President Levy Patrick Mwanawasa
President of Republic of Zambia
Parliament Buildings
Parliament Road
PO Box 31299, Lusaka

7 March 2006

Dear Mr. President,

RE: Importance of prioritising tabling of strong Zambia Freedom of Information Bill

I am writing from the Commonwealth Human Rights Initiative (CHRI), an international non-government organisation headquartered in New Delhi. CHRI's Right to Information (RTI) Programme works to promote the right to information, in particular by assisting governments to develop strong RTI legislation and to support implementation of new access laws (please log on to our website www.humanrightsinitiative.org for more information).

I recently saw an article in the *Zambia Post* on-line edition, dated 1 February 2006, reporting that the Information Minister has said that it is unlikely that the Freedom of Information Bill (FOI Bill) will be tabled as a priority in Parliament. This is troubling, particularly considering that the Mung'omba Constitutional Review Commission specifically recommended that citizens have the right to access information held by the state. In December 2005, I wrote to Mr. Wila Mung'omba, Chairman of the Constitutional Review Commission, regarding the importance of inclusion of the right to access information in the new draft Constitution of Zambia (see a copy of the letter attached for reference), following reports that Justice Minister George Kunda had decided to exclude the right to information from the draft Constitution.

I wanted to take this opportunity to urge the Government to take concrete steps to ensure the successful passage of the FOI Bill in the National Assembly. As you would likely be aware, the right to information is a fundamental human right, which has been recognised by the United Nations for more than 50 years. It gained international legal status via Article 19 of the International Covenant on Civil and Political Rights, to which Zambia acceded on 10 April 1984.

As you are no doubt aware, recognising and implementing the right to access information is a simple, but extremely useful, step to open, effective and responsive governance. The right to information is also essential to facilitating meaningful participatory development. For a relatively small cost and investment of time, entrenchment of an effective access to information regime increases government transparency and reduces corruption, and thereby supports economic growth.

I am attaching a summary of key principles, which should underpin any effective right to information law, for your reference (see Annex 1). These principles are based upon international and regional standards, evolving State practice, and the general principles of law recognised by the community of nations.

Our RTI Team has reviewed the FOI Bill against international standards. While the FOI Bill in its current form contains some useful provisions, nonetheless there is scope for its improvement. The broad heads of our suggestions for further developing the FOI Bill are summarised below (see Annex 2 for a more detailed discussion):

- Broaden the scope of the definition of "information"
- Define the term 'access' and clarify that it includes taking samples and inspection of public works
- Broaden the scope of the law to cover more "public authorities"
- Reduce and narrow the exemptions provisions
  - Narrow the privacy exemption
  - Narrow the exemption for functions of public authorities
  - Do not apply exemptions to old documents
- Extend the proactive disclosure duties on public authorities
- Simplify the request and processing procedures
  - Clarify the role of Public Information Officers
  - Shorten time limits in special cases
  - Remove and/or reduce fees
- Strengthen the Public Information Commission
  - Ensure the independence of the Commission
  - Clarify the decision-making powers of the Commission
  - Clarify who carries the burden of proof in appeals
  - Permit ad hoc investigations by the Commission
- Strengthen the offences and penalties provisions
- Extend the Annual Reporting requirements
- Require public education and training on the law

I would encourage the Government to adopt a participatory approach when revising and enacting any national FOI Bill. Experience has shown that for any right to information legislation to be effective it needs to be respected and "owned" by both the government and the people. Participation in the legislative development process requires that policy-makers proactively encourage the involvement of civil society groups and the public broadly. This can be done in a variety of ways, for example, convening public meetings to discuss the content of the law, strategically and consistently using the media to raise awareness and keeping 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 the legislation, invite submissions from the public at all stages of the legislative drafting process, and publishing and circulating the draft FOI Bill widely for public comment and giving such comments due consideration.

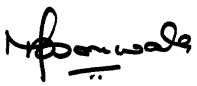
For your information, CHRI has been working on RTI issues in the Commonwealth for more than eight years, during which time we have accumulated considerable best practice expertise in terms of legal drafting and implementation. This was collected in our 2003 publication, *Open Sesame: Looking for the Right to Information in the Commonwealth.* I am enclosing a copy of Open Sesame along with this letter. The Report can also be accessed at http://www.humanrightsinitiative.org/publications/chogm/chogm_2003/default.htm.

I would also like to offer CHRI's assistance with your legislative process, for example, we can assist with legislative research, provide drafting guidance drawing upon other Commonwealth jurisdictions and we can review any further drafts of the FOI Bill to ensure they accord with international openness standards. Notably, our RTI Team has reviewed a number of draft FOI Bills throughout the Commonwealth, including most recently India, Kenya, Guyana, Malawi, Sierra Leone, Mozambique, Fiji, and Cayman Islands (please view our website for more information).

For your information, I am also enclosing a copy of a comparative table of Commonwealth right to information laws, which summarise the key elements of the right to information laws, which are in place in the Commonwealth. These laws can also be found on our website at www.humanrightsinitiative.org/programs/ai/rti/international/laws_&_papers.htm.

If we can be of any further assistance with reviewing the FOI Bill, please do not hesitate to contact me on +91 9810 199 745 or +91 11 2685 0523 or via email at majadhun@vsnl.com. Alternatively, please contact Ms Charmaine Rodrigues, Co-Coordinator, Right to Information Programme at charmaine@humanrightsinitaitive.org or Ms Tapasi Sil, Project Officer, Right to Information Programme at tapasi@humanrightsinitiative.org.

Yours sincerely,



Maja Daruwala
Director

Encl: as above

Cc:
1) Information Minister, Mr Vernon Mwaanga, Ministry of Information and Broadcasting
2) Justice Minister & Attorney General, George Kunda, Ministry of Legal Affairs,
3) Mr. Amusaa Mwanamwambwa, Speaker of Parliament
4) Mr. Kellys Kaunda, Chairperson, Media Institute of Southern Africa – Zambia
5) Mr. Anthony Mukwita, Chairperson for Politics & Parliament, MISA – Zambia

ANNEX I
BEST PRACTICE FOI LEGISLATIVE PRINCIPLES

CHRI's 2003 Report, *Open Sesame: Looking for the Right to Information in the Commonwealth* (see enclosed), captured the key principles which should underpin any effective right to information law, drawing on international and regional standards, evolving State practice, and the general principles of law recognised by the community of nations. Article 19, an NGO, which specifically works on right to information, has also developed "Principles on Freedom of Information Legislation" which were endorsed by the United Nations Special Rapporteur in 2000.[1] The African Union and the Commonwealth[2] - both of which Zambia is a member - have also endorsed minimum standards on the right to information.

These various generic standards have been summarised into the five principles below, which I would encourage you to consider when you finalise your own FOI Bill.

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 in the objectives clause of any Act. Every member of the public should have a specific *right* to receive information and those bodies covered by the Act therefore have an *obligation* to disclose 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 is gaining influence and impact on the public and therefore cannot be beyond their scrutiny. Part 3 of the South African *Promotion of Access to Information Act* 2000 provides a very good example to draw on.

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. Section 4 of the new Indian *Right to Information Act 2005* provides a useful model.

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 pubic 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.

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[1] Hussain, A. (2000) Report of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression submitted in accordance with Commission resolution 1999/36, Doc.E/CN.4/2000/63, 5 April. See also Ligabo, A., Haraszti, M. & Bertoni, E. (2004) *Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression*.

[2] See (1999) Commonwealth Freedom of Information Principles, in *Promoting Open Government Commonwealth Principles And Guidelines On The Right To Know*, Report of the Expert Group Meeting on the Right to Know and the Promotion of Democracy and Development, Marlborough House, London, 30-31 March 1999.

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 absolute 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 (e.g. President) or bodies (e.g. 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, Cheap and Quick Access Procedures

A key test of an access law's effectiveness is the ease, inexpensiveness and promptness with which people seeking information are able to obtain it. The law should include clear and uncomplicated procedures that ensure quick responses at affordable fees. Applications should be simple and ensure that the illiterate and/or impecunious are not in practice barred from utilising the law. Officials should be tasked with assisting requesters. Any fees, which are imposed for gaining access, should also not be so high as to deter potential applicants. Best practice requires that fees should be limited only to cost recovery, and that no charges should be imposed for applications nor for search time; the latter, in particular, could easily result in prohibitive costs and defeat the intent of the law. The law should provide strict time limits for processing requests and these should be enforceable.

All public bodies should be required to establish open, accessible internal systems for ensuring the public's right to receive information. Likewise, provisions should be included in the law, which require that appropriate record keeping and management systems are in place to ensure the effective implementation of the law.

Effective Enforcement: Independent Appeals Mechanisms & Penalties

Effective enforcement provisions ensure the success of access legislation. 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.

While internal appeals provide an inexpensive first opportunity for review of a decision, oversight by an umpire independent of government pressure is a major safeguard against administrative lethargy, indifference or intransigence and is particularly welcome where court-based remedies are slow, costly and uncertain. The fear of independent scrutiny ensures that exemption clauses are interpreted responsibly and citizens' requests are not unnecessarily obstructed. While the courts satisfy the first criteria of independence, they are notoriously slow and can be difficult to access for the common person. As such, in many jurisdictions, special independent oversight bodies have been set up to decide complaints of non-disclosure. They have been found to be a cheaper, more efficient alternative to courts and enjoy public confidence when they are robustly independent, well funded and procedurally simple.

Best practice supports the establishment of a dedicated Information Commission with a broad mandate to investigate non-compliance with the law, compel disclosure and impose sanctions for non-compliance. Experience from a number of Commonwealth jurisdictions, including Canada, England, Scotland and Western Australia, has shown that Information Commission(er)s have been very effective in raising the profile of the right to information and balancing against bureaucratic resistance to openness. Of course, there are alternatives to an Information Commission. For example, in Australia, the Administrative Appeals Tribunal has appeal powers and in New Zealand and Belize the Ombudsman can

deal with complaints. However, experience has shown that these bodies are often already overworked and/or ineffective, such that they have rarely proven to be outspoken champions of access laws.

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.

In the first instance, legislation should clearly detail what activities will be considered offences under the Act. It is important that these provisions are comprehensive and identify all possible offences committed at all stages of the request process – 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.

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.

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 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 incorporated 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 specifically require that the government ensure that programmes are undertaken to educate the public and the officials responsible for administering the Act.

ANNEX 2
KEY RECOMMENDATIONS OF CHRI FOR AMENDING THE ZAMBIA FOI BILL

Broaden the scope of the definition of "information":

1. It is very positive that the FOI Bill allows the right to access information under the control of a public authority. However, consideration should be given to broadening the definition of information under s.2 to ensure that there is no ambiguity about what can be disclosed:

   "information" means any material in any form, including records, documents, file notings, memos, emails, opinions, advices, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models, data, material held in any electronic form and any information relating to a private body which can be accessed by a public authority under any law.

Define the term "access" to information and amend s. 25 to clarify that it includes taking samples and inspection of public works

2. Section 2 of the FOI Bill should be amended to include a definition of the term "access" to clarify the specific content of the right to 'access' information. This will promote maximum accessibility by the public. In this context, the law should be drafted to permit access not only to documents and other materials via copying or inspection, but it should also permit the inspection of public works and taking of samples from public works. Such an approach has been incorporated into the India *Right to Information Act 2005* in recognition of the fact that corruption in public works is a major problem in many countries, which could be tackled by facilitating greater public oversight through openness legislation.. A model definition could be:

   "access" to information means the inspection of works and information, taking notes and extracts and obtaining certified copies of information, or taking samples of material.

3. Accordingly, s.25, which deals with the 'means by which communication is to be made', should also be amended to include the right to inspect public works and the right to take samples of public works.

Broaden the scope of the Act to cover more "public authorities"

4. The current definition of the term 'public authority' under the Second Schedule of the FOI Bill is relatively comprehensive but is a little confusing in its current form. The definition could be simplified and included under s.2 instead of in a separate schedule, to assist easier interpretation of the law. A model definition could be:

   "public authority" shall include the Parliament and its committees, the courts, Cabinet, a Ministry, Department, Executive agency, statutory body, municipal corporation, government corporation, any government commission or any other agency of Government, whether part of the executive, legislature or judiciary and includes any authority or body established or constituted: (i) by or under the Constitution; (ii) by any other law; bodies which appear to exercise functions of a public nature, or are providing under a contract made with a public authority any service whose provision is a function of that authority, a publicly owned company and any other body owned, controlled or substantially financed by funds provided directly or indirectly by the Government"

Reduce and narrow the exemptions provisions

5. It is very positive that Part III of the FOI Bill, which deals with the right to information and the exemptions regime, contains only a very limited number of exemptions. This accord with best practice which requires that information should only be withheld if disclosure would cause or be likely to cause harm and if the public interest in secrecy outweighs the public interest in disclosure.

Narrow the privacy exemption

6. It is legitimate that a certain level of protection be accorded to the privacy rights of individuals. However, in its current form the exemption provided under s.13 is much too wide because it only requires that information "relates" to privacy interests, not that it would actually unjustifiably HARM those privacy interests. This is not appropriate. It is recommended therefore that the s.13 be amended to protect against "*disclosures which would involved and unreasonable and unwarranted invasion of privacy*".

7. Even where privacy rights are being invaded, the fact remains that privacy rights often need to be balanced against the public's right to know, particularly in instances where it is public officials that are asserting the right to privacy to protect against disclosure on their own behalves. It is vital to government accountability that public officials can individually be held to account for their official actions. As such, a new clause should also be inserted in s.13 making it explicit that in certain instances a third party's privacy rights must always give way to openness, for example where:
    (a) the third party has effectively consented to the disclosure of the information;
    (b) the information given to the public body by the person to whom it relates and the person was informed by or on behalf of the public body, before it is given, that the information belongs to a class of information that would or might be made available to the public;
    (c) the individual is or was an official of a public body and the information relates to any of his or her functions as a public official including but not limited to:
        (i) the fact that the person is or was an official of that public body;
        (ii) the title, work address, work phone number and other similar particulars of the person;
        (iii) the classification, salary scale or remuneration and responsibilities of the position held or services performed by the person; and
        (iv) the name of the person on a record prepared by the person in the course of employment.
    (d) The information relates to an allegation of corruption or other wrongdoing
    (e) the person making the request is the guardian of the third party, or the next of kin or the executor of the will of a deceased third party; or
    (f) the third party has been deceased for more than 20 years.

<u>Narrow the exemption for functions of public authorities</u>

8. It is legitimate that section 14(a) attempts to protect against certain sensitive international relations disclosures. However, the provision should be reworded to protect against "disclosures that would or would be likely to seriously damage Zambia's lawful and legitimate international relations" (subject of course to the public interest override in s.16). It is of concern that the exemption currently does not include a harm test, but focuses only on the type of information ("defence or security information from a foreign government") and the fact that the information was given in confidence. Just because information was given to the Zambian Government in confidence does *not* mean that it should necessarily *remain* confidential. At the time it was communicated it may have been sensitive, but at the time it is requested it may be harmless. There is also a chance that the provision will be abused by corrupt officials who may connive with foreign officials in confidence but then seek to hide their activities using this clause. What if the confidential information that was passed on relates to a corrupt deal undertaken by a previous administration? Is it really legitimate that it be withheld? What harm will it cause the nation – in fact, will it not be of benefit in exposing corrupt dealings and making government more accountable?

9 Sub-section 14(d), which attempts to protect internal discussions, may be misused by secretive officials. The opinions, discussions and weighing of evidence and advice by officials is exactly the kind of information that most need to be exposed to public scrutiny, in the interests of good governance and accountability. It is not enough 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. Of course, where the discussions relate to sensitive information, it must be remembered that such information will be protected under other exemptions clauses. At the very most, the following exemption could be included:

A public authority may refuse to disclose information, where to do so would, or would be likely to:

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

and disclosure would be contrary to the public interest.

Do not apply exemptions to old documents

10 A new provision on non-applicability of exemptions with regard to historical information/documents should be inserted in the FOI Bill. The following may be considered:

"any information relating to any occurrence, event or matter, which has taken place, occurred or happened more than [10? 20?] years before the date on which any request is made shall be provided to any person making a request".

Extend the proactive disclosure duties on public authorities:

11. It is very positive that s.20 currently requires the proactive disclosure of a considerable amount of information. Nevertheless, consideration should be given to extending the categories of information, which need to be automatically disclosed in line with the most recent best practice. Section 4 of the new Indian *Right to Information Act 2005* and Article 7 of the Mexican *Federal Transparency and Access to Public Government Information Law 2002* provide excellent models for consideration. They require the disclosure of information such as the recipients of government subsidies, concessions and licenses, publication of all government contracts and information about proposed development works.

12. Such provisions operate to assist the public to keep better track of what the government is doing as well as ensuring key activities of public bodies are always and automatically kept open to public scrutiny. Notably, although the initial effort of collecting, collating and disseminating the information may be a large undertaking, over time it will be worth the investment as it will reduce requests in the long run because people will be able to easily access routine information without having to apply to public bodies. Amend s.20 to include additional proactive disclosure obligations based on Indian & Mexican laws:

"(1) Every public body shall,

(a) publish [before X date? within 3 months of? the commencement of this Act]:

(i) the powers and duties of its officers and employees;

(ii) the procedure followed in the decision making process, including channels of supervision and accountability;

(iii) the norms set by it for the discharge of its functions;

(iv) the rules, regulations, instructions, manuals and records, held by it or under its control or used by its employees for discharging its functions;

(v) a directory of its officers and employees;

(vi) the monthly remuneration received by each of its officers and employees, including the system of compensation as provided in its regulations

(vii) the budget allocated to each of its agency, indicating the particulars of all plans, proposed expenditures and reports on disbursements made;

(viii) the manner of execution of subsidy programmes, including the amounts allocated and the details of beneficiaries of such programmes;

(ix) particulars of concessions, permits or authorisations granted by it;

(x) details in respect of the information, available to or held by it, reduced in an electronic form;

(xi) the names, designations and other particulars of the Public Information Officers, and appeals bodies under the Act;

(xii) such other information as may be prescribed;

and thereafter update there publications within such intervals in each year as may be prescribed;

(b) publish all relevant facts while formulating important policies or announcing the decisions which affect public;

(c) provide reasons for its administrative or quasi judicial decisions to affected persons;

(d) before initiating any project, or formulating any policy, scheme, programme or law, publish or communicate to the public in general or to the persons likely to be affected thereby in particular, the facts available to it or to which it has reasonable access which in its opinion should be known to them in the best interest of natural justice and promotion of democratic principles.

(e) *Upon signing, public authorities must publish all contracts entered into, detailing at a minimum for each contract:*
   (i) *The public works, goods acquired or rented, and the contracted service, including any sketches, scopes of service and/or terms of reference;*
   (ii) *The amount;*
   (iii) *The name of the provider, contractor or individual to whom the contract has been granted,*
   (iv) *The periods within which the contract must be completed.*

Simplify the request and processing procedures:

13. It is essential that any law be developed to ensure that application, access and appeal processes are speedy, cheap and user-friendly. To this end, consideration should be given to including specific wording in the law making it clear that the *"internal processes for receiving and processing applications and appeals should be designed to promote easy, simple, quick and cheap access to information for the public".*

Clarify the role of Public Information Officers:

14. It is very positive that s.22 of the FOI Bill proposes appointing Information Officers to deal with requests because it is useful for the public to have a clear and consistent point of contact which they know will always be responsible for dealing with their applications. The FOI Bill should clarify that *"as many Information Officers as a necessary to ensure proper implementation of the law need to be appointed"*. This is especially important in terms of decentralising implementation – sub-offices of a public authority should also be required to identify an officer who is responsible for receiving applications. It cannot be expected that people from all over the country wanting to submit their application in person have to travel to the head office of the authority. The FOI Bill should also make it clear that where the Head of a Public Authority does NOT appoint Information Officers, the Head of a Public Authority themselves will be deemed to be the Information Officer for the purposes of the law.

15. Section 22(b) should also be amended to broaden the role of the Information Officer, to also make them a point of contact for promoting the law *within* the bureaucracy. This is often done in other jurisdictions, in recognition of the importance of having an in-house champion and expert on the law. The Bill could clarify that*:*

> *Information Officers will act as the central contact within the public body for receiving requests for information, for assisting individuals seeking to obtain information, for processing requests for information, for providing information to requesters, for receiving individual complaints regarding the performance of the public body relating to information disclosure and for monitoring implementation and collecting statistics for reporting purposes.*

Shorten time limits in special cases

16. Section 24, which sets out the time limits for dealing with applications, should be amended to include an additional provision requiring information to be provided with 48 hours where it relates to the life and liberty of a person. This good practice approach has been implemented in s.7(1) of the new Indian *Right to Information Act 2005*.

Waive and/or reduce fees

17. Best practice requires that no fees should be imposed for accessing information, particularly government information, as costs should already be covered by public taxes. The FOI Bill should specifically state that fees should be limited only to cost recovery, with no additional margin for profit, and a maximum limit should be imposed. Charges should only cover reproduction costs, not search or collation/compilation time.

18. Additionally, the FOI Bill should provide for fee waiver where information is not provided within the set time limits OR where the imposition of fees would cause financial hardship OR when it is in public interest to disclose information, for example where disclosure would benefit a large group of people. These suggestions are in accordance with international best practice.

Strengthen the Public Information Commission

19. It is very positive that the FOI Bill proposes the creation of the Public Information Commission. It must be ensured that the Information Commission is independent of government pressure, as it will act as a major safeguard against administrative lethargy, indifference or intransigence and needs to be empowered accordingly. Notably, special independent oversight bodies have been found to be a cheaper, more efficient alternative to courts and enjoy public confidence when they are robustly independent, well-funded and procedurally simple. The fear of independent scrutiny ensures that exemption clauses are interpreted responsibly and citizens' requests are not unnecessarily obstructed.

Ensure the independence of the Commission:

20. The procedure for appointing Information Commissioners must be impartial and independent of government interference, to ensure that Information Commissioners are seen as non-partisan. At the outset, the impartial selection of Commissioners should be ensured by promoting a transparent procedure, whereby nominations are published prior to their consideration, the criteria for selection of Commissioners is written down and published and the deliberations of the Selection Committee are minuted and published. The minimum qualifications for Commissioners at s.6(5) should also be modified to include certain positive skills requirements, for example:

    The persons to be appointed, as the Information Commissioners should –
    (a) be publicly regarded as persons who can make impartial judgments;
    (b) have sufficient knowledge of the workings of Government;
    (c) have not been declared a bankrupt;
    (d) have a demonstrated commitment to open government
    (e) *be otherwise competent and capable of performing the duties of his or her office*

21. The Commissioners need to be given security of tenure and salary. In accordance with the principles of the separation of powers, removal should only be permitted through impeachment proceedings in Parliament. Further, the term of office of the commissioners should be fixed, for instance, 5 years. A provision permitting resignation should also be included.

22. The Information Commission should be given financial autonomy to ensure its independence from government control. It should be explicitly stated that the Commission will be given *"budgetary, operational and decision-making autonomy and should be completely independent of the interference or direction of any other person or authority, other than the Courts"*.

Clarify the decision-making powers of the Commission

23. Most importantly, s.32 of the FOI Bill, which sets out the power of the Information Commission to make recommendations regarding disclosure, should be amended to give the Information Commission the power to make *binding decisions*. Otherwise, the ability of the Commission to address entrenched secrecy within the bureaucracy will be severely curtailed. Recommendations can be ignored, largely with impunity. The Commission needs binding powers to *compel* disclosure. In countries like India, Mexico, Scotland, the United Kingdom, some provinces in Canada and some States in Australia, Information Commissions have the power to make binding decisions.

24. While sections 7 and 8 properly give the Information Commission a wide remit to look at issues related to compliance with the law, the provisions of section 8 could usefully be extended to make it more explicit what the powers of the Commission are in relation to dealing with complaints. Section 19(8) of the Indian *Right to Information Act 2005* is a good model:

    In its decision, the Central Information Commission…has the power to –
    (a) require the public authority to take any such steps as may be necessary to secure compliance with the provisions of this Act, including-
        (i) by providing access to information, if so requested, in a particular form;

(ii) *by appointing a Central Public Information Officer or State Public Information Officer, as the case may be;*
(iii) *by publishing certain information or categories of information;*
(iv) *by making necessary changes to its practices in relation to the maintenance, management and destruction of records;*
(v) *by enhancing the provisions of training on the right to information for its officials;*
(vi) *by providing it with an annual report in compliance with proactive disclosures under s.XX;*

(b) *require the public authority to compensate the compliant for any loss or other detriment suffered;*
(c) *impose any of the penalties provided under this Act;*
(d) *reject the application.*

Permit ad hoc investigations by the Commission

25. An additional provision should be included in s.8(1) replicating s.30(3) of the Canadian *Access to Information Act 1982*, which gives the Information Commission the power to initiate its own investigations *even in the absence of a specific complaint by an aggrieved applicant, eg. persistent cases of departmental non-compliance*. This provision is used to allow the investigation into the patterns of non-compliance, either across government or within a department and produce reports and recommendations for general improvements rather than in response to specific individual complaints.

Clarify who carries the burden of proof in appeals

26. Consideration should be given to including an additional provision under Part IV of the FOI Bill, making it clear that '*in any appeal proceedings, the public authority to which the request was made has the onus of establishing that a decision given in respect of the request was justified'.* It accords with best practice to make the body refusing disclosure and/or otherwise applying the law responsible for justifying their decision. It would be unfair and extremely difficult for members of the public – who will never have seen the document they are requesting – to be forced to carry the burden of proof.

Strengthen the offences and penalties provisions

27. While it is positive that s.39 of the FOI Bill contains penalty provisions for deliberate non-compliance with the law, nevertheless in accordance with best practice the offences and penalty provisions should be extended. Specifically, it is recommended that:

- New offences are inserted to permit penalties to be imposed where an official refuses to accept an application or unreasonably delays providing information, without any reasonable excuse;
- New offences are inserted to punish officials who are found to have obstructed the processing of applications or appeals or the work of the Information Commission;
- Sanctions (including fines and imprisonment for very serious offences) can be imposed personally on any official who negligently or willfully fails to comply with their duties under the law. (This accords with good practice in India, for example, where officials must pay fines, calculated daily, out of their own pay where they unreasonably delay providing information). 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;
- Any official on whom a penalty is imposed shall also be liable to appropriate disciplinary action under the service rules applicable to him or her;
- Penalties can be imposed on departments for persistent non-compliance. Poorly performing public authorities should be sanctioned and their bad behaviour even brought to the attention of their Minister who should have to table an explanation in National Assembly;
- The FOI Bill must clarify who can impose penalties – the Information Commission, High Court or both.

Extend the Annual Reporting requirements

28. It is very positive that s.36 requires the Information Commission to produce annual reports to be considered by the National Assembly. However, to ensure that the reports are comprehensive and cover off all key issues, the law itself should set down minimum requirements for these reports. Its also important that the Commission's reports are considered by National Assembly, so the law should specify that a particular Committee will consider the report and submit comments to National Assembly for consideration. CHRI recommends that s.36 be reworked as follows:

    (1) The Information Commission must as soon as practicable after the end of each year, prepare a report on the implementation of this Act during that year and cause a copy of the report to be laid before the National Assembly.

    (2) The [insert name of Committee] shall consider the Information Commission's report in the next possible session and report back to National Assembly with its conclusions and recommendations

    (3) Each report shall, at a minimum, state in respect of the year to which the report relates:

        (i) the number of requests made to each public authority;
        (ii) 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;
        (iii) the number of appeals sent to the Information Commissioners for review, the nature of the complaints and the outcome of the appeals;
        (iv) particulars of any disciplinary action taken against any officer in respect of the administration of this Act.
        (v) the amount of charges collected by each public authority under this Act;
        (vi) any facts which indicate an effort by public authorities to administer and implement the spirit and intention of this Act;
        (vii) recommendations for reform, including recommendations in respect of particular public authorities, for the development, improvement, modernisation, reform or amendment of this Act or other legislation or common law or any other matter relevant to operationalising the right to access information, as appropriate.

    (4) The Commission may from time to time lay before the National Assemble such other reports with respect to those functions as he thinks fit.

Require public education and training on the Act

29. It is increasingly common to include provisions in the law itself mandating a body not only to monitor implementation of the law, but also to actively promote the concept of open governance and the right to information within the bureaucracy and amongst the public. The Information Commission could do this job, in its role as a champion of openness in administration. In other jurisdictions, 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. Sections 83 and 10 of the South African *Promotion of Access to Information Act 2000* together provide a very good model:

    South Africa*: 83(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 by 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 [under] 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;

10 (1) The [Insert name of body] must, within 18 months…compile in each official language a guide containing such information, in an easily comprehensible form and manner, as may reasonably be required by a person who wishes to exercise any right contemplated in this Act….

(3) The [Insert name of body] must, if necessary, update and publish the guide at intervals of not more than two years.