

Analysis of the Republic of Vanuatu draft *Freedom of Information Bill* 2006 & Recommendations For Amendments

"The great democratising power of information has given us all the chance to effect change and alleviate poverty in ways we cannot even imagine today. Our task, your task...is to make that change real for those in need, wherever they may be. With information on our side, with knowledge a potential for all, the path to poverty can be reversed."

--- Kofi Annan



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Commonwealth Human Rights Initiative
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ANALYSIS OF REPUBLIC OF VANUATU

DRAFT FREEDOM OF INFORMATION ACT 2006

1. Transparency International Vanuatu (TIV) has forwarded a copy of a draft *Freedom of Information Act 2006* to the Commonwealth Human Rights Initiative (CHRI) for review and comment. CHRI understands that the Bill has been drafted by TIV, with a view to submitting it to the Government of Vanuatu for enactment as a law. CHRI welcomes the opportunity to comment on the Bill. Based on CHRI's experience in drafting and reviewing access to information legislation across the Commonwealth, this paper suggests some amendments to the Bill to ensure that the final legislation which is drafted is in line with recent international best practice on access to information. We hope that our recommendations are of use to the Vanuatu campaign.
2. At the outset, we would like to encourage both the drafters and eventually the Government to consult widely with the public and other key stakeholders before the Bill is finalised and tabled in Parliament. 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 policy-makers proactively engage civil society groups and the public during 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 draft Bill; inviting submissions from the public before Parliament votes on the Bill; convening public meetings to discuss the proposed law; and strategically and consistently using the media to raise awareness and keep the public up to date on progress.

ANALYSIS OF DRAFT BILL AND SUGGESTIONS FOR IMPROVEMENT

3. Overall, CHRI's assessment is that the Bill is relatively strong. It is very positive that the draft Bill draws heavily on the best practice contained in the Article 19 Model Law and the newly enacted Indian *Right to Information Act 2005*. TIV should be commended for incorporating such model legislative provisions into the draft Bill. Nonetheless, CHRI has still made a number of recommendations for improving the Bill. Notably, since the Article 19 Model Law was drafted in 2001, there have been a number of important developments in the area of access legislation which have extended and broadened the right to information and which should be considered for inclusion in the TIV draft Bill.

GENERAL

4. At the outset, it is generally problematic that the language of the draft Bill is very complicated and overly legalistic, such that it may be very difficult not only for the public to understand the law, but also for public officials to know how to implement it. The right to information is primarily about trying to open up government to the participation of the common person. As such, it is crucial that any right to information law is drafted in a user-friendly way. The terms of the law need to be clear and precise, but plain English should be used as much as possible. The new Indian *Right to Information Act 2005*, the South African *Access to Information Act 2000* and the Mexican *Federal Transparency and Access to Public Government Information Law 2002* provide better models.

Recommendation

The Bill should be reviewed with a view to simplifying all of its provisions and ensuring that it can be easily understood by the public and bureaucrats alike. User-friendly language should be used and complicated cross-referencing and legalistic language should be avoided.

PREAMBLE / OBJECTS CLAUSE

5. It is very positive that the bill includes a Preamble, which in addition to explaining the process aims of the Act recognises the broader democratic objective of the law, which is to promote transparency and accountability. However, a major shortfall is that it restricts the right to access information to “citizens” only. This could have major implications, as many poor and disadvantaged people may not have the necessary documentation to PROVE their citizenship. This could therefore be abused by resistant bureaucrats to refuse to accept applications. Bureaucrats may also use this requirement to reject applications from NGOs – a practice which has been witnessed in other jurisdictions. Additionally, permanent residents, expatriate workers or even refugees – none of whom have citizenship papers – will be denied the right to information.
6. Good international practice supports the extension of the Act to allow *all persons* access to information under the law, whether citizens, residents or non-citizens (such as asylum seekers) and to bodies, rather than only individuals. This approach has been followed in a number of jurisdictions, including the United States and Sweden, the two countries with the oldest access laws. This change may require the inclusion in s.4 of a definition of “person”.
7. Alternatively, if this formulation is considered too broad, other formulations could be used. For example, Canada allows access to information to citizens AND “permanent residents” (see s.4(1), *Access to Information Act 1982*) and New Zealand allows requests to be made by citizens, permanent residents or any “person who is in New Zealand” (see s.12(1)(c) *Official Information Act 1982*). This latter formulation is particularly useful because it removes the need for proof of residence documents from applicants, while still limiting access only to people in Vanuatu.

Recommendation

Amend the Preamble to give “all persons” the right to access information rather than just “citizens”. At the very least, a formulation should be devised to let residents of Vanuatu who are not citizens to access information.

PART I: PRELIMINARY

Section 2 – Commencement

8. It is recommended that s.2(1) of the proposed law clearly specify a date on which the Act will come into force. Failure to specify a commencement date in the legislation itself can otherwise undermine the use of the law in practice. In India for example, the *Freedom of Information Act 2002* was passed by Parliament and even assented to by the President but it NEVER came into force because no date for commencement was ever notified in the Official Gazette. CHRI is not aware of whether local regulations require publication of laws in the Official Gazette within a set time. If so, then this regulation read with s.2(1) would appear to constitute a *de facto* commencement date. However, CHRI would note the experience of one Pacific Islands country where it was anecdotally reported that administrative orders and legislation had not been published in the Gazette as required by the local law for years, as a result of dysfunction in the government and bureaucracy. To avoid this possibility, it is preferable to include a specific date in the law.
9. Notably, while it is understandable that the Government of Vanuatu may wish to allow for more time to prepare for implementation, best practice shows that the law itself should specify a maximum time limit for implementation, to ensure there is no room for the provision to be abused and implementation to be stalled indefinitely. Experience suggests a maximum limit of 1 year between passage of the law and implementation is

sufficient (see Mexico for example). Alternatively, in Jamaica, because the Government believed that full implementation could take time, their legislation incorporated a phased approach which required key Ministries to implement in the first year, and other agencies to implement 12 months later.

Recommendation

Amend s.2(1) to include a maximum time limit for the Act coming into force in, ideally immediately but not later than 1 year from the date the Act receives Presidential assent.

Section 4 - Interpretation

Definition of "person"

10. Subject to the amendment of the Preamble to give access to information to all persons as recommended in paragraphs 5-7, amend s. 4 to insert an appropriate definition of "person" to whom the rights guaranteed under this Act shall apply.

Definition of "development activity"

11. Section 4(1)(c) leaves room for a definition of "development activity". This term is used at s.10(2)(c) which requires proactive disclosure of information related to projects and development activities. If this disclosure obligation is to be capable of practical implementation, it may be preferable to include two separate definitions – one for "Small Development Activities" and one for "Large Development Projects". The disclosure requirements would then be different. Small Development Activities, such as the construction of a road, installation of a water pump or building of a small clinic, could require information disclosure at the time of implementation via a local notice board, in the newspaper and/or at a village meeting. In the case of large scale development projects, more extensive disclosure and consultation requirements may need to be included (see paragraph 22 below for more):

"Small Development Activity" means any project or programme, the value of which is less than [insert amount – US\$50,000??]

"Large Development Activity" means any project, the value of which is more than [insert amount – US\$50,000??]

Definition of "publish"

12. While it is extremely positive that the Act requires information to be published and disseminated through a variety of mediums including print, broadcast and electronic, information accessible under the Act is so important and relevant to people's lives that every effort must be made to ensure that it is widely disseminated, in as many ways as possible. It is recommended that the definition of "publish" under s.4(1)(j) be expanded to include making information accessible through notice boards, newspapers, public announcements, media broadcasts, the internet etc. In addition, every public body must be required to have this information on hand so that it may be copied or inspected on request.

Definition of "personal information"

13. It is commendable that the Act defines the term "personal information" under s.4(1)(k). However, the current clause is too broad, requiring only that the information "relates" to a living individual who can be identified via that information. Such a vague definition opens up considerable scope for misapplication and abuse by public officials. Consideration should be given to amending s.4(1)(k) to tighten the scope and definition of personal information within the law itself to prevent misinterpretation.

Section 3(II) of the Mexican *Federal Transparency and Access to Public Government Information Law* provides a good example:

The information concerning a physical person, identified or identifiable, including that concerning his ethnic or racial origin, or referring to his physical, moral or emotional characteristics, his sentimental and family life, domicile, telephone number, patrimony, ideology and political opinions, religious or philosophical beliefs or convictions, his physical or mental state of health, his sexual preferences, or any similar information that might affect his privacy.

Definition of “right to information”

14. It is very positive that s.4(1)(l) defines the right to information to include inspection of works and taking samples. However, it is problematic that the definition currently refers only to public bodies and makes no reference to private bodies. This severely limits the right granted under s.13.

Definition of “third party”

15. Section 4(1)(m) defines a third party to include another public body. However, this is inappropriate because in practice it means that one government body can be a third party in respect of an application to another public body. However, all public bodies form part of the same bureaucracy and as such, should be considered as a single functioning entity for the purpose of processing applications. All public bodies comprise part of the second party to any application, namely, the Government, where the application is made to a public body rather than a private body. Section 4(1)(m) should be amended to reflect this.

Recommendation

- *Insert an appropriate definition of “person”, to clarify whom the rights guaranteed under this Act shall apply. (See paragraph 5-7 for possible models.)*
- *Amend s. 4(c) to include an appropriate definition of “development activity”.*
- *Broaden the definition of “publish” under s.4(j) to ensure that information is published and disseminated, including, but not limited to making information accessible through notice boards, newspapers, public announcements, media broadcasts, the internet or any other means, including inspection of offices of public authorities.*
- *Amend s.4(k) to tighten the definition of “personal information”.*
- *Amend s.4(l) to include the “right to access information held by or under the control of private bodies”.*
- *Reword s.4(1)(m) to define third party as “a person other than the person making a request for information, but does not include other public bodies where the request is received by a public body”.*

PART II: MEASURES TO PROMOTE OPENNESS

Section 6 – Guide to Using the Act

16. Section 6 comprehensively requires the Information Commissioner to compile a guide on using the Act within 12 months of the Act coming into force. This is an excellent provision. It is positive that the Act requires the guide to be regularly updated, however, it is recommended that s.6(3) specify a clear time frame for updation. Section 10(3) of the South African *Promotion of Access to Information Act 2000* – on which s.6 is based – provides for the guide to be updated and published at regular intervals of not more than 2 years.

Recommendation

Amend s. 6(3) to provide for a specific time frame within which the guide to using the Act will be updated and published, for example, every 2 years.

Section 7 – Information Officers

17. It is positive that the Act specifically identifies officials who will be responsible for processing applications and promoting the right to information within the bureaucracy. However, to ensure that there are sufficient personnel resources dedicated to this work, consideration should be given to specifically requiring that “as many officers as are necessary to facilitate the timely access to information by the public shall be appointed as Information Officers”.
18. Considering the vast geographic spread of Vanuatu, consideration should also be given to requiring the appointment of Information Officers outside the capital city. Thus, an additional provision may be added requiring “the appointment of Information Officers at all sub-offices of a public body or private body”. Otherwise, the public may have difficulty submitting their applications in practice, if they have to rely solely on mail and cannot submit their application to an official in person. Alternatively, in India, Assistant Public Information Officers have been required to be appointed at the district level, and these officers are then tasked with forwarding applications to the relevant Public Information Officers.

Recommendation

- *Amend s.7(1) to explicitly require that “as many officers as are necessary to facilitate the timely access to information by the public shall be appointed as Information Officers”.*
- *Consider inserting an additional clause which requires “the appointment of Information Officers at all sub-offices of a public body or private body” or the “appointment of Assistant Information Officers at all district/provincial offices who will be responsible for forwarding applications to the relevant Information Officer within 5 days”.*

Section 8 – Maintenance of Records

19. 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. In this context, it is positive that s.8(1) requires all public bodies to properly maintain their records. However, s.8(1) should more explicitly require that appropriate record keeping and management systems are in place “to ensure the effective implementation of the law”. Section 6 of the Pakistan *Freedom of Information Ordinance 2002* provides useful guidance in this context, specifically requiring computerisation of records and networking of information systems:
- Computerisation of records - Each public body shall endeavour within reasonable time and subject to availability of resources that all records covered by the provisions of this Ordinance are computerised and connected through a network all over the country on different system so that authorised access to such records is facilitated.*
20. Section 8(2) requires public bodies to put in place procedures for the correction of personal information. While this is a positive step forward, consideration should be given to including more detail in the Bill as to what minimum requirements there must be for any such regime. The NGO, Privacy International (www.privacyinternational.org), may be able to provide assistance in this regard.

21. It is extremely positive that s.8(3) empowers the Information Commissioner to develop a Code of Practice on Records Management within 12 months of the Act's commencement. This is in keeping with best practice in the United Kingdom, where under s.46 of the *Freedom of Information Act 2000*, the Lord Chancellor is responsible for developing a Code of Practice on Records Management.

Recommendations

- *Amend s.8(1) to require every public body "to maintain its records in a manner which facilitates the right to information as provided for in this Act", including requiring bodies to computerise records and network information systems;*
- *Clarify the content of the requirements under s.8(2).*

Sections 10 and 11 – Duty to Publish

22. The new generation of access laws are now recognising the proactive disclosure can be a very efficient way of servicing the community's access needs efficiently, while reducing the burden on individual officials to respond to specific requests. The more information is actively put into the public domain in a systemised way, the less information will be requested by the public. In this regard, it is excellent that s.10 imposes obligations on public bodies to proactively publish certain information so that the public are not required to submit individual applications for routine information. While the current provision is very strong, a couple of amendments could make it even more useful in practice:

- *Disclosure of public contracts*: The Bill currently draws on the provisions in the India Act. However, one key element missing in that law was the requirement that information about public contracts be proactively disclosed. The Mexican transparency law requires such disclosure. Considering the amount of corruption which regularly surrounds public procurement and services contracts, proactive disclosure of such agreements could be a key mechanism for promoting government accountability and reducing corruption. A model provision is provided below, which could be inserted as a sub-clause to s.10(2):

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.*
- *Disclosure of information about development activities*: As discussed at paragraph 11 above, consideration should be given to reworking s.10(2)(c) to impose more specific disclosure requirements in respect of development activities, depending on the size of the relevant project. Information about Small Development Activities should be proactively disclosed on noticeboards, via the media and in village meetings once they are finalised but prior to implementation. Information about the activity, its cost, the implementer and the deadline for implementation should be provided at a minimum. Large Development Activities should require more comprehensive consultation. Information should be proactively disclosed regarding the initiation of a project design, the design process, opportunities for input into that process, tendering, and ongoing implementation.

23. Section 10(1) currently provides for updating information within 12 months of its publication. However, some of the information which is being collected and published may change very often, such that it could be terribly out of date if it is not updated more

regularly. Accordingly, a maximum time limit of 6 months should be allowed for updating and the rules should prescribe shorter time limits for specific categories of information, as appropriate (for example, new government contracts should be published weekly or monthly).

24. Section 11 is an important provision which requires the Information Commissioner to publish a guide to assist public bodies in publishing information proactively under s.10 of the Act. However, it is recommended that s.11 be amended to require such a guide to be published within no more than six months of the Act coming into force, and thereafter updated regularly, so that early on in the Act's implementation, public bodies have guidance on how best to meet their proactive disclosure obligations.

Recommendations

- *Amend s.10(1) and/or insert a new clause requiring that information be updated at least every 6 months, and permitting the rules to prescribe shorter updating time limits as appropriate.*
- *Insert a new clause into s.10(2) to require that information about contracts made by public bodies be disclosed proactively upon signing of the contract.*
- *Amend s.10(2)(c) to elaborate upon the disclosure requirements in relation to development activities, depending upon their size.*
- *Amend s.11(1) to specifically require the Information Commissioner to publish a guide on proactive disclosure within 6 months of the Act coming into force.*

PART III: THE RIGHT TO INFORMATION HELD BY PUBLIC AND PRIVATE BODIES

Sections 13 and 14 – General Right of Access

25. As noted in paragraph 14 above, it is imperative that the definition of right to information be defined broadly to make it clear that it includes the right to access information from private bodies. While this is implied by s.14(2), nonetheless, either in the definition of right to information at s.4(1)(l) or in s.13(1) it should be made explicit that:

“Every person has the right to information held by or under the control of:

- (a) public bodies and*
- (b) private bodies where the information is necessary for the exercise or protection of a right”.*

26. In respect of the right to information from private bodies, it is recommended that the reference to “rights” be clarified. In South Africa, where this provision originated, there has been some confusion over its interpretation because of the lack of specification. To ensure that the provision is as broad as possible, it is suggested that the Bill refer to “information necessary for the exercise of protection of any right recognised under the Constitution of Vanuatu, Vanuatu common law or any international treaty to which Vanuatu is a signatory”.

Recommendation

- *Amend s.13 to make it absolutely clear that the right to information relates to both public and private bodies. (See the analysis at paragraph 14 as well)*
- *Amend s.14(2) to specify that information can be access from private bodies which is “necessary for the exercise of protection of any right recognised under the Constitution of Vanuatu, Vanuatu common law or any international treaty to which Vanuatu is a signatory”.*

Section 15 – Legislation Prohibiting or Restricting Disclosure

27. Section 15(1) appears to attempt to make the new access law superior to existing inconsistent legislation. However, the provision could be worded more strongly to leave no doubt that the new law will actually override all existing secrecy provisions. An additional clause could also be added requiring all laws to be reviewed to identify which laws must be amended or repealed to support the new openness legislation. This is important because if old secrecy laws are left on the statute books, there may be confusion within the bureaucracy about their duties at law. Consideration could be given to replicating s.22 of the Indian *Right to Information Act, 2005* which states clearly that the Act overrides existing inconsistent legislation, including the Official Secrets Act.

Recommendation

Amend s.15(1) to provide that:

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.

PART IV: MAKING AND MANAGING REQUESTS

Section 16 – Request for Information

28. Section 16 is a crucial provision because it sets out the actual process for the public to request access to a document. The procedures for requesting information outlined under s.16 are very strong, in particular the provisions: allowing for requests to be made in writing or through electronic means in local languages (s.16(1)); requiring officials in public bodies to provide requestors with reasonable assistance, free of charge, to make their requests (s.16(2)) and assist individuals in making oral requests for information which will be reduced into writing, where such requests cannot be made due to disability, illiteracy or lack of access to postal services (s.16(3)) and the non-requirement of individuals to give reasons for requests (s.16(4)). However, CHRI recommends a few minor amendments to further strengthen the provisions under s.16.

Application Fee

29. Section 16(1) appears to require the payment of an application fee. This provision should be removed. Experience has shown that fees – and application fees in particular – can be a major administrative obstacle to the making of applications by poor people. Not only cost, but the hassle of making the payment, getting a receipt and providing that receipt to the Information Officer, can be a major disincentive to making applications. In India, many people in rural areas are spending more money on the process of paying the fee than the value of the actual fee itself! Additionally, while it is positive that s.16(1) allows electronic applications, this provision becomes less useful if a written receipt of payment of an application fee must nonetheless be provided.

Reasonable assistance

30. It is extremely positive that s.16(2) requires officials in public bodies to provide reasonable assistance, free of charge, to individuals to make requests for information. However, in light of the Act's coverage of private bodies (s.14(2)), it is recommended that Information Officers within private bodies be required to extend similar assistance to individuals making requests for information.

Oral requests

31. Further to paragraph 30 above, it is recommended that s.16(3) be amended to require that in addition to public bodies, private bodies will also be required to assist individuals to make oral requests for information. Such oral requests should be allowed to be made not only by telephone (as the Bill currently provides), but also in person, in recognition of

the fact that oral requests may be made by disabled or illiterate people who may not have access to a phone.

Application forms

32. Section 16(6) permits bodies to develop application forms which must be used by requesters. While the provision requires that the forms do not “unreasonably delay requests or place an undue burden” on requesters, nonetheless, in practice this requirement will be hard to police. Are requesters expected to make an appeal to the Information Commissioner where they believe the form *has* placed an unfair burden on them or unreasonably delayed their application?

Recommendation

- *Amend s.16(1) to remove the reference to “accompanying such fee as may be prescribed” so that no application fee is payable.*
- *Amend s.16(2) to refer to applications under s.14(2) as well in order to extend the duty to provide reasonable assistance to requestors to Information Officers in private bodies as well;*
- *Broaden s.16(3) to require private bodies to assist individuals to make oral requests for information to be reduced thereafter into writing.*
- *Amend s.16(3) to remove the requirement that oral requests are made by telephone and to allow the illiterate or disable to also make their requests in person to an Information Officer.*
- *Delete s.16(6) because in practice, it may still place an undue burden on requesters.*

Sections 17 and 22 – Transfer of Requests and Information Not Held

33. Section 17(1) allows any official to transfer a request to the Information Officer to deal with. However, it should be made clearer that the official must EITHER assist the requester to make the application and then respond to the application themselves OR transfer the application to the Information Officer who will deal with it forthwith.

34. Section 17(2) deals with transfers of requests, where the information requested is held by another public body or its subject matter is more closely connected with the functions of another public body. If this formulation is chosen, then it must be made explicit that even where a request is transferred, the same time limits apply to processing the request. Otherwise, public bodies may simply keep transferring applications throughout the bureaucracy on the basis that the “subject matter is more closely connected with their functions”. This is such a broad criteria, that it could easily be abused. In fact, consideration should be given to deleting that phrase from s.17(2) and only permitting transfers where the information is not held by the public body. In all other cases, the public body can process the application, and simply consult other agencies whose functions are more closely connected with the subject of the request.

35. While it is positive that s.17(2) requires officials to notify requestors where an application has been transferred, the clause should be amended to make it explicit that requestors be notified of the transfer as soon as practicable but no later than 5 days of the transfer.

36. Section 22 also deals with transfer of applications, where an organisation does not hold the requested information. To avoid confusion and make the law easier to apply for officials, it is recommended that s.22 be merged with s.17, which will then deal with transfers in all cases. Notably, the provision in s.22 which deals with cases where information is not held by a private body could be separated into another provision if necessary. Consideration could then be given to adding another sub-clause dealing with

a case where NO public body is believed to hold the information requested – in which case a rejection notice will be issued.

37. In accordance with best practice, where a request is transferred, the time limits for processing the request should be calculated from the time the application was first received, not the date it was transferred to the second body. This is the approach adopted in s.22 but it is not dealt with in s.17.

Recommendation

- *Merge s.22 with s.17 so that all the transfer provisions sit together.*
- *Consider separating out s.22(4) which deals with information not held by a private body and adding an additional clause dealing with information not held by ANY public body.*
- *Amend s.17(1) to clarify that the official must either deal with the request themselves OR transfer the request to the Information Officer.*
- *Delete from s.17(2) the words “or the subject matter of which is more closely connected with the functions of another public body” to restrict transfers only to those cases where the public body does not hold the information. This will avoid abuse of the transfer provision.*
- *Amend s.17(2) to require public bodies to notify requestors in writing where a request for information is transferred “as soon as practicable and no later than 5 days of the transfer”.*
- *If s.22 is merged with s.17, retain s.22(3) which clarifies that the original time limits apply to applications which have been transferred. Alternatively, if the provisions remain separate, insert a new clause in s.17 replicated s.22(3).*

Section 18 – Time Limits for Responding to Requests

38. The time limits in s.18 are generally appropriate, however it is recommended that the provision under s.18(3) for extending the time limit for dealing with voluminous requests be reconsidered. In cases where a request is genuinely too large to process without unreasonably interfering with the public authority’s workload, it is preferable that public and private bodies first be required to consult applicants and assist them to narrow their search, if possible. This could be done either by contacting them over the telephone or inviting them to inspect the records and identify those that are specifically required. Thereafter, if the application still can’t be processed within the 20 day time limit then public or private bodies should consider extending the time limit, recording the reasons for doing so in writing.

Recommendation

Amend s.18(3) to require that a public or private body may extend the time limit for dealing with requests, where the request is voluminous or likely to interfere with the activities of the body, subject to the public or private body making every effort to first assist the applicant to modify his/her request if possible.

Section 19 – Notice of response

39. Section 19(2) sets out in detail the content of notices to requesters on the outcome of their application, but for some reason the provision applies only to officials in public bodies and not private bodies. There is no justification for notices from private bodies not to be as fulsome as those from public bodies. This section should be amended accordingly.

Recommendation

- *Amend s.19(2) to refer to both s.14(1) and s.14(2) so that requesters get the same form of notice whether their application is made to a public or private body.*
- *Insert a cross reference in s.19(2) to section 20(5) and vice versa to ensure that notices contain all the relevant information required.*

Section 20 - Fees

40. Section 20(1) permits fees to be imposed under the Act for providing access. In this case, the rates should be set 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, with no additional margin for profit, and a maximum limit should be imposed.

No fee for search or preparation time

41. Section 21(1) currently permits costs to be charged for the time taken to search for and prepare the information. However, best practice supports that charges should only cover reproduction costs, not search or collation/compilation time. Imposing fees in respect of the latter could easily result in prohibitive costs, particularly if bureaucrats deliberately drag their heels when collating information in order to increase fees.

Fee Waiver

42. It is extremely positive that s.20(4) allows fees to be reduced or waived where the levying of the fee would cause financial hardship to an individual or if it is in the public interest. Such a provision will go a long way to ensuring that some of the underprivileged sections of society will have equal benefit of the use of this Act. Two options are available in terms of who decides on the waiver: (1) the Head of the body could be given the power to waive fees and could delegate that power as necessary; (2) the Information Officer could be given the power to waive fees and internal guidelines could then be developed to assist the Information Officer to make his/her decision. It is recommended that the latter option be chosen because this will likely be more efficient in terms of promoting timely decisions.

Fee Regulations

43. Section 20(8) should be amended to make it clear that the Minister MUST, in collaboration with the Commissioner, make rules in respect of the fee regime for the law. Each public body should not be permitted to set their own fees. This will undoubtedly lead to inconsistencies, and resistant bodies will use fees as one way of deterring requests. In accordance with common practice, the relevant fees regulation will set out the amounts payable for copies (depending on the size of the paper), the costs of floppies or CDs, the cost of inspection time and the cost for taking samples.

Recommendation

- Amend s.20(1) to exclude search and preparation time from the fee payable for access.
- Specify in s.20(4) that the Information Officer will have the power to waive fees, subject to any internal or government guidelines regarding fee waiver.
- Insert a cross reference in s.19(2) to section 20(5) and vice versa to ensure that notices contain all the relevant information required.
- Amend s.20(8) to make it explicit that only the Minister and the Information Commissioner together may prescribe fees under the law, and no public body may set their own fee schedule.
- Insert a new provision or amend s.20(11) to make it clear that any fees charged for provision of information "shall be reasonable, shall in no case exceed the actual cost of providing the information such as making photocopies or taking print outs and shall be set via regulations at a maximum limit taking account of the general principle that fees should not be set so high that they undermine the objectives of the Act in practice and deter applications".

Section 21 – Means of Communicating Information

Taking samples

44. Taking into account the fact that the definition of "right to information" in s.4 includes the right to inspect works and to take samples of materials, s.21(2) needs to be reworked to reflect that people may want to access information that is not in documentary or electronic form. It is important that all the provisions of the Bill are internally consistent.

Providing information in the form requested

45. It is understandable that there may be cases where a request is genuinely too large to process without unreasonably interfering with a public authority's workload. However, s.21(3) needs to be reworded to make it clear that in such situations, the public or private body should: (a) be required to consult the applicant and assist them to try to narrow their search and (b) should not be allowed to reject the request, but should only be allowed to provide the information in a form which is less burdensome. As the provision is currently worded, it does not make it clear that the body must still supply the information, but simply in a different form. A public or private body should not be able to reject applications simply because of the anticipated time it will take to process them. Proposed wording is suggested below:

- (1) *Where a public authority is of the opinion that processing the request would substantially and unreasonably divert the resources of the public authority from its other operations, the public authority shall assist the applicant to modify his/her request accordingly.*
- (2) *Only once an offer of assistance has been made and refused can the public authority reject the application on the ground that processing the request would substantially and unreasonably divert the resources of the public authority from its other operations":*

Translations

46. It is very positive that sections 21(4) and (5) require that information shall be provided in different official languages, and will even be translated if translation is in the public interest. However, it is slightly confusing that two provisions are included which deal with the same issue. To avoid overlap and confusion, it is preferable that these two clauses be merged.

Recommendation

- Amend s.21(2) to clarify that forms of access include taking a sample of materials and inspecting public works.
- Amend s.21(3) to provide that where a request for information is voluminous or likely to interfere with the activities of the body, the public or private body must make every effort to assist the applicant to modify his/her request accordingly, but if that is not possible, may then provide the information in another more convenient form.
- Merge sections 21(4) and (5) which deal with translations.

Section 23 – Frivolous, Vexatious, Repetitive or Unreasonable Requests

47. Best practice requires that no application shall be rejected unless the information requested falls under a legitimate and specifically defined exemption. Information that does not fall within an exempt category cannot be denied. Accordingly, s. 23(1) which permits non-compliance with a request on the grounds that the “*request for information which is frivolous or vexatious*” should be deleted. This provision could too easily be abused, particularly by resistant bureaucrats, many of whom may be of the opinion that any request for information from the public is vexatious. If this clause is retained, at the very least the provision needs to be amended to clarify what constitutes a ‘frivolous or vexatious request’.
48. Section 23(2) allows applications to be rejected by a public or private body because processing would “*unreasonable divert its resources*”. This provision is ripe for abuse. As discussed in paragraph 45 above, while it is understandable that there may be cases where a request is genuinely too large to process without unreasonably interfering with the public or private body’s workload in such cases the public or private body should be required to consult the applicant and assist them to try to narrow their search. Applications should not be summarily rejected simply because of the anticipated time it will take to process them or would unreasonably divert their resources.

Recommendations

- Section 23(1) should be amended to delete the words “*which is vexatious or*”
- Section 23(2) should be deleted or at least amended so that where a public or private body is of the opinion that processing the request would substantially and unreasonably divert its resources from its other operations, the public authority shall assist the applicant to modify his/her request accordingly. Only once an offer of assistance has been made and refused can the public or private body reject the application on this ground. (See the wording in paragraph 45 above.)

PART V: EXCEPTIONS

Section 24

49. It is extremely positive that the ALL exemptions outlined in the Act are subject to the blanket “public interest override” in s.24(1), 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. This ensures that every case is considered on its individual merits and public officials do not just assume that certain documents will always be exempt. It ensures that the “public interest” is always at the core of a right to information regime. However, to ensure that the provision is properly applies, it is recommended that:

- The word “may” be changed to “shall” so that information MUST be disclosed if disclosure is in the public interest. There should be no discretion to nonetheless withhold the information.
- Private bodies should also be required to disclose information if disclosure is in the public interest. Considering that the Bill requires private bodies to disclose information where “rights” issues are involved, the public interest is arguably even more important in that context.

50. The meaning of “public interest” is variable according to the facts of each case. However, consideration may be given to including a *non-exhaustive* list of factors which may be taken into consideration when weighing the public interest, to give officials some guidance on what they should be taking into account when weighing the public interest.

Recommendation

- *Amend s.24(1) to change the word “may” to “shall” and to require private bodies to disclose information in the public interest also.*
- *Consider inserting an additional clause giving some – non-exhaustive – guidance on what can be considered when weighing the public interest:*

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 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.

Sections 25 – 35

51. Exemptions to the rule of maximum disclosure should be kept to an absolutely minimum and should be narrowly drawn. The exemptions in the Bill are mostly appropriate, but certain provisions should be reviewed and or deleted. Specifically:

- It is legitimate to consult third parties about disclosure of their confidential information. However:
 - Consideration should be given to extending the provisions in sections 29(2) and (3) to cover the personal information referred to in s.27 as well. If confidential personal – rather than commercial – information is to be disclosed, those third parties have rights too.
 - A time limit should be placed on the making of submissions by third parties in accordance with s.29(2). Otherwise, the processing of an application may be interminably delayed by a third party. In accordance with the Indian Act on which the provision is based, it should be clarified that third parties have 10 days within which to make a representation, but a decision still will be made on the application within the standard time limits.
 - Section 29(3) needs to be amended because it refers not only to trade secrets, which is a recognised legal term, but “commercial secrets”. This is an unnecessarily broad term with no agreed meaning at law. Its interpretation has already caused confusion in India where the same provision is in effect.
- Section 31(1) is a legitimate provision, but to ensure that wrongful conduct is not protected, consideration should be given to including in s.31(1)(i) a reference to the “lawful” prevention or detection of crime.

- Section 34(1)(c) is not appropriate because it could too easily be abused by secretive officials who believe that all their decision making processes are sensitive and should not be open to the scrutiny of the public. This is a very common reaction within the bureaucracy and needs to be broken down by an access law – not protected. Ironically, information which discloses advice given to the government during the policy and decision-making process is exactly the kind of information that the public *should* be able to access, unless it is particularly sensitive. The public has the right to know what advice and information the Government bases its decisions on and how the Government reaches its conclusions. It is not enough to argue that disclosure 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.

Recommendation

- *Consider applying s.29(2) to confidential personal information as well as confidential commercial information.*
- *Include a time limit in s.29(2) by which third parties must make their submission, for example, “third parties have 10 days within which to make an oral or written representation from the date of receipt of the notice, but in any case a decision will be made on the application in accordance with the time limits in s.18(1)”.*
- *Amend s.29(3) to remove the reference to “commercial secrets”.*
- *Amend s.31(1) to refer to the “lawful” prevention or detection of crime.*
- *Delete section 34(1)(c).*

PART VI: THE INFORMATION COMMISSIONER

Sections 36- 38 and 41- 43

52. The provisions contained in this part of the Bill are generally in accordance with best practice, which is very positive. However, some refinements could still be considered to make the Information Commissioner even stronger.

Appointment and removal of the Information Commissioner

53. It is extremely positive that the selection of the Information Commissioner will be through an open process. However, it may be useful to include criteria for candidates for the position to ensure that they are properly qualified. Also, some of the disqualification criteria in s.36 (2) could be tightened, because it is essential that the Commission is utterly impartial and well-respected by the public as an upstanding citizen who is pro-transparency and accountability.

Term of Office

54. With regard to term of office mentioned in s.36(3), the provision for the re-appointment of the Information Commissioner to serve a maximum of two further terms is too long for one person to hold office. Re-appointment should be restricted to only one additional term. A maximum age limit could also be prescribed (for instance sixty-five years), beyond which an Information Commissioner shall not hold office.

Independence and Powers

55. It is extremely positive that the Information Commissioner has been given operational and administrative autonomy to effectively discharge his/her functions in office. However, s.37(1) should clarify specifically that the Information Commissioner also has budget making autonomy.

Recommendation

- *Insert minimum qualifications criteria for the Information Commissioner:
The person to be appointed as the Information Commissioner shall –
(a) be publicly regarded as a person who can make impartial judgments;
(b) have a demonstrated commitment to open government
(c) have sufficient knowledge of the workings of Government;
(d) have not been declared a bankrupt;
(e) be otherwise competent and capable of performing the duties of his or her office.*
- *Amend s.36(3) to reduce the term of re-appointment to one year.*
- *Consider inserting a new provision setting an age limit beyond which an Information Commissioner shall not hold office.*
- *Amend s.37(1) to clarify that the Information Commissioner will have budget autonomy.*

Sections 39 and 40 – General Activities and Reports

56. It is very positive that the Bill gives the Information Commissioner broad powers to investigate non-compliance, make reports and recommendations and undertaking training and awareness work. To give these provisions more importance within the legislative framework of the Bill, it would be useful to separate them out into a separate part on monitoring and reporting, rather than embedding them amongst the provisions dealing with appointment and removal of the Commissioner.

57. More specifically, to strengthen the reporting provisions in ss.39(1)(a)-(c), it would be useful to specify that any reports must be submitted to Parliament and then referred to a parliamentary committee for consideration. Otherwise, the reports may just end up being tabled and ignored. The same provision needs to be inserted with regard to the annual reports required to be tabled in parliament in accordance with s.40. To strengthen the training and awareness raising provisions in ss.39(1)(d) and (f), it would be useful to make it explicit that the Commissioner will be properly funded to carry out such activities.

Recommendation

- *Move sections 39 and 40 to sit with Part 2 (Measures to Promote Openness) or into a new part titled “Monitoring and Reporting”. If the latter option is chosen s.12, dealing with reports to the Information Commissioner, should be moved into the new part.*
- *Amend ss.39(1)(a)-(c) to specify that reports will be submitted to Parliament.*
- *Insert a new sub-clause in s.39 specifying that any ad hoc reports of the Information Commissioner to Parliament must be referred to a parliamentary committee for consideration and comment.*
- *Insert a new sub-clause in s.39 requiring the Information Commissioner to be properly resourced to undertake training and public awareness activities.*
- *Insert a new sub-clause in s.40 specifying that annual reports of the Information Commissioner to Parliament must be referred to a parliamentary committee for consideration and comment.*

PART VII: ENFORCEMENT BY THE COMMISSIONER

58. Part VII has been drafted very comprehensively, which is encouraging because a strong, independent enforcement mechanism is essential to any effective access regime. It is

positive that the remit of the Information Commissioner is broad. In that context, it is also positive that the Commissioner's decision-making powers enable the Commissioner to compel disclosure, but also to require compliance with other provisions of the Act, such as appointment of Information Officers and implementation of proactive disclosure provisions. However, some refinements could still be considered to make the Information Commissioner even stronger.

Sections 44 – Complaint to the Commissioner

59. It is positive that s.44 includes a relatively comprehensive list of grounds of complaint – and a catch-all provision at s.44(2)(i). However, consideration should be given to reworking the opening clause of s.44(2) because as it is currently worded, it restricts complaints only to people who have “made a request for information”. This means that someone who has tried to access proactive disclosure information may be barred from complaining. It means that third parties aggrieved by a decision in relation to the exemption in s.29(2) cannot make appeals. It also means that people will be barred from bringing complaints to the Information Commissioner regarding patterns of non-compliance. For example, an NGO which surveys compliance across the government and identifies problems will not be able to use the survey results to bring an action under s.44(2)(i) asking the Information Commission to take action to improve compliance. This would be disappointing.

Recommendation

- *Amend s.44(2) to delete the words “who has made a request for information” and replace the words “with an obligation under Part III” with “with an obligation under this Act”.*
- *Insert a specific provision clarifying whether third parties have the right to make complaints under s.44(2).*
 - *If third parties CAN make complaints, an additional provision needs to be added specifying that third party information will not be released until the time for making an appeal has passed and no appeal has been made.*

Sections 45, 47(1) and 48 – Investigations

60. Section 45 is based on the Indian *Right to Information Act 2005*. Notably however, the original provision suggested by civil society was actually aimed at empowering the Information Commissioner to initiate his/her own investigations in the absence of a complaint, for example, where he/she had identified a pattern of non-compliance across government or within a public body. This type of provision appears to be included at s.47(1). Section 47(1) should replace or be combined with s.45. The investigation powers in ss.45 and 48 should then be merged into one section so they sit together and are read before the provisions on decisions.

Recommendation

- Merge sections 45 and 48 which deal with investigations and accordingly remove the complicated cross-referencing in later provisions to the different investigation provisions.
- Amend the wording of s.45 and/or replace it with s.47(1) to make it clear that the Commissioner is empowered to initiate his/her own complaints and investigations into cases of non-compliance with the Act.

Sections 46 and 47 - Complaint Decisions and Implementation of Decisions

Deemed rejection of complaints

61. Section 46(2) should provide that where the Commissioner fails to decide on a complaint within the 30 day time limit, it shall be deemed as a rejection and the complainant will have the right to appeal to a higher court.

Summary rejection of complaints

62. Currently, s.46(3)(a) gives the Information Commissioner summary power to reject applications which are “*frivolous, vexatious or clearly unwarranted*”. However, best practice requires that no application shall be rejected unless the information requested falls under a legitimate and specifically defined exemption. This principle applies to complaints as well as applications. Otherwise, this provision could be abused. If this clause is retained, at the very least the provision needs to be amended to clarify what constitutes a ‘frivolous, vexatious or clearly unwarranted request’.

Decision-making powers

63. Sections 46(5) and 47(2) both deal with the decision-making powers of the Information Commissioner, the former in relation to non-compliance with Part III and the latter in relation to non-compliance with Part II. It is not clear why these powers have been separated however. Common practice supports a single decision-making provision which gives the Information Commissioner very broad powers to compel compliance with the provisions of the *entire Act*.

Power to impose fines

64. It is extremely positive that s.46(5) and s.46(6) empower the Commissioner to impose fines on public and private bodies for unreasonable failures to comply with the provisions of the Act. While it is positive that there is no upper limit on the fines that can be imposed under s.46(6), it is recommended that the Act prescribe a minimum fine amount that may be imposed on a public or private body, or the individual responsible as the case may be.

Recommendation

- Amend s. 46(2) to provide that failure to comply with sub-section (1) is deemed to be a rejection and the applicant has the right to appeal to a higher court.
- Delete s.46(3)(a) allowing for the summary rejection of frivolous, vexatious or unwarranted requests.
- Merge ss.46(5) and 47(2) into a single decision-making provision, giving the Commissioner power to make orders in respect of non-compliance with ANY provision of the Act and accordingly remove the complicated cross-referencing in later provisions to the different investigation provisions.
- At a minimum, amend ss.46(4), 5(b) and 5(c) to refer to non-compliance with the Act rather than only non-compliance with Part III and amend s.47(2) to refer to non-compliance with the Act rather than only non-compliance with Part II.
- Amend s.46(6) to provide for a minimum fine to be imposed by the Information Commissioner for unreasonable failures to comply with the provisions of the Act.

Section 50 - Binding nature of decisions

65. It is positive that s.50 makes it clear that the Commissioner's decisions are binding and allows a failure to implement the Commissioner's decision to be dealt with as a contempt of court. However, consideration should be given to making it explicit that the Commissioner also has the power to impose fines directly on an official or a public or private body where they fail to comply with his/her order.

Recommendation

Insert an additional sub-clause in s.50 making it explicit that the Information Commissioner has the power to impose a fine on any official or public or private body if they fail to comply with his/her decision. Amend the offences provisions in s.53 accordingly.

PART IX: CRIMINAL AND CIVIL RESPONSIBILITY

Section 53 – Criminal Offences

66. It is positive that the Act sets out offences and penalty provisions, in particular the provision for the imposition of fines and prison sentences (s.53(2)). Sanctions for non-compliance are particularly important incentives for timely disclosure in jurisdictions where the bureaucracy is unused to hurrying at the request of public. While the provisions of the current Act are a good start, they could be substantially extended to cover more instances of non-compliance. Section 12 of the Maharashtra *Right to Information Act 2002*; s.49 of the Article 19 Model Law; s.54 of the UK *Freedom of Information Act 2000*; s.34 of the Jamaican *Access to Information Act 2002*; and s.42 of the Trinidad & Tobago *Freedom of Information Act 1999* all provide useful models.

67. In the first instance, it is important to clearly detail what activities will be considered offences under the Act. Section 53(1) should be broadened to clearly specify the kinds of actions which are punishable under the law. Additional offences need to be created, for example:

- unreasonable delay or withholding of information,
- knowingly providing incorrect information,
- concealment or falsification of records,
- willful destruction of records without lawful authority,
- obstruction of the work of any public body under the Act; and/or
- non-compliance with the Information Commissioner's orders.

68. Once the offences are detailed, sanctions need to be available to punish the commission of offences. International best practice demonstrates that punishment for serious offences can include imprisonment, as well as substantial fines. Notably, 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 must be large enough to balance out the gains from corrupt practices. In this context, s. 53(2) should provide for the imposition of a minimum fine as opposed to a maximum fine.
69. When developing penalties provisions, lessons learned from India are illuminating. In India, penalties can be imposed on individual officers, rather than just their department. 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. The relevant provisions need to be carefully drafted though, to ensure that defaulting officers, at whatever level of seniority, are penalised. It is not appropriate for penalty provisions to assume that penalties will always be imposed on Information Officers. Instead, the official responsible for the non-compliance should be punished.

Recommendation

- *Insert a more comprehensive offences provision at s.53, for example:*
 - (1) *Subject to sub-section (3), where any Information Officer has, without any reasonable cause, failed to supply the information sought within the period specified under section 18(1), the Information Commissioner or the Courts shall, on appeal, impose a penalty of [XXX], which amount must be increased by regulation at least once every five years, for each day's delay in furnishing the information, after giving such Public Information Officer a reasonable opportunity of being heard.*
 - (2) *Subject to sub-section (3), where it is found in appeal that any Information Officer has:*
 - *Refused to receive an application for information*
 - *Mala fide denied a request for information;*
 - *Knowingly given incomplete or misleading information,*
 - *Knowingly given wrong information, or*
 - *Destroyed information, without lawful authority;*
 - *Obstructed access to any record contrary to the Act;*
 - *Obstructed the performance of a public body of a duty under the Act;*
 - *Interfered with or obstructed the work of an Information Officer, the Information Commissioner or the Courts; or*
 - *Failed to comply with the decision of the Information Commissioner or Courts;**the Information Officer commits an offence and the Information Commissioner or the Courts shall impose a fine of not less than [XXXX] and the Courts can also impose a penalty of imprisonment of up to two years or both.*
 - (3) *An officer whose assistance has been sought by the Information Officer for the performance of his/her duties under this Act shall be liable for penalty as prescribed in sub-sections (1) and (2) jointly with the Information Officer or severally as may be decided by the Information Commissioner or the Courts.*
 - (4) *Any fines imposed under sub-sections (1), (2) and (3) shall be recoverable from the salary of the concerned officer, including the Information Officer, or if no salary is drawn, as an arrears of land revenue.*
 - (5) *The Information Officer or any other officer on whom the penalty under sub-sections (1), (2) and (3) is imposed shall also be liable to appropriate disciplinary action under the service rules applicable to him and the Information Commissioner or Courts will refer the case to the appropriate authority for action accordingly.*

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PART X: MISCELLANEOUS

Section 54 – Regulations

70. In accordance with the recommendations made in paragraph 43 above, it should be clarified that the Minister has the power to make fee rules, in collaboration with the Information Commissioner. Certainly, it is not appropriate for different public bodies to make their own fee rules.

Recommendation

Insert an additional sub-clause clarifying that the Minister has the power to make fee rules.

Insert new section – Regular Parliamentary Review of the Act

71. 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 Bangladesh. 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 peoples right to information. Section 38 of the *Jamaican Access to Information Act 2002* provides a useful model.

Recommendation

Insert a new clause to provide for a parliamentary review of the Act after the expiry of two years from the date of the commencement of this Act and then every five years after that.

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