for exemption which requires disclosure to be “injurious”. It is positive that a limitation has been placed on the exemption, but this is a relatively low threshold. Consideration should be given to adopting international best practice standards which suggest an alternative test of whether disclosure would cause “serious prejudice”.
42. It is of serious concern that the sub-sections expanding on s.26(1) do not contain any limiting requirement that disclosure be likely to cause injury/serious prejudice. Instead, the sub-sections in s.26(1) are preceded simply with the words “without limiting the generality of the foregoing [a

public body] *may refuse* the following information”. The absence of any limiting phrase at the end of the clause may be interpreted to allow the exemption of information if it falls into any of the categories listed in s.26(1)(a)-(i) whether or not disclosure would be likely to be injurious. The wording of s.26(1) should be carefully reconsidered with a view to ensuring that the sub-sections are limited.

43. It is also questionable whether it is appropriate in s.26(1)(d)(ii) to exempt not only information relating to the defence of Uganda but information relating to “allied states”. This broadens the application of the exemption significantly, and introduces a very political notion of “allies”. Such a determination is difficult for public officials to make. In any case, information relating to allies should be covered by s.25 which relates to the disclosure of information which would prejudice international relations (see comments in paragraph 39 above). Similarly, s.26(1)(h) could more effectively be covered under s.25.
44. Section 27 is a common inclusion, aimed at protecting information which would prejudice legitimate law enforcement activities. The objective of the section is appropriate, but it is currently drafted too widely. For example:
- S.27(1) should include an overall limitation like that currently included only in s.27(1)(c), which requires that information can only be withheld if the disclosure “could reasonably expect to be injurious to [specific interests]”. Without the inclusion of such a caveat, the section currently allows information to be withheld simply because it relates to “the enforcement of law and order” (s.29(1)(a)(ii)).
 - Although the introductory phrases of s.27(2) attempt to limit the exemption to disclosures that “could be reasonably expected to facilitate the commission of a crime”, the provision then applies to “any” information relating to three specific areas (see ss.(a)-(c)).

Consideration should be given to redrafting ss.27(1) and (2) to ensure that they apply narrowly to only restrict disclosures that “may substantially prejudice”, “be likely to cause harm”, “may reasonably be injurious”, etc to law enforcement activities.

45. Section 28 is satisfactory. It is legitimate that third party rights in relation to personal information be balanced against the public’s right to know.
46. Section 29 attempts to deal with commercial information in which third parties have an interest. The exemptions contained in s.29 are largely legitimate, but some provisions are currently too broad. In particular, sections 29(1)(c) and (d) do not even require that the information to be disclosed was given in confidence, but only that it might prejudice a company’s “competitive position” or “interfere” with their negotiations. A huge amount of information in which the public has a legitimate interest could be covered under these provisions. In this age where privatisation and outsourcing is increasingly being undertaken by governments, the private sector’s influence and impact on the public is growing. In this context, it is crucial that private bodies are not placed beyond the public’s scrutiny. Considering that one of the Bill’s objectives is to ensure transparency and accountability, it is not justified that the interests of commercial enterprises be given such priority over the public’s right to know. Consideration could be given to redrafting the provision along the lines of the ‘commercial and confidential information’ exemption in the Article 19 Model FOI Law:

29.(1) A request for information may be refused if-

- (a) the information was obtained from a third party and to grant the request would constitute an actionable breach of confidence;*
- (b) the information is required to be held in confidence pursuant to an international legal obligation;*
- (c) the information contains a trade secret;*

(d) *the information was obtained in confidence from a third party and to grant the request would, or could reasonably be expected to, seriously prejudice the legitimate commercial or financial interests of that third party.*

47. Section 29(4) should be deleted because it duplicates s.37.
48. Section 30 overlaps considerably with s.29, such that consideration should be given to deleting the entire section and/or merging it with s.29. For example, s.29(1)(b) and s.30(1)(a) attempt to cover similar information; the main difference is that s.29 is more tightly drawn and therefore less open to abuse. Likewise, s.29(1)(b) covers similar information to that covered by ss.30(1)(b) and (c), except that the latter provisions are broader. At the very least, consideration should be given to merging ss.30(1)(b) and (c) because they currently overlap significantly. It is recommended that the new sub-section could read: *"If the record consists of information supplied in confidence by a third party and its disclosure could prejudice future supply of similar information or information from the same source and it is in the public interest that such information continue to be supplied"*.
49. Section 31 legitimately attempts to protect against disclosures which would result in the endangerment of individuals and/or property. However, s.31 currently overlaps to some extent with s.27(2)(c). Consideration should be given to merging s.27(2)(c) with s.31. If it is felt that the subject matter of both sections should remain separate, consideration should be given to improving readability by moving s.31 so that it sits after s.27.
50. Section 32 is satisfactory.
51. Section 33 is a common inclusion, aimed at protecting against disclosures which would reasonably be expected to cause serious prejudice to the economic interests of the State or the ability of the government to manage the economy of the State. Consideration should be given to reviewing the exact terms of s.33(1) however, to ensure the scope of the provision is clear. For example, the phrase "financial welfare of the state" is capable of a variety of interpretations and could therefore easily be misapplied. Section 33(2) is satisfactory except for the final line which appears to be out of context. This line should be deleted. Likewise, s.33(5) should be deleted. (NB: There is no s.33(3) or (4).)
52. Section 34 should be reconsidered. It is an extremely specific exemption and potentially covers a huge amount of information collected by Government. It is not clear why a specific exemption is included to protect research. In this respect, it is notable that third party information is already protected under ss.28-30. In any case, the test that disclosure would cause "serious disadvantage" is too vague because then nature of the interests being protected is not clarified. Must the disadvantage be commercial? If not, does it cover personal disadvantage, such as securing scholarships or being subjected to unwanted media attention? The test could easily be abused in its current form.
53. Section 35(1) should be reconsidered. The provision allows the exemption of records relating to advice, discussions and deliberations internal to the bureaucracy. Such records contain exactly the type of information that the public *should* be able to access if they are to be able to meaningfully scrutinise government decision-making. It is vital that the public knows what advice and information the Government bases its decisions on and how the Government reaches its conclusions. It is not enough in this context to argue that disclosure of this kind of information would inhibit internal discussions. Officials should be able – and be required – to ensure that their advice can withstand public scrutiny. To fear such transparency raises questions about the soundness of the entire decision-making process. It should also be recalled that the remaining exemptions in Part III [sic] operate to ensure that sensitive material is still protected. The only aspect of s.35(1) which should be retained is the exemption of policy information the premature disclosure of which could frustrate the success of the policy. The State has a legitimate interest in ensuring its policies are not undermined because they are released to the public prematurely. It

should be noted though, that this provisions assumes that the information will eventually be disclosed – it is only premature disclosure that is protected.

54. Section 35(2) should be reconsidered.

- Section 35(2)(a) legitimately attempts to protect exam and audit information. However, the word “could” should be removed from the sub-section; the test for exemption should require the effectiveness of the testing procedures to actually be in jeopardy.
- Section 35(2)(b) should be deleted. It is overly complicated and the type of information being exempted is anyway already covered under ss.28-30 relating to the protection of third party information.
- Section 35(2)(c) should be deleted. As discussed in paragraph 54 above, the public should be able to scrutinise the Government’s decision-making processes. Draft documents comprise part of this process. As has been show in Britain in relation to advice provided in relation to the Iraq war, it has been very important for the public to be able to scrutinise how the bureaucracy’s advice to the Government changed over time.
- Section 35(3) should apply to information covered by the whole Bill and should reduce the maximum exemption time limit from 20 years to 10 years. This accords with international best practice standards.

55. Section 36 is satisfactory.

Part IV: Third Party Intervention

56. Taking into account the analysis of ss.28-30 in paragraphs 45-48 above, CHRI accepts that the inclusion of provisions to protect third party information interests in specified circumstances is appropriate. However, the provisions in Part IV are currently confusingly drafted - they overlap significantly with the exemptions provisions currently contained in ss.28-30, but make no reference to those sections. It appears that the purpose of Part IV is to allow third parties an opportunity to explain why the exemptions in s.29 should be applied to information in which they have an interest. If this is the case, the provisions in Part IV would more usefully sit with s.29. Notably, at present Part IV does not provide a similar opportunity in respect of the type of third party information referred to in s.28. Consideration should be given redrafting the provisions in Part IV to cover both personal and commercial third party information.

57. It is also questionable whether Part IV in its current form is capable of being implemented to achieve its objectives. Currently, it appears that third party representations will only be requested where the public authority has already decided to disclose the information (see s.38). However, if third party rights are to be genuinely considered, representations should be called for at the outset and considered as part of the overall decision-making process. It is also not clear how the time limits for representations under s.38(3)(c) and 39(1) will interact with the time limits in s.19; clearer instructions should be given to the public officials responsible for implementing the law.

58. It is recommended that ss.28 and 29 and Part IV be reconsidered with a view to merging the provisions – keeping them within Part III on exemptions to ensure that the third party exemptions continue to be covered by the public interest override in s.37 – and clarifying the access regime to be applied to information which relates to third parties.

Part V: Complaint and Appeals

59. It is very positive that the draft Bill includes detailed provisions permitting appeals against decisions not to release information. However, it is a major flaw in the appeals framework that the draft Bill only allows for one “internal appeal” (to the Permanent Secretary of the Public Service) after which complainants are required to go the expense of taking their case to 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. While the courts satisfy the first criteria of independence, they are notoriously slow and can be difficult to access for the common person.

60. In any case, it is our assessment that the current appeals process as currently designed is seriously flawed and should be reconsidered. Section 40 appoints the Permanent Secretary of the Public Service (PSPS) as the Chief Information Officer (CIO), while s.41(1) makes the CIO the first point of appeal for people who are aggrieved by the decision of an Information Officer. Unlike the provisions dealing with Information Officers, no allowance is made for the CIO to delegate his/her powers. It is inconceivable in reality that the PSPS could be expected to deal with all of the appeals that will be brought under the new access law. The PSPS already has a full set of duties and his/her entrenched position within the heart of the public service could in practice result in conflicts of interest. Further, it is unlikely that the PSPS will have the appropriate skills to handle appeals considering the Bill envisages investigations being undertaken. The PSPS's position is predominantly administrative/managerial, not investigative or quasi-judicial. In light of the fact that best practice requires that an *independent* appeals mechanism should be included in the law, we recommended that this internal mechanism be removed from the draft Bill or at the very least replaced with a department level internal appeal process in order to diffuse the responsibility.
61. Whether or not some form of internal appeal is included in the appeal framework, consideration should still be given to including an additional non-court independent appeals mechanism in the final Bill. A new body need not necessarily be set up – for example, the Ombudsman or a current tribunal could take on the additional responsibilities. Alternatively, of course, consideration can be given to setting up a new Information Commission.
62. Howsoever the appeal mechanism is designed and whatever body or authority is chosen, the investigative powers referred to in s.42(1) and (2) should be retained and extended to ensure that the appeal can be properly considered. 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:*
- (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.*
63. Section 42(3) should be deleted as it is currently unjustifiably broad. It removes all of the appeal authority's discretion in terms of transparency of his/her investigations despite the fact that ss.48(2) and (3) already serve to protect against disclosure of sensitive material during appeals.

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64. Section 43 sets out the manner of making a complaint. It is recommended that s.43(1)(a) be reconsidered as there is no real reason why the complaint should be in a prescribed form. Requiring a specific form be used may make the appeals process less accessible to the common person for no justifiable reason.
65. Section 44 is generally good in that it sets clear time limits for decision-making and a workable framework for providing notice of decisions. However, s.44(3) fails to satisfactorily detail the decision-making powers of the appeal authority. Later in the draft Bill, section 50 sets out the powers of the Court in relation to appeals under the law. Consideration should be given to providing the first appeals authority with the same powers.
66. Notably, s.44 also requires further consideration because it fails to provide the appeals authority with the powers to impose penalties or to ensure enforcement of its orders. Rights needs remedies and without the ability to compel compliance with the decisions of the appeal authority and impose penalties, recalcitrant public authorities may simply choose to ignore appeal decisions they disagree with. In reality, without penalty provisions, public authorities may just deny access to information in the first instance, secure in the knowledge that no negative consequences will follow for them if their decision is eventually overturned on appeal. Consideration should be given to including an additional provision setting out a penalties regime available to discipline officials and/or authorities failing to comply with the terms of the law. The new article should also specifically state who – the first appeals authority, the courts or any other body – can impose the penalty. A number of model provisions have been included below for consideration:
- s.12 of the Maharashtra (India) *Right to Information Act 2002*:
 - (1) *Where any Public Information Officer has without any reasonable cause, failed to supply the information sought, within the period specified...the appellate authority may, in appeal impose a penalty of rupees two hundred fifty, for each day's delay in furnishing the information, after giving such Public Information Officer a reasonable opportunity of being heard.*
 - (2) *Where it is found in appeal that any Public Information Officer has knowingly given -
 - (a) incorrect or misleading information, or
 - (b) wrong or incomplete information ;the appellate authority may impose a penalty not exceeding rupees two thousand, on such Public Information Officer as it thinks appropriate after giving such officer a reasonable opportunity of being heard...*
 - (4) *The penalty under sub-sections (1) and (2) as imposed by the appellate authority, shall be recoverable from the salary of the Public Information Officer concerned, or if no salary is drawn, as an arrears of land revenue.*
 - s.54 of the UK *Freedom of Information Act 2000*:
 - (1) *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.*
 - (2) *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.*
 - s.49 of the Article 19 Model Law:
 - (3) *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.]*

(4) 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.

67. Consideration should be given to including a “deemed decision” provision within s.44, similar to that in s.21 of the draft Bill, to ensure that if no action is taken on the appeal the complainant will not be restrained from invoking the remaining appeals processes.
68. Section 45 relating to appeals involving third parties is thorough but could as easily have been covered under s.42(4), by simply requiring notice to be given to the complainant, Information Officer and any relevant third party(s). Consideration should be given to merging s.45 with s.42.
69. The remaining provisions are generally satisfactory. It is very positive that s.46 explicitly permits complainants to appeal to the High Court. Likewise, it is highly commendable that s.48 requires that the High Court be given access to all documents when it is considering an appeal. Such a provision is vital to ensuring that the Court can exercise proper oversight of the decisions of bodies covered by the law. In accordance with s.49(3), the burden of proof also correctly lies with the authority making the decision.

Part VI: Report to Parliament

70. It is very positive that s.51 places an obligation on public bodies to monitor and report annually on the implementation of the law. Increasingly, access to information laws have included provisions empowering a specific body, such as an existing National Human Rights Commission or Ombudsman, to monitor and support the implementation of the Act. 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. Consideration should be given to drawing on the best practice of other access regimes and providing more guidance to bodies on the nature of their reporting requirement. Section 40 of the Trinidad & Tobago *Freedom of Information Act 1999* provide a useful example:

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;*

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- (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.

Suggested Additional Provisions

71. The draft Bill does not include a number of provisions commonly included in right to information legislation. The remainder of this analysis suggests a number of extra provisions that should be included in the final Bill to strengthen the overall access regime and enable the regime to operate more effectively in practice. The recommendations are in no particular order.
72. A good access law should include an explicit provision which makes it clear that the new law overrides all other inconsistent legislation. A right to information law should be comprehensive, both in the right it extends and the restrictions it recognises. The list of exemptions included in the law should be exhaustive and other laws should not be permitted to extend them. If other laws restricting the right are kept on the law books, there will be confusion about which provisions have priority – secrecy or openness. Consideration should be given to including an additional clause which explicitly provides that the law will override inconsistent legislation. Section 14 of the Indian *Freedom of Information Act 2002* provides a good model:

Act to have overriding effect

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

73. In order to support maximum information disclosure, the law should also provide protection for “whistleblowers”, that is, individuals who disclose information in contravention of the law and/or their employment contracts because they believe that such disclosure is in the public interest. Whistleblower protection is based on the premise that individuals should be protected from legal, administrative or employment-related sanctions for releasing information on wrongdoing. The inclusion of strong whistleblower protection is important in order to send a message to the public and officials that the government is serious about opening up to legitimate scrutiny. Consideration should be given to including an additional article dealing with whistleblower protection. Section 47 of the Article 19 Model FOI Law³ provides a useful model:

(1) No one may be subject to any legal, administrative or employment-related sanction, regardless of any breach of a legal or employment obligation, for releasing information on wrongdoing, or that which would disclose a serious threat to health, safety or the environment, as long as they acted in good faith and in the reasonable belief that the information was substantially true and disclosed evidence of wrongdoing or a serious threat to health, safety or the environment.

(2) For purposes of sub-section (1), wrongdoing includes the commission of a criminal offence, failure to comply with a legal obligation, a miscarriage of justice, corruption or dishonesty, or serious maladministration regarding a public body.

74. Officials responsible for making decisions regarding disclosure of information may legitimately be concerned that wrong decisions on their parts, that is, decisions which result in the disclosure of information that their superiors believe should not have been released, could result in action being taken against them. Similar concerns could be harboured at an institutional level. In order to

³ <http://www.article19.by/publications/freedominfo/w/>

encourage openness and guard against this possibility, consideration should be given to including additional provisions to protect officials/bodies acting in good faith to discharge their duties under the law. Section 89 of the South African *Promotion of Access to Information Act 2000* and section 38 of the Trinidad and Tobago *Freedom of Information Act 1999* provide good examples:

South Africa: *No person is criminally or civilly liable for anything done in good faith in the exercise or performance or purported exercise or performance of any power or duty in terms of this Act.*

Trinidad & Tobago: *(1) Where access to a document has been given in accordance with the requirements of this Act or in good faith, in the belief that it was required to be given in accordance with this Act, unless malice is proved –*

- (a) no action for defamation, breach of confidence or infringement of copyright may be brought against the public authority or against the responsible Minister, or an officer or employee of the public authority as a result of the giving of access;*
- (b) no action for defamation or breach of confidence may be brought, in respect of any publication involved in the giving of access by the public authority, against –*
 - (I) any person who was the author of the document; or*
 - (II) any person as a result of that person having supplied the document or the information contained in it to the public authority;*
- (c) no person shall be guilty of an offence by reason only of having authorised, or having been involved in the giving of the access.*

(2) The giving of access to a document, including an exempt document, in consequence of a request shall not be taken for the purposes of the law relating to defamation, breach of confidence or copyright, to constitute an authorisation or approval of the publication of the document or its contents by the person to whom access is given.

(3) Nothing in this Act affects any privilege, whether qualified or absolute, which may attach at common law to the publishing of a statement.

75. Although not ordinarily included in early forms of right to information legislation, it is increasingly common to 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 law. Consideration should be given to including an additional provision 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 name of 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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Annex 1

COMMONWEALTH HUMAN RIGHTS INITIATIVE “The Right to Information in the Ugandan Context” December 2003

By Charmaine Rodrigues

"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, in the coming days, 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

Background

Uganda's history has been littered with governance problems. As the Report of the Uganda Constitutional Review Commission noted: "Uganda's political development has been characterised by authoritarianism...in spite of attempts to establish democratic structures". Uganda continues to try to deal with the political legacy that years of dictatorship have left behind. The Constitution developed and adopted soon after the National Resistance Movement took over signified a major step in the process restructuring Uganda's political institutions and norms. However, work is still to be done to implement the provisions of the Constitution. Added to this is the fact that even now, the Constitution is being reviewed. While this process offers opportunities to reinforce and strengthen constitutional accountability mechanisms, the risk also exists that the Review will allow for key provisions to be revised and weakened instead.

In any case, Article 41 of the current Constitution of Uganda makes an excellent contribution to ensuring increased government transparency and accountability by explicitly guaranteeing the right to access information and requires Parliament to enact an access to information law:

41. (1) Every citizen has a right of access to information in the possession of the State or any other organ or agency of the State except where the release of the information is likely to prejudice the security or sovereignty of the State or interfere with the right to the privacy of any other person.

41. (2) Parliament shall make laws prescribing the classes of information referred to in clause (1) of this article and the procedure for obtaining access to that information.

Despite these provisions, to date no law has yet been enacted. This is a serious problem. Even where a constitutional guarantee exists, the fact remains that there is still a need for legislation to detail the specific content and extent of the right. Legislation sets a clear framework for putting in place systems and creating cultures of openness that are uniform across public and private bodies. Moreover, without legislation, which usually includes simple dispute resolution mechanisms, people cannot be expected to pursue a constitutional case against the government every time they want to gain access to any piece of information.

In this general context, it is very positive that Ugandan civil society has already seized upon the opportunity presented by the Ugandan Government's recent statement in parliament of their intention to develop right to information legislation within the next few months, as well as the commitment by an individual member of parliament to developing a private members bill on the topic. This is an excellent chance for civil society organisations and the public more generally to kickstart the process of entrenching new norms of participatory governance in Uganda. The contribution that strong right to information legislation can make in this respect cannot be underestimated.

The Importance of the Right to Information for Uganda

It is a crucial oversight that the Ugandan Government has still not enacted access to information legislation, for it has proven extremely beneficial for other jurisdictions because:

- *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 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.

There has been some indications in the press that the Government may actually be looking at the constitutional review process as an opportunity to restrict constitutionally-protected monitoring bodies and mechanisms, rather than entrenching them more effectively. While civil society needs to be vigilant against this threat, as long as the current Constitution prevails there remains a real opportunity to press the Government to implement right to information legislation and thereby to make major inroads into increasing citizen engagement with their own governance processes.

The right to information offers a simple, cost-effective means for institutionalising a framework of transparency within which the Government will need to adapt as it continues to develop and reform.

Developing Legislation

The following section outlines some key standards, guidelines and principles that should be kept in mind when developing right to information legislation.

International RTI Standards and Guidelines

For over 50 years, the United Nations General Assembly has recognised that: “*Freedom of Information is a fundamental human right and the touchstone for all freedoms to which the United Nations is consecrated*”⁴. Enshrined in the Universal Declaration of Human Rights, the right’s status as a legally binding treaty obligation was affirmed in Article 19 of the International Covenant on Civil and Political Rights which states: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and *to seek, receive and impart information and ideas through any media and regardless of frontiers*”⁵. This has placed the right to access information firmly within the body of universal human rights law.

It is important that access to information is recognised as a *right* because it:

- Accords it sufficient importance, as being inherent to democratic functioning and a pre-condition to good governance and the realisation of all other human rights.
- Becomes part of the accepted international obligations of the state. This means that the right to access information attracts the *guarantee of protection* by the state.
- Distances it from being merely an administrative measure by which information is gifted by governments to their people at their discretion since a legally enforceable right cannot be narrowed or ignored at the whim of government.
- Creates a duty-holder on the one hand and a beneficiary of a legal entitlement on the other. Non-disclosure of information is therefore a violation and the beneficiary can seek legal remedy.
- Signals that information belongs to the public and not government. The idea that everything is secret unless there is a strong reason for releasing it is replaced by the idea that all information is available unless there are strong reasons for denying it. The onus is on the duty-holder to prove its case for refusing to disclose documents.
- Sets a higher standard of accountability.
- Gives citizens the legal power to attack the legal and institutional impediments to openness and accountability that still dominate the operations of many governments. It moves the locus of control from the state to the citizen, reinstating the citizen as sovereign.

Over the years, the importance of the right to access information has been acknowledged again and again in myriad international agreements, including the African Charter on Human and Peoples Rights, the European Convention on Human Rights and the Inter-American Convention on Human Rights. The African Charter on Human and Peoples’ Rights, signed by all nineteen of the Commonwealth’s African member states, explicitly recognises the right to receive information.⁶ In 2002, the African Union’s Commission on Human and Peoples’ Rights adopted the Declaration of Principles on Freedom of Expression in Africa and reiterated that “public bodies hold information not for themselves but as custodians of the public good and everyone has a right

⁴ UN General Assembly, (1946) Resolution 59(1), 65th Plenary Meeting, December 14.

⁵ Emphasis added

⁶ OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), 27 June 1981, Art. 9(1).

to access this information”.⁷ Part IV deals explicitly with the right to information. Though not binding, it has considerable persuasive force as it represents the will of a sizeable section of the African population.

African Union Declaration of Principles: Part IV (2002)

- Everyone has the right to access information held by public bodies.
- Everyone has the right to access information held by private bodies which is necessary for the exercise or protection of any right.
- Refusals to disclose information shall be subject to appeal to an independent body and/or the courts.
- Public bodies shall be required, even in the absence of a request, to actively publish important information of significant public interest.
- No one shall be subject to any sanction for releasing in good faith information on wrongdoing, or information which would disclose a serious threat to health, safety or the environment.
- Secrecy laws shall be amended as necessary to comply with freedom of information principles.⁸

Principles Underpinning National RTI Legislation

The development of national RTI legislation which is owned by both the public and the government can take time. Participation in the legislative development process requires that government proactively encourage the involvement of civil society groups and the public broadly. This can be done in a variety of ways, for example, by: convening public meetings to discuss the law; strategically and consistently using the media to raise awareness and keep the public up to date on progress; setting up a committee of stakeholders (including officials and public representatives) to consider and provide recommendations on the development of legislation; and inviting submissions from the public at all stages of legislative drafting.

While it is necessary to ensure that the public participates in the drafting process to ensure that the final legislation developed is appropriate for the national context, 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*, provides more detailed discussion of these standards, but a summary is provided below:

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

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

⁷ *Resolution on Freedom of Expression*, African Commission on Human and Peoples’ Rights, 7 May 2001, http://www.achpr.org/Recommendations___Resolutions_-_ACHPR_88-02.pdf as on 20 September, 2003.

⁸ *Declaration of Principles on Freedom of Expression in Africa*, adopted by the African Commission on Human and Peoples’ Rights, 7 May 2001, Part IV, <http://www.article19.org/docimages/1600.pdf> as on 20 September, 2003.

Part 3 of the South African *Promotion of Access to Information Act* 2000 provides a very good example to draw on.

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

In order to support maximum information disclosure, the law should also provide protection for “whistleblowers”, that is, individuals who disclose information in contravention of the law and/or their employment contracts because they believe that such disclosure is in the public interest. Whistleblower protection is based on the premise that individuals should be protected from legal, administrative or employment-related sanctions for releasing information on wrongdoing. It is important in order to send a message to the public that the government is serious about opening itself up to legitimate scrutiny.

Minimum Exceptions: The key aim of any exceptions should be to protect and promote the public interest. The law should therefore not allow room for a refusal to disclose information to be based on trying to protect government from embarrassment or the exposure of wrongdoing.

In line with the commitment to maximum disclosure, exemptions to the rule of maximum disclosure should be kept to an absolutely minimum and should be narrowly drawn. The list of exemptions should be comprehensive and other laws should not be permitted to extend them. Broad categories of exemption should be avoided and blanket exemptions for specific positions (eg. President) or bodies (eg. the Armed Services) should not be permitted; in a modern democracy there is no rational reason why such exemptions should be necessary. The law should require that other legislation be interpreted, as far as possible, in a manner consistent with its provisions.

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

Simple Access Procedures: A key test of an access law's effectiveness is the ease, inexpensiveness and promptness with which people seeking information are able to obtain it. The law should include clear and uncomplicated procedures that ensure quick responses at affordable fees. Applications should be simple and devised to 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.

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 record management systems are in place to ensure the effective implementation of the law. The law should provide strict time limits for processing requests.

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 to information.

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

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

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

Conclusion

Developing the content of an access to information law presents formidable challenges. Design matters, as do details. Bureaucratic and political resistance cannot be underestimated, as openness can be threatening to officials unused to being scrutinised by the people to whom they are supposed to be accountable. Much depends on the balance that the system is able to achieve between ensuring the right of every citizen to be adequately informed of public affairs, and reassuring bureaucrats that interests such as national security and public safety will at the same time be protected.

A right to information law has a crucial place in the overall institutional framework for transparency and its importance to the overall governance context cannot be underestimated. Importantly, while a law alone cannot *always* ensure an open regime, a well-crafted law, which strengthens citizens' democratic participation, is half the battle won.