

Detailed Analysis of the *Indian Freedom of Information Act 2002* & 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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BACKGROUND

1. The right to information has been recognised by the Indian Supreme Court for decades as a constitutionally protected fundamental right. Since 1997, State Governments have been taking the lead in enacting legislation setting out the framework for implementing the right in practice. Nine State Governments have now enacted legislation, but it remains a fact that people in the other 20 states of India are still reliant only on their constitutional right if they want to access information. People should not be expected to undertake litigation in the High Court and/or Supreme Court every time they require a simple piece of information from their government.
2. The Central Government passed the *Freedom of Information Act* in December 2002. Although Presidential Assent was provided soon after, more than 18 months later the Act has still not come into force. This is disappointing. In any case, the current Act is deficient in many respects, including its limited scope (specifically, the exclusion of private bodies from coverage), the breadth of its exemptions, the failure to include a public interest override of exemptions, the absence of an effective independent appeals mechanism and the failure to include public education and monitoring provisions. These shortcomings need to be remedied as a priority if the Act is to effectively serve its purpose.
3. It is encouraging that the newly elected United Progressive Alliance has stated its commitment to taking practical measures to reform the current Act. The Congress Party stated in its election manifesto that: "All government agencies but particularly those that deal with citizens on a day-to-day basis must operate in a responsive and accountable manner. The Right to Information Act at the centre will be made more progressive, meaningful and useful to the public. The monitoring and implementation of the Act will be made more participatory and the penalty clauses regarding delays, illegal denials and other inadequacies relating to the supply of information to the public will be operationalised soon. Protection will be extended to all "whistleblowers" through statutory means, if necessary." More recently, in a speech to the joint session of Parliament on 7 June 2004, President APJ Abdul Kalam reiterated that: "The Right to Information Act will be made more progressive, participatory and meaningful."
4. In this reform context, this paper attempts to provide an analysis of the current *Freedom of Information Act* and to suggest changes that should be made to the Act to bring it into line with international best practice. It is generally well-accepted that there are basic minimum standards which all RTI legislation should meet. Chapter 2 of CHRI's 2003 Report, *Open Sesame: Looking for the Right to Information in the Commonwealth*¹, provides more detailed discussion of these standards. The critique below draws on this work.² CHRI has suggested possible amendments drawing on international best practice, areas for improvement and issues for further consideration.
5. Notably, any process to amend the law should be undertaken in a participatory fashion. 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 law-makers proactively encourage the involvement of civil society groups and the public in the legislative process. This can still 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 a 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. There is already considerable good practice and lessons learned that can be drawn from State-level experiences with right to information legislation – particularly Delhi, Karnataka and Maharashtra which have seen an active civil society utilise access laws and demonstrate their strengths and weaknesses.

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

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

CONSTITUTIONAL ISSUES

6. Before coming to an analysis of the Act, it is important to first consider the issue of the scope of any Central law on the right to information. To date, there has been considerable confusion and disagreement over the extent of the Central Government's law-making competence. This issue needs to be clarified as a priority, to reduce confusion during implementation.
7. The NDA Government responsible for enacting the current Act maintained that it had the legislative competence to enact a law on the right to information for the entire country, covering both Central and state public authorities. It was argued that the Centre had sole power to legislate because right to information is not specifically mentioned in any of the legislative entries in the Lists in the Seventh Schedule of the Constitution. Therefore, under the residual law-making power conferred on the Central Government by entry 97 of the Union List, the Central Government has competence to enact a law. On this interpretation, the Central Act, once in force, would override all State Acts. In any case, the Government called on all States with laws to repeal them. It is not clear what the position of the new Central Government will be.
8. Alternatively, it is arguable that both the States and the Centre have powers to legislate on the right to information. It is a well-established legal principle that the Lists in the Constitution which set out the State and Centre's law-making powers refer not just to those matters that are explicitly listed, but also to those matters that are *incidental, or ancillary*, to them³. It can be argued that ensuring the provision of access to information relating to subject matter explicitly mentioned in a List is a matter "ancillary" to that subject. For example, if a legislature is competent to legislate on railways transport, it is also competent to legislate to provide information relating to railways transport. On the basis of this argument, it follows that:
 - (i) Parliament is exclusively competent to legislate on access to information relating to matters in the Union List; and
 - (ii) State legislatures are exclusively competent to do the same with respect to matters in the State List, such that current state right to information legislation is valid;
 - (iii) both Parliament and the States can enact freedom of information laws in relation to matters in the Concurrent List.
9. If the analysis in paragraph 8 is correct, in practice the situation regarding competence in relation to subject matter under the State and Union Lists is clear. In relation to subject matter falling in the Concurrent List however, there may still be confusion. Constitutional law principles are clear that where there is conflict between a central and state law, the central law will prevail. However, in practice, bureaucrats working on subject matter falling under the Concurrent List cannot be expected to have to consider for themselves whether there is a conflict of laws and if so, which parts of which law will apply to their work. To avoid confusion, the Centre will need to draft a law which "covers the field" and operates as the sole law in relation to access to information for Concurrent List subjects.
10. The issue of State versus Centre competence is not unique to India. Australia, Canada and the United States are all federations and each has had right to information legislation for decades. Although their central governments have passed access laws, the States/Provinces/Territories have also passed their own right to information legislation. The interaction between the centre and state acts is well-illustrated by a comparison of the scope provisions in the Australian Federal *Freedom of Information Act 1982* and the State of Victoria's *Freedom of Information Act 1982*:
 - Federal: s.3 - *The object of this Act is to extend as far as possible the right of the Australian community to access to information in the possession of the Government of the Commonwealth...*
 - State: s.3 - *The object of this Act is to extend as far as possible the right of the community to access to information in the possession of the Government of Victoria and other bodies constituted under the law of Victoria for certain public purposes...*

³ *State of Bombay v. F.N. Balsara* (1951) S.C.R. 682; *Baldeo Singh v. I.T.C.* (1961) 1 S.C.R. 482.

Recommendations

Both the State and Central Governments need to give serious consideration to how they will each develop appropriate right to information laws. Clarification of State and Centre law-making competencies should be requested from the Supreme Court. Accordingly, the Central Government may then need to consider to redrafting the entire current Act with a view to ensuring that it does not attempt to go beyond the scope of the Central Government's legislative competence. Alternatively, if the Centre has sole law-making competence, at a minimum the progressive features in the State laws need to be reflected in the national law.

ANALYSIS OF FREEDOM OF INFORMATION ACT 2002

Title & Preamble

11. The law should be renamed the "Right to Information Act". The Supreme Court has repeatedly recognised that access to information as a fundamental RIGHT. This should be reflected in any legislation on the matter to ensure that implementing bodies are clear that access to information is not a discretionary gift granted to the people by a benevolent government. It is a constitutionally mandated *obligation* on the government to implement the corresponding *right*.
12. In the same vein, the Preamble should be drafted in stronger terms. This is particularly important because courts will often look to the preamble of legislation when interpreting the law. The current Preamble is problematically worded and reflects a number of defects in the law. It:
 - Provides the right to access information only to "citizens" not to all people (see paragraph 15);
 - Refers only to "public authorities", without also covering private bodies (see paragraph 16-17);
 - Is targeted at improving "administration", rather than more broadly improving 'governance', a term which covers the political as well as the bureaucratic aspects of government.

Recommendations

- *Rename the law "Right to Information Act".*
- *Redraft the Preamble to make it explicit that the objectives of the Act are to:*
 - (i) *give effect to the Fundamental Right to Information, which will contribute to strengthening democracy, improving governance, increasing public participation, promoting transparency and accountability and reducing corruption*
 - (ii) *establish voluntary and mandatory mechanisms or procedures to give effect to right to information in a manner which enables persons to obtain access to records of public authorities, and private bodies where the information is needed for the exercise and/or protection of a right, in a swift, effective, inexpensive and reasonable manner.*
 - (iii) *promote transparency, accountability and effective governance of all public authorities and private bodies by including but not limited to empowering and educating all persons to:*
 - *understand their rights in terms of this Act in order to exercise their rights in relation to public authorities and private bodies.*
 - *understand the functions and operation of public authorities; and*
 - *effectively participating in decision making by public authorities that affects their rights.*

Current Chapter I - Preliminary

Section 1

13. Section 1(3) requires the date of enactment of the Act to be specifically notified. As recent history has demonstrated, such a formulation has allowed the law to sit on the books for 18 months despite receiving Presidential assent. Although it is understandable that the Government may wish

to allow for time to prepare for implementation, best practice has shown that the Act 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).

Recommendations

- *Amend s.1(3) 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 2

14. Section 2, which contains the Act's definitions, is currently somewhat confusingly set out. Consideration should be given to moving and/or reworking some of the definitional clauses. It is extremely important to draft these definitions carefully to ensure that they maximise the breadth of the coverage of the Act and do not inadvertently exclude relevant information from the scope of the law. Specifically:

- It is not necessary to include a definition of 'freedom of information'. Rather, much of this clause could more appropriately be merged with the current s.3. Also, to ensure consistency and clarity, the term "right to information" should be used throughout the whole Act, rather than freedom of information. Notably, the parts of the definition which deal with the form of access to be provided should more appropriately sit in the body of the law. See paragraph 28 below for further discussion on this issue.
- The definition of "public authority" is too narrow.
 - Although the inclusion of bodies substantially funded by the Government goes some way to covering private or quasi-public bodies providing public services, the scope of the law should include "bodies which undertake public functions on behalf of the Government". At a time when the Government is increasingly outsourcing and in some cases even privatising the provision of public services - in the electricity, telephones and transport sectors for example - it is important that the public still has an assured right to access information about these services.
 - It should be made explicit that the Act covers all three arms of government: executive, legislature and judiciary, subject to the exemptions. While these three arms should all be captured under the proviso covering bodies established under the Constitution, to avoid any ambiguity, this should be made clear.
- The definition of "information" is unnecessarily narrowed by requiring the information to relate to "administration, operations or decisions of a public authority". Best practice from throughout the Commonwealth indicates that most Acts simply refer to "access to information *held by or under the control of* a body.

Recommendations

- *Delete the definition of "freedom of information" with a view to merging its provisions with s.3 setting out the right to information and a new provision detailing forms of access.*
- *Broaden the definition of "public bodies" to explicitly include all arms of government as well as all "bodies which undertake public functions on behalf of the Government".*
- *Broaden the definition of "information" to ensure it covers any information "held by or under the control of the Government".*

Current Chapter II – Freedom of Information and Obligation of Public Authorities

Section 3

15. Section 3 currently restricts the right to citizens only. The coverage of the Act should extend to allow all persons access to information under the law, whether citizens, residents or non-citizens (such as asylum seekers). This best practice 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.2 of a definition of “person”.
16. The scope of the Act should be extended to cover information held by private bodies which is necessary for the exercise or protection of a right. Private bodies are increasingly exerting significant influence on public policy. Furthermore, as noted above, India has witnessed increasing outsourcing of important government functions and is likely to continue to see further privatisation of important services as part of its economic development strategy. In this context, it is unacceptable that these bodies, which have such a huge effect on the rights of the public, should be exempted from public scrutiny simply because of their private status. As one commentator aptly observed, the scope of a right to information law needs to be “resolved by reference to its role in protecting the fundamental interests of citizens, and not by reference to the provenance or structural characteristics of the institution holding the contested information.”⁴
17. Part 3 of the South African *Promotion of Access to Information Act 2000* (POAIA) already provides a working example of this approach. It is notable that the POAIA has been enacted in a developing country with similar challenges to those faced by the Indian Government, such that it is no excuse that this best practice example cannot be replicated in India. It is suggested that a new s.3 could be drafted as follows:
- (1) *Subject to this Act, every person has a legally enforceable right to obtain access in accordance with this Act to information held by or under the control of:*
- (a) *A public authority [as defined in s.2 taking into account the recommendations made in paragraph 14 above];*
 - (b) *A private body where access to that information is necessary for the exercise or protection of any right.*

Recommendations

- *Amend s.3 to confer a right to information on all people not just citizens.*
- *Broaden s.3 to extend a right to access information “held by or under the control of a private body where access to that information is necessary for the exercise or protection of any right”. This change may also require the inclusion in s.2 of a definition of “private body”.*

Section 4

18. 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.4(a) requires all public authorities to properly maintain their records. However, s.4(a) 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 computerization of records and networking of information systems. Consideration should also be given to empowering an appropriate body to develop guidelines or a Code on records management to this end. This has been done 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.

⁴ Lewis, D. (2003) “The need and value of access to information from no-state agencies”, CHRI unpublished, p.9.

Pakistan: s.6 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.

19. It is positive that s.4(b) requires suo moto disclosure by the bodies covered by the Act. However, the list of topics which public bodies are required to proactively publish and disseminate should be extended. Article 7 of the Mexican *Federal Transparency and Access to Public Government Information Law 2002* provides an excellent model for consideration:

With the exception of classified or confidential information as stipulated in this Law, the subjects compelled by the Law must...put at the public's disposition and keep up to date the following information:

- I. Their constitutional structure;*
- II. The powers of each administrative unit;*
- III. A directory of their public servants, from the level of the head of the department or his equivalent and below;*
- IV. The monthly remuneration received for each position, including the system of compensation as established in the corresponding dispositions;*
- V. The address of the liaison section, as well as the electronic address where requests for information can be received;*
- VI. The aims and objectives of the administrative units according to their operational schemes;*
- VII. The services they offer;*
- VIII. Their procedures, requisites and forms...;*
- IX. Information concerning the budget assigned to each agency, as well as reports about its disbursement, in the terms established by the Budget for the Federation's Expenses. In the case of the Executive Branch, this information will be made available for each agency and entity by the Secretariat of the Treasury and Public Credit, which will also inform the public about the economic situation, public finance and the public debt in the terms established by the budget;*
- X. The results of the audit of any subject compelled by the Law completed, as appropriate, by the Secretariat of the Comptroller and Administrative Development, internal comptrollers or the Federation's Superior Auditor, and, in such cases, the corresponding explanations;*
- XI. The design and execution of subsidy programs as well as the amounts allocated to them and criteria for access to them.*
- XII. All concessions, permits or authorizations granted, with their recipients specified.*
- XIII. All contracts granted under the terms of the applicable legislation detailing for each contract:*
 - (a) The public works, goods acquired or rented, and the contracted service; in the case of studies or research the specific subject must be indicated;*
 - (b) The amount;*
 - (c) The name of the provider, contractor or the physical or moral person to whom the contract has been granted, and*
 - (d) The periods within which the contracts must be completed.*
- XIV. The norms applicable to each subject compelled by the Law.*
- XV. The reports that each subject must generate, according to the law.*
- XVI. Mechanisms for citizen participation in cases where they exist, and*
- XVII. Any other information that may be useful or considered relevant, in addition to information based on statistical surveys that is responsive to the public's most frequently asked questions.*

The information to which this article refers must be made public in such a form as to facilitate its use and comprehension by individuals, and ensure its quality, veracity, timeliness and trustworthiness...

20. Section 4(b) should also explicitly require that public bodies publish the information to ensure maximum accessibility by the public, with a minimum obligation that the information is published in the local language on every body's website and a copy held for (free) inspection at all of the body's offices, ie. not just the body's headquarters. A maximum time limit should be included for updating the information, preferably every 6 months and no more than annually. The initial effort 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.

21. The scope of ss.4(c)-(e) also needs to be clarified. It is commendable that the Government intends to proactively provide the public with information about development activities and government decision-making. However, considering the sheer volume of information this could cover, it may be useful to provide guidelines, whether in the rules or in the Act itself, to more clearly direct officials as to what information needs to be proactively disseminated at a minimum, when, how, how often and to whom. Such guidelines may also specify different dissemination requirements according to the size and/or cost of the different activities or the subject matter of the relevant decisions.

Recommendations

- *Amend s.4(a) 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, and consider requiring a body to develop specific guidelines on proper record keeping and management which must be followed by all bodies subject to the Act.*
- *Extend the proactive disclosure obligations imposed on public bodies.*
- *Insert an additional clause elaborating how information should be published:
“For the purpose of this section, information should be published widely and in a manner easily accessible to the public. “Publish” shall mean appropriately making known to the public the information to be communicated through notice boards, newspapers, public announcements, media broadcasts, the internet or other such means and shall include inspection at all of the bodies offices. All materials shall be published keeping in mind the local language and the most effective method of communication in that local area.”*
- *Insert an additional clause requiring information to be updated at least every 6 months.*
- *Clarify how ss.4(c)-(e) will be implemented in practice.*

Insert: New - Chapter III – Procedures for Making Requests

Section 5

22. It is positive that s.5 of the Act requires the appointment of Public Information Officers (PIO), because the designation of officers within public bodies who are specifically responsible for managing and promoting access to information can be a useful way of ensuring the law is more effectively implemented. However, s.5(1) should make it clear that PIOs should be nominated at the local level, and not just at the headquarters. In the context of a Central Government law, it will be particularly important that people in outlying areas and states are able to lodge and follow up requests locally. Section 5(1) of the Maharashtra *Right to Information Act* provides a good example, as does s.17 of the South African *Promotion of Access to Information Act 2000*. It should be noted though, that any delegation provisions must make it explicit that if delegates are given the same powers as PIOs, they will also be subject to the same penalties for dereliction of duty. Likewise, officials whose assistance is requested by a PIO may also be subject to penalties for any failure to comply with the law.

Maharashtra: (1) *Every Competent Authority shall for the purposes of this Act, designate one or more officers as Public Information Officers in all administrative units and offices under such Authority;*

(2) *Every Public Information Officer shall deal with a request for information and shall render reasonable assistance to any person seeking such information;*

(3) *The Public Information Officer may seek the assistance of any other Officer or Employee as he considers necessary for the proper discharge of his duties.*

(4) *Any Officer or Employee whose assistance has been sought under sub-section (3), shall render all assistance to the Public Information Officer seeking his assistance.*

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

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- (2) *The information officer of a public body has direction and control over every deputy information officer of that body.*
 - (3) *The information officer of a public body may delegate a power or duty conferred or imposed on that information officer by this Act to a deputy information officer of that public body.*
 - (4) *In deciding whether to delegate a power or duty in terms of subsection (3), the information officer must give due consideration to the need to render the public body as accessible as reasonably possible for requesters of its records.*
 - (5) *Any power or duty delegated in terms of subsection (3) must be exercised or performed subject to such conditions as the person who made the delegation considers necessary.*
 - (6) *Any delegation in terms of subsection (3)—*
 - (a) *must be in writing;*
 - (b) *does not prohibit the person who made the delegation from exercising the power concerned or performing the duty concerned himself or herself; and*
 - (c) *may at any time be withdrawn or amended in writing by that person.*
 - (7) *Any right or privilege acquired, or any obligation or liability incurred, as a result of a decision in terms of a delegation in terms of subsection (3) is not affected by any subsequent withdrawal or amendment of that decision.*

Recommendations

- *Insert a new clause requiring PIO's to be appointed at the panchayat, district, taluka and block levels and permitting the delegation of the PIOs functions as necessary to ensure maximum accessibility for the public.*
- *Draft the delegation provisions to make it explicit that delegates and officials whose assistance is requested by the PIO will be subject to the same offences and penalties regime as PIOs for failure to comply with the law.*

Section 6

23. Section 6 which sets out how a request for information is made is a crucial provision. Best practice requires that access procedures should be as simple as possible and designed to be easily availed by all members of the community, whether illiterate, disabled or geographically distant from centres of power. It is positive that the provision currently places a responsibility on the PIO to render assistance to reduce oral requests in writing and that it does not require that a request should be in any particular form. Requiring requestors to submit a specific form may in practice prove an obstacle to access, as some people may not have easy access to said forms, for example because they cannot download it from the internet or because they are not proximate to a government office where they can be obtained. As long as the requestor provides sufficient particulars to allow information to be identified and located, that should be sufficient.
24. In practice, it would be useful for receipts to be provided once applications are received by bodies. This would ensure that requesters have written proof of the date on which they submitted the application and written recognition from the relevant body of the time limits which apply to the request. The receipt should also acknowledge payment of fees, if any (see paragraph 26-27 below for further discussion re fees). In order to ensure maximum ease for users of the law, s.6 should also make it clear that applications can be made in any of India's official languages. It should be the duty of the relevant public body to translate the request. To require all requestors to submit an application in Hindi or English could in practice exclude millions of people from utilising the law.
25. Section 6 should also make it explicit that applications must not require requestors to state a reason for their request. This should prevent cases like that of Maharashtra, where the Act does not require reasons to be provided, but the request form prescribed via regulation has introduced this condition. There should be no room for officials to deny requests simply because they are not satisfied with the requestor's reasons for wanting the information. Most Acts in the Commonwealth specifically provide that no reasons need to be provided by an applicant.

Recommendations

- *Insert a new clause requiring bodies to provide applicants with a receipt of their application, including the date of receipt, the date by which a response must be provided and details of fees paid (if any).*
- *Insert a new clause making it explicit that applications can be submitted in any of India's official languages.*
- *Insert a new clause making it explicit that requestors are not required to state a reason for their application.*

Section 7

26. Section 7 appears to permit the imposition of a fee for access. Best practice requires that no fees should be imposed for accessing information, particularly government information, as costs should already be covered by public taxes. At the very least, no application fee should be levied because the initial work required to locate information and determine its sensitivity to disclosure is a routine and expected task of government. This is the case in Trinidad & Tobago where s. 17(1) of the *Freedom of Information Act 1999* specifically states that no fees shall be imposed for applications. Notably, s.17(3) of the Trinidad & Tobago Act goes further and states that the even where fees are imposed, if a body subject to the Act fails to comply with the time limits for disclosure of information, access to which the applicant is entitled shall be provided free of charge. If any fees are imposed, 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. 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.

27. Provision should be made to allow the waiver of fees levied under the Act where that is in the public interest, such as where a large group of people would benefit from release/dissemination of the information or where the objectives of the Act would otherwise be undermined (for example, because poor people would be otherwise excluded from accessing important information). Such provisions are regularly included in access laws in recognition of the fact that fees may prove a practical obstacle to access in some cases. A definition of "public interest" may be included to provide direction to officials implementing the law. Section 29(5) of the Australian *Freedom of Information Act* provides a useful model:

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

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

Recommendations

- *Delete the requirement for payment of a fee at the time an application is made.*
- *Insert a new clause clarifying that any fees charged for provision of information "shall be reasonable, shall in no case exceed the actual cost of copying 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".*
- *Insert a new clause which states that "if a body subject to the Act fails to comply with the time limits for disclosure of information, access to which the applicant is entitled shall be provided free of charge".*
- *Insert a new clause allowing for the waiver and/or remission of any fees where their imposition would cause financial hardship or where disclosure is in the general public interest.*

Insert new section – Form of Access

28. As noted in paragraph 14, bullet point 1 portions of the current definition of “freedom of information” in s.2 of the Act should be moved to sit with the provisions in s.7 which deal with the form of access provided. Additionally, the current provisions dealing with the form of access should be extended to allow for inspection of works and the provision of translations and records in alternative formats in some cases. Section 2(i) of the Delhi *Right to Information Act* and ss.12(2) and (3) of the Canadian *Access to Information Act* provide useful models:

Delhi: *“right to information”...includes the inspection of works, documents, records, taking notes and extracts and obtaining certified copies of documents or records, or taking samples of material.*

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

(a) *forthwith, if the record or part thereof already exists under the control of a government institution in that language; or*

(b) *within a reasonable period of time, if the head of the government institution that has control of the record considers it to be in the public interest to cause a translation to be prepared.*

(3) *Where access to a record or a part thereof is to be given under this Act and the person to whom access is to be given has a sensory disability and requests that access be given in an alternative format, a copy of the record or part thereof shall be given to the person in an alternative format*

(a) *forthwith, if the record or part thereof already exists under the control of a government institution in an alternative format that is acceptable to that person; or*

(b) *within a reasonable period of time, if the head of the government institution that has control of the record considers the giving of access in an alternative format to be necessary to enable the person to exercise the person's right of access under this Act and considers it reasonable to cause that record or part thereof to be converted.*

29. It is very positive that s.7(3) requires that, where a request is rejected, reasons and appeal rights should be communicated to the applicant. This is a crucial provision as the information contained in the notice will be relied upon by the requestor in determining whether to proceed with an appeal. In this context, consideration should be given to elaborating upon the current provision to make absolutely sure that requestors are provided with sufficient information by officials. Section 26 of the Australian *Freedom of Information Act 1982* provides a useful example:

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

(a) *state the findings on any material questions of fact, referring to the material on which those findings were based, and state the reasons for the decision;*

(b) *where the decision relates to a document of an agency, state the name and designation of the person giving the decision; and*

(c) *give to the applicant appropriate information concerning:*

(i) *his or her rights with respect to review of the decision;*

(ii) *his or her rights to make a complaint to the Ombudsman in relation to the decision; and*

(iii) *the procedure for the exercise of the rights referred to in subparagraphs (i) and (ii);*

including (where applicable) particulars of the manner in which an application for review under section 54 [dealing with internal reviews] may be made.

30. Section 7(3) regarding notification of decisions should be extended to cover instances where a request is partially rejected (as permitted under s.10). Likewise, even where access is granted, notices should include information about requestors' rights to appeal the imposition and calculation of any fees and any adverse decision regarding the form of access to be provided.

Recommendations

- *Insert a new clause clearly setting out the forms of access allowed under the Act, in the broadest terms possible. The clause should specifically allow inspection of materials and taking of samples and extracts, as well as the provision of translations and records in alternative formats in certain specified cases.*
- *Amend s.7(3), which sets out the content of rejection notices, to:*
 - *Elaborate on the content of notice to ensure that requesters have sufficient information on which to base an appeal and are fully aware of their appeal rights.*
 - *Make it clear that it applies to both total and partial rejections of requests.*
- *Insert a new clause setting of the content of notices allowing disclosure, including information regarding appeals against the imposition of fees, the amount of fee and the form of access.*

Insert new section – Transfer of Requests

31. The procedural provisions in the Act currently do not deal with transfers of requests, where requests are made to the wrong body. This is a serious oversight. It is easy to envisage cases where requestors misdirect an application; often it is not clear to a layperson which department would have primary responsibility for a particular subject. For example, the drilling of borewells relates to rural development and tribal welfare, as well as municipal and panchayat bodies – who would a requestor apply to for information about the borewell in their village? The government knows its own business most fully, such that the government should be responsible for ensuring that misdirected applications are transferred. Transfers should be prompt; in practice, public bodies will almost immediately be able to determine whether a particular request should be transferred and can do so without delay. Requestors themselves should not be required to resubmit applications as this could result in additional fees and unnecessary delays. Notification should be provided to requestors if an application is transferred, so that they will know who to follow up with. Section 8 of the *Jamaican Access to Information Act 2002* provides a useful model.

8.—(1) *Where an application is made to a public authority for an official document—*

(a) which is held by another public authority; or

(b) the subject matter of which is more closely connected with the functions of another public authority, the first mentioned public authority shall transfer the application or such part of it as may be appropriate to that other public authority and shall inform the applicant immediately of the transfer.

(2) A transfer of an application pursuant to subsection (1) shall be made as soon as practicable but not later than [5] days after the date of receipt of the application.

Recommendation

- *Insert a new clause requiring bodies to transfer applications and notify requestors of the transfer, within 5 days, where applications are submitted to the wrong body.*

Insert new section – Deemed Refusals

32. Experience with implementation of access to information regimes has shown that many officials avoid the application of the law by simply ignoring requests. To address this problem, “deeming” provisions need to be included so that a failure to respond to a request in time is automatically deemed a refusal, thereby allowing appeal provisions to be invoked. Experience in the states of India has shown that the absence of such a deeming provision has sometimes resulted in confusion over whether and when appeals can be lodged and dealt with.

Recommendation

- *Insert a new clause on deemed refusals in the following terms:
If a Public Information Officer fails to give the decision on a request for access to the requestor concerned within the period contemplated in s.7(1), the Public Information Officer is, for the purposes of this Act, regarded as having refused the request.*

Insert: New – Chapter IV – Exemptions

Section 8

33. While keeping in mind the overarching principle of maximum disclosure, it is nevertheless well-accepted that there can be a small number of legitimate exemptions in any access regime. Exemptions to the rule of maximum disclosure should be kept to an absolute minimum and should be narrowly drawn. The key principle underlying any exemption is that its purpose must be to genuinely protect and promote the public interest. Even where exemptions are included in legislation, they should not apply to documents more than 10 years old. Further, ALL exemptions should be subject to a blanket “public interest override” whereby a document which falls within the terms of a *general* exemption provision should still be disclosed if the public interest in the *specific* case requires it.
34. The current exemptions regime found in ss.8 and 9 of the Act is seriously problematic because it is not tempered by a public interest override. This is a major deficiency. A public interest override provision application to all the exemptions in the Act should be included as a matter of priority, in accordance with best practice. The test for exemptions is in 3 parts:
- (i) Is the information covered by a legitimate exemption?
 - (ii) Will disclosure cause substantial harm?
 - (iii) Is the likely harm greater than the public interest in disclosure?

Recommendation

- *Insert a public interest override provision which covers all exemptions under the Act in the following terms:
Notwithstanding any provision in this Act, a body may not refuse to indicate whether or not it holds a record, or refuse to communicate or disclose or allow access to information, unless the harm to the protected interest outweighs the public interest in disclosure.*

35. Even with the inclusion of a public interest override, it remains important to ensure that the exemptions included in the law are tightly drawn and are the minimum required to protect legitimate interests. While some of the exemptions in ss.8 and 9 are necessary, wide ranging exemptions can defeat the very purpose of the legislation. Notably, because the object of the legislation is to give effect to the fundamental right to information under the Constitution of India, any restrictions placed on the right to information should arguably be limited to the restrictions allowable in the Constitution of India. There has been considerable debate in this context about whether the current exemptions regime is constitutionally valid.

Recommendation

- *Review the constitutionality of the entire exemptions regime with a view to deleting all exemptions which are not permissible in accordance with the Constitution.*

36. In the event that the current exemptions are not struck down as unconstitutional, nevertheless the exemptions in s.8 still require considerable amendment to bring them into line with best practice.

At the outset, it is problematic that all of the exemptions adopt a low threshold test of harm to a protected interest to justify exemption, namely the requirement that disclosure “prejudicially affect” the protected interest. Legally, this constitutes very broad wording. Alternative formulations require that disclosure would cause “serious harm” or “substantial prejudice”. Such wording ensures sufficient protection for sensitive information without setting the bar so low that even the slightest negative consequence of disclosure can be used to justify withholding information.

37. Section 8(1)(a) legitimately attempts to protect information that is sensitive to national security, international relations and India’s strategic scientific and economic interests. However, consideration should be given to deleting the protection given to information related to “the sovereignty and integrity of India”. Experience has shown that such broad concepts have been notoriously misused by Government MPs who too often hide their partisan misdeeds under the banner of national sovereignty. In any case, the exemption for “security of the State” already covers the relevant information, but is a tighter term and therefore less open to abuse.
38. Section 8(1)(b) attempts to provide legitimate protection against the disclosure of information that would undermine law enforcement activities and/or the judicial process. However, the exemption is currently too broad; it should not justify withholding information to protect “public safety and order”. Notably, this phrase is used in Article 19(2) of the Constitution as a general exemption. However, more guidance needs to be provided on its practical content to prevent abuse. The phrase has too often been interpreted by governments to stifle opposition on the grounds that said opposition would ‘threaten public order’. There is a real danger that the exemption in this form could be used to undermine the Act. One can imagine public officials arguing that that the release of documents proving corruption by top level politicians could prejudicially affect public order because it might encourage people to – legitimately – agitate against the Government.
39. Section 8(1)(c) is a common provision in federations. The need to protect sensitive inter-governmental information is understandable. However, the current wording of the exemption to allow protection for information “exchanged in confidence” between governments could be abused by officials to unjustifiably keep information secret by simply putting a heading of “in confidence” on documents.
40. Section 8(1)(d) should be deleted because best practice maintains that it is improper to provide exemptions for entire classes of information. While *some* information in *some* Cabinet papers may be sensitive – and on that basis, will be covered by one of the other exemption provisions in the Act - it is not the case that *all* Cabinet papers are *always* sensitive. Furthermore, this provision could easily be abused; the Government could simply send politically sensitive documents to Cabinet to deliberately protect them against disclosure.
41. Section 8(1)(e) should be substantially amended because it is not appropriate that it attempts to exempt the disclosure of advice given to the government during the decision-making process. Ironically, this 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. Of course, it will generally not be appropriate to disclose advice *prior* to a decision being reached. In this context, protection should be provided for “premature disclosure which could frustrate the success of a policy or substantially prejudice the decision-making process”. Of course, relevant information should still eventually be disclosed – it is only premature disclosure that should be protected.

Recommendations

- *Assuming that the current exemptions in s.8 ARE constitutionally valid:*
 - *Delete the phrase “information, the disclosure of which would prejudicially affect” in ss.8(a), (b), (c) and (f) with the phrase “information, the disclosure of which will or is likely to cause serious harm”;*
 - *Delete the words “the sovereignty and integrity of India” from s.8(1)(a);*
 - *Delete the words “public safety and order” from s.8(1)(b), or alternatively provide additional guidance as to the scope/limits of this phrase;*
 - *Replace the words “may lead to an incitement to commit an offence” to “is reasonably likely to lead to the commission of an offence” in s.8(1)(b);*
 - *Delete the words “including information exchanged in confidence between the Central and State Governments or any of their authorities or agencies” from s.8(1)(c);*
 - *Delete s.8(1)(d) entirely;*
 - *Replace s.8(1)(e) with the following provision:*
 - “A body may refuse to indicate whether or not it holds a record, or refuse to communicate information, where to do so would, or would be likely to: -*
 - (a) cause serious prejudice to the effective formulation or development of government policy;*
 - (b) seriously frustrate the success of a policy, by premature disclosure of that policy”.*

42. Section 8(2), which deals with declassification of documents over time, has a number of defects. Best practice supports a reduction in the maximum non-disclosure period from 25 years to 10 years. This takes into account the fact that documents are not automatically declassified at this date, but rather are reviewed to assess whether sufficient time has passed so that they are no longer sensitive and can be released. It is illogical and inappropriate that the decision of the Government as to the computation of the lapsed period under s.8(2) is final and unappealable. In accordance with s.12, all other decisions which affect non-disclosure are able to be appealed. Decisions under s.8(2) should be no different.

Recommendations

- *Amend s.8(2) to reduce the time limit for consideration of declassification of records to 10 years.*
- *Delete from s.8(2): “Provided that where any question arises as to the date from which the said period of twenty-five years has to be computed, the decision of the Central Government shall be final”.*

Section 9

43. Section 9(a) allows public bodies not to process requests where to do so would unreasonably divert their resources. Such provisions are quite common. However, considering the poor state of records management in many bodies currently, this provision begs the question – if records management were more efficient, would a request falling under this provision have actually diverted a large amount of resources? There is no need for the additional clause in the provision allowing requests to be rejected if they “adversely interfere with the functioning of such authority”. This phrase is very broad and could be interpreted by recalcitrant officials to deny legitimate requests. PIOs should also be required to offer assistance to amend requests *before* they are rejected under this section. Otherwise, a requestor will have to incur additional costs by reformulating their application and then submitting it as a new request.

44. Section 9(d), which deals with non-disclosure to protect personal privacy, should be moved to sit with the other exemptions provisions. It is legitimate that a certain level of protection be accorded to the privacy rights of third parties. Notably though, 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. Section 24 of the draft *Access to Information Bill 2004* recently prepared by Government of Uganda provides a useful model to draw on when formulating an provision to protect third parties' privacy rights:

- (1) *Subject to subsection (2), an information officer shall refuse a request for access if its disclosure would involve the unreasonable disclosure of personal information about a person, including a deceased individual.*
- (2) *A person may be granted access to a record referred to in subsection (1) in so far as the record consists of information -*
 - (a) *about a person who has consented in writing to its disclosure to the person requesting the record;*
 - (b) *that was given to the public body by the person to whom it relates and the person was informed by or on behalf of the public body, before it is given, that the information belongs to a class of information that would or might be made available to the public;*
 - (c) *already publicly available;*
 - (d) *about a person who is deceased and the person requesting the information is -*
 - (i) *the person's next of kin; or*
 - (ii) *making the request with the written consent of the person's next of kin; or*
 - (e) *about a person who is or was an official of a public body and which relates to the position or functions of the person, including, but not limited to -*
 - (i) *the fact that the person is or was an official of that public body;*
 - (ii) *the title, work address, work phone number and other similar particulars of the person;*
 - (iii) *the classification, salary scale or remuneration and responsibilities of the position held or services performed by the person; and*
 - (iv) *the name of the person on a record prepared by the person in the course of employment.*

Recommendations

- *Delete from s.9(a) the words: "adversely interfere with the functioning of such authority".*
- *Amend s.9(a) to require PIOs to offer assist requesters to reformulate their requests before they are rejected on the basis of s.9(a).*
- *Move s.9(d) to sit with the other exemptions clauses under s.8.*
- *Amend s.9(d) to narrow the protection for private information and make it subject to a public interest override.*

Section 10

45. It is positive that the Act allows for severability and disclosure of non-exempt information. Accordingly s.10(2) should be amended to require the relevant notice to the requestor advising of partial disclosure to also include advice regarding the opportunity and process for appealing that decision. This should be worded along the lines of s.7(3) which deals with rejection notices, taking account of the analysis and suggestions in paragraph 30 above.

Recommendation

- *Amend s.10(2) to require the notices advising of partial disclosure to include advice regarding the appeals process.*

Section 11

46. Paragraph 2 of s.11(1) should be deleted because, as discussed in paragraphs 33-34 above, a public interest override should be applicable to all the exemptions contained in the Act. There is no reason why the Act should provide for a public interest override only in respect of third party information.
47. The time limits in ss.11(1)-(3) are unnecessarily long. Considering that requests not involving third parties are required to be disposed of within 30 days *at the most*, but “as expeditiously as possible”, it is difficult to justify doubling this time limit where a third party is involved. At the very least, consideration should be given to amending these clauses to require that such requests are still disposed of “as expeditiously as possible”. More appropriately, initial notifications to third parties should be made within 5 days; this is a reasonable time for an initial determination to be made regarding whether a third party needs to be consulted. Third parties should then be given 15 days to respond and should be able to respond orally (eg. by telephone) or in writing/electronically. A maximum of 10 days could then be allowed for a final decision. Many laws require all decisions – whether involving third parties or not – to be made within the basic time limit of 30 days. In some jurisdictions, the time limits for processing requests are as little as 5 days.

Recommendation

- *Delete paragraph 2 of s.11(1).*
- *Reduce the time limits in ss.11(1)-(3) to 30 days in total.*

Insert: New - Chapter V: Complaint and Appeals

Section 12

48. Best practice international standards require that an effective access to information law include an appeals mechanism which is independent of government, as well as cheap, quick and procedurally simple. The failure of the Act to include such an appeals process is one its most serious deficiencies. In fact, even the basic internal appeals process currently included in the Act is poorly drafted.
49. Currently, the Act appears to allow for two internal appeals: s.12(1) allows for an initial internal appeal but leaves the details of that process to be determined at a later date and prescribed in regulations; and s.12(2) allows for a second appeal to the “Central Government, State Government or Competent Authority”. It is appropriate that the law allows for one internal appeal, as this is a cost-effective way of allowing the government to verify its own decisions. In practice, a middle level official will make the initial decision and it will be cross-checked on appeal by a senior official. There is no justification for two internal appeals however. This would simply increase the administrative burden on the bureaucracy and costs.

Recommendation

- *Delete s.12(1), thereby reducing the number of internal appeals to one.*
- *Amending s.12(2) to take into account the recommendations below regarding the establishment independent Information Commission.*

Insert new sections – Information Commission

50. 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.

51. Best practice supports the establishment of a dedicated Information Commission with a mandate to review refusals to disclose information, compel release 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. A number of states in India have appointed an existing administrative tribunal to hear appeals and in Maharashtra the Lokyukta performs this function. 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.
52. In Canada and the United Kingdom, a single Information Commissioner has been appointed. However, a Commission with multiple Commissioners and/or multiple state-based Commissions would be more appropriate in the Indian context because it is anticipated that the workload of such a body would be too much for a single Commissioner and/or Office to manage. The members of any Information Commission need to be, and be seen to be, people of integrity who are also qualified to hear appeals. Commissioners will have an important role to play in countering possible resistance within Government towards openness and information disclosure such that it is important that candidates are well-respected as well as highly competent. The draft Kenyan *Access to Information Bill 2000* provides a useful model:

10(2) The person appointed to the office of Information Commissioner shall -

 - (a) be a person qualified to be appointed as a judge of the High Court of Kenya;*
 - (b) be publicly regarded as a person who can make impartial judgments;*
 - (c) have sufficient knowledge of the workings of Government;*
 - (d) not have had any criminal conviction and not have been a bankrupt;*
 - (e) be otherwise competent and capable of performing the duties of his or her office;*
 - (f) not be the President, Vice President, a Minister or Deputy Minister, a serving public officer or a Member of Parliament; and*
 - (g) not hold any other public office unless otherwise provided for in this Act.*
53. The procedure for appointing Information Commissioners must be impartial and independent of government interference, to ensure that Information Commissioners are seen as non-partisan. 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. Appointment and removal procedures should reflect those currently used for appointment of judges.
54. To ensure the absolute independence of the Information Commission, a specific provision affirming the independence of the Information Commission should be included in the Act. It should be explicitly stated that the Commission must have *"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"*.
55. In setting up the appeals regime of the Information Commission, it is first necessary to detail the parameters of the Commission's appeal remit. Section 88 of the Queensland (a State of Australia) *Freedom of Information Act 1992* is a good general provision which could be used as a starting point. Likewise, s.31 of the Canadian *Access to Information Act 1982* provides a good model:

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

- (a) review any decision that has been made by an agency or Minister in relation to the application concerned; and*
 - (b) decide any matter in relation to the application that could, under this Act, have been decided by an agency or Minister;*
- and any decision of the Commissioner under this section has the same effect as a decision of the agency or Minister...*

Canada: (1) *Subject to this Act, the Information Commissioner shall receive and investigate complaints*

- (a) from persons who have been refused access to a record requested under this Act or a part thereof;*
- (b) from persons who have been required to pay an amount under [the fees provisions] that they consider unreasonable;*
- (c) from persons who have requested access to records in respect of which time limits have been extended...where they consider the extension unreasonable;*
- (d) from persons who have not been given access to a record or a part thereof in the official language requested by the person..., or have not been given access in that language within a period of time that they consider appropriate;*
- (d.1) from persons who have not been given access to a record or a part thereof in an alternative format pursuant to a request..., or have not been given such access within a period of time that they consider appropriate;...*
- (f) in respect of any other matter relating to requesting or obtaining access to records under this Act.*

56. In order to ensure that the Information Commission can perform its appeal functions effectively, it is imperative that Commissioners are explicitly granted the powers necessary to undertake a complete investigation and ensure enforcement of their orders (see paragraphs 62-67 below for more re enforcement). The powers granted to the Canadian Information Commissioner under s.36 of the Canadian Access to Information Act 1982 provide a useful model:

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

- (a) to summon and enforce the appearance of persons before the Information Commissioner and compel them to give oral or written evidence on oath and to produce such documents and things as the Commissioner deems requisite to the full investigation and consideration of the complaint, in the same manner and to the same extent as a superior court of record;*
- (b) to administer oaths;*
- (c) to receive and accept such evidence and other information, whether on oath or by affidavit or otherwise, as the Information Commissioner sees fit, whether or not the evidence or information is or would be admissible in a court of law;*
- (d) to enter any premises occupied by any government institution on satisfying any security requirements of the institution relating to the premises;*
- (e) to converse in private with any person in any premises entered pursuant to paragraph (d) and otherwise carry out therein such inquiries within the authority of the Information Commissioner under this Act as the Commissioner sees fit; and*
- (f) to examine or obtain copies of or extracts from books or other records found in any premises entered pursuant to paragraph (d) containing any matter relevant to the investigation.*

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

57. In addition to the Commission's investigative powers, it is necessary to clearly set out the Commission's decision-making powers, to ensure that bureaucrats cannot attempt to ignore its decisions as recommendatory only. In accordance with best practice evinced in a number of jurisdictions (eg. the State of Queensland in Australia, Mexico), the Commission should have the power to make binding determinations, compel parties to take action, enforce compliance with

orders and impose sanctions as appropriate. Without strong powers, the Commission could easily be ignored and sidelined by a bureaucratic establishment which is determined to remain closed. Section 88 of the Queensland *Freedom of Information Act 1992* (which is replicated in paragraph 55 above), as well as s.82 of the South African *Promotion of Access to Information Act* and ss.42-43 of the Article 19 Model FOI Law provide very useful examples:

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

- (a) confirming, amending or setting aside the decision which is the subject of the application...;*
- (b) requiring [the relevant body] to take such action or to refrain from taking such action as the court considers necessary within a period mentioned in the order;*
- (c) granting an interdict, interim or specific relief, a declaratory order or compensation; or*
- (d) as to costs.*

Article 19: *42(2) In his or her decision pursuant to sub-section (1), the Commissioner may: -*

- a. reject the application;*
 - b. require the public or private body to take such steps as may be necessary to bring it into compliance with its obligations under Part II;*
 - c. require the public body to compensate the complainant for any loss or other detriment suffered;...*
 - d. in cases of egregious or wilful failures to comply with an obligation under Part II, impose a fine on the public body.*
- (3) The Commissioner shall serve notice of his or her decision, including any rights of appeal, on both the complainant and the public or private body.*
43. *(1) The Commissioner may, after giving a public body an opportunity to provide their views in writing, decide that a public body has failed to comply with an obligation under Part III.*
- (2) In his or her decision pursuant to sub-section (1), the Commissioner may require the public body to take such steps as may be necessary to bring it into compliance with its obligations...including by: -*
- a. appointing an information officer;*
 - b. publishing certain information and/or categories of information;*
 - c. making certain changes to its practices in relation to the keeping, management and destruction of records, and/or the transfer of records to the [insert relevant archiving body];*
 - d. enhancing the provision of training on the right to information for its officials;*
 - e. providing him or her with an annual report, in compliance with section 21; and/or*
 - f. in cases of egregious or wilful failures to comply with an obligation under Part III, paying a fine.*
- (3) The Commissioner shall serve notice of his or her decision, including any rights of appeal, on the public body.*

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

59. In addition to the key issues discussed above, a number of additional procedural provisions will also need to be considered and addressed; for example: setting a maximum time limit for decisions of the Information Commission, preferably no more than 30 days; setting out the form that notices of appeal decisions should take; allowing for "deemed decisions", where failure by the Information Commission to deal with the complaint in time is treated as a refusal such that remaining appeals processes can then be availed; allowing for delegation of Information Commissioners' powers.

Recommendations

- *Insert a new section/Part establishing an independent Information Commission. At a minimum, the following issues must be addressed:*
 - *Qualifications of the Commissioner(s) and appointment and removal process, with a view to ensuring independence from Government;*
 - *Parameters of the Commission's appeal remit;*
 - *Investigatory powers, including the ability to review all documents and power to initiate own investigations;*
 - *Decision-making powers, including the power to make binding determinations, compel parties to take action, enforce compliance with orders and impose sanctions;*
 - *Procedures, including time limits for decisions; form of notices of appeal decisions; "deemed decision" provisions; delegation of Information Commissioners' powers.*

Insert new section – Appeals to the Courts

60. Section 15 of the Act, which bars the jurisdiction of the Courts, needs to be deleted. The Supreme Court has held on numerous occasion that the right to information is a constitutionally entrenched fundamental right. Decisions made by bureaucrats in relation to a constitutional right must be amenable to challenge in a court of law. Such appeals fall within the original jurisdiction of the High Court and the Supreme Court under Articles 32, 139 and 226 of the Constitution.

Recommendation

- *Replace s.16 with a provision which explicitly states that appeals from decisions of the Information Commission can be made to the courts, on points of fact and law.*

Insert new section – Burden of Proof

61. The burden of proof should be on the body refusing disclosure and/or otherwise applying the law to justify their decision. This is justified because it will be unfair and extremely difficult for members of the public – who will never have seen the document they are requesting – to be forced to carry the burden of proof. Section 61 of the Australian *Freedom of Information Act 1982* provides a useful model:

- (1) *Subject to subsection (2), in proceedings under this Part, the agency or Minister to which or to whom the request was made has the onus of establishing that a decision given in respect of the request was justified or that the Tribunal should give a decision adverse to the applicant.*
- (2) *In proceedings [relating to third parties], the party to the proceedings that opposes access being given to a document in accordance with a request has the onus of establishing that a decision refusing the request is justified or that the Tribunal should give a decision adverse to the applicant.*

Recommendation

- *Insert a new section clarifying that the burden of proof during the appeals process is on the body refusing disclosure and/or otherwise applying the law to justify their decision.*

Insert new section – Offences & Penalties

62. The Act is seriously weakened by the absence of comprehensive offences and penalties provisions, a shortcoming which should be rectified as a priority. Sanctions for non-compliance are particularly important incentives to timely disclosure in jurisdictions where the bureaucracy is unused to hurrying at the request of public.
63. In the first instance, it is important to 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, knowing provision of incorrect information, concealment or falsification of records, wilful 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.
64. 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.
65. When developing penalties provisions, lessons learned from the Indian states with right to information laws are illuminating. In Maharashtra, penalties are able to 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. It is therefore important in combating entrenched cultures of secrecy that individual officers are faced with the threat of personal sanctions if they are non-compliant. 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 PIOs. If the PIO has genuinely attempted to discharge their duties but has been hindered by the actions of another official, the PIO should not be made a scapegoat. Instead, the official responsible for the non-compliance should be punished.
66. Most Acts contain combined offences and penalty provisions. A number have been replicated for consideration below: s.12 of the Maharashtra *Right to Information Act 2002*; s.49 of the Article 19 Model Law; and s.54 of the UK *Freedom of Information Act 2000*.

Maharashtra: (1) *Where any Public Information Officer has without any reasonable cause, failed to supply the information sought, within the period specified...the appellate authority may, in appeal impose a penalty of Rs 250, for each day's delay in furnishing the information, after giving such Public Information Officer a reasonable opportunity of being heard.*

(2) *Where it is found in appeal that any Public Information Officer has knowingly given -*

(a) incorrect or misleading information, or

(b) wrong or incomplete information ;

the appellate authority may impose a penalty not exceeding Rs 2000, on such Public Information Officer as it thinks appropriate after giving such officer a reasonable opportunity of being heard...

(4) *The penalty under sub-sections (1) and (2) as imposed by the appellate authority, shall be recoverable from the salary of the Public Information Officer concerned, or if no salary is drawn, as an arrears of land revenue.*

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

a. obstruct access to any record contrary to this Act;

b. obstruct the performance by a public body of a duty under this Act;

c. interfere with the work of the [appeals and/or monitoring body]; or

d. destroy records without lawful authority.[..or

e. conceal or falsify records.]

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

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

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

67. To remove any ambiguities from the law, it should be clear that the internal appeal authority, Information Commission and courts are all empowered to impose sanctions under the Act.

Recommendation

- *Insert comprehensive offences and penalty provisions to deal with unreasonable delay or withholding of information, knowing provision of incorrect information, concealment or falsification of records, wilful 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.*
- *Enable sanctions to be imposed personally on any individual found guilty of an offence under the Act, including PIO delegates and individuals whose assistance was requested by a PIO.*
- *Empower the internal appeal authority, Information Commission and courts to impose sanctions under the Act.*

Current Chapter III: Miscellaneous

Section 13

68. It is positive that s.13 operates to protect public authorities and their employees from liability arising from disclosures.

Section 14

69. It is positive that s.14 explicitly provides that the new access law overrides all other inconsistent legislation. A right to information law should be comprehensive, both in the right it extends and the restrictions it recognises. The list of exemptions included in the law should be exhaustive and other laws should not be permitted to extend them. In this context, it is important to note that best practice requires that the *Official Secrets Act* and other laws or civil services rules which entrench secrecy should be repealed and/or substantially amended. If other laws restricting the right are kept on the law books, there will be confusion about which provisions have priority – secrecy or openness.

Section 15

70. As detailed in paragraph 60 above, it is arguable whether s.15 is constitutionally valid such that it would be struck down by the courts. In any case, it operates to undermine the objectives of the Act and therefore needs to be deleted.

Recommendation

- *Delete section 15, because barring appeals to the courts is unconstitutional.*

Section 16

71. Section 16 currently operates as a de facto exemption clause, excluding entire bodies/institutions from the purview of the Act. This is contrary to best practice and the promotion of open

government. While it is understandable that the Government should wish to protect against the disclosure of sensitive security/intelligence information, this is adequately provided for by the national security exemption in s.8(1)(a). It is unnecessary and unjustifiable to go beyond this and simply assume that *all* the information held by security/intelligence organisations is sensitive and needs to be put beyond the scope of the Act. For example, basic information such as personnel records, procurement contracts and general budget information cannot be justifiably exempted.

Recommendation

- *Delete section 16, because the exemptions in s.8 are sufficient to protect sensitive information.*

Suggested Additional Provisions

Insert new section – Monitoring & Reform

72. It is increasingly common to include provisions in access laws mandating a body to monitor and promote implementation of the Act, as well as raise public awareness about using the law. Monitoring is important - to evaluate how effectively public bodies are discharging their obligations and to gather information which can be used to support recommendations for reform. Different monitoring models are found in various jurisdictions. Some countries require every single public body to prepare an annual implementation report for submission to parliament, others give a single body responsibility for monitoring – a particularly effective approach because it ensures implementation is monitored across the whole of government and allows for useful comparative analysis – and still others prefer a combination of both. Section 40 of the Trinidad & Tobago *Freedom of Information Act 1999* and s.48 and 49 of the United Kingdom *Freedom of Information Act 2000* provide useful models of potential monitoring approaches:

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

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

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

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

United Kingdom: 49(1) *The Commissioner shall lay annually before each House of Parliament a general report on the exercise of his functions under this Act.*

(2) The Commissioner may from time to time lay before each House of Parliament such other reports with respect to those functions as he thinks fit

48(1) If it appears to the Commissioner that the practice of a public authority in relation to the exercise of its functions under this Act does not conform with that proposed in the codes of practice under sections 45 and 46, he may give to the authority a recommendation (in this section referred to as a "practice recommendation") specifying the steps which ought in his opinion to be taken for promoting such conformity.

(2) A practice recommendation must be given in writing and refer to the particular provisions of the code of practice with which, in the Commissioner's opinion, the public authority's practice does not conform

Recommendation

- Insert a new section making the Information Commission responsible for monitoring of implementation of the Act, including overseeing annual reports from bodies covered by the Act and submitted a summary report to Parliament.

Insert new section – Education & Training

73. It is increasingly common to include provisions in the law itself mandating a body not only to monitor implementation of the Act, but also to actively promote the concept of open governance and the right to information within the bureaucracy and amongst the public. 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], 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 [Information Commission] 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.

(2) The guide must, without limiting the generality of subsection (1), include a description of--

- (a) the objects of this Act;
- (b) the postal and street address, phone and fax number and, if available, electronic mail address of:
 - (i) the information officer of every public body; and
 - (ii) every deputy information officer of every public body...;
- (d) the manner and form of a request for...access to a record of a public body...[or] a private body...;

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- (e) the assistance available from [and the duties of] the Information Officer of a public body in terms of this Act;
- (f) the assistance available from the [Information Commission] in terms of this Act;
- (g) all remedies in law available regarding an act or failure to act in respect of a right or duty conferred or imposed by this Act, including the manner of lodging --
- (i) an internal appeal; and
 - (ii) an application with [the Information Commission and] a court against a decision by the information officer of a public body, a decision on internal appeal or a decision of the head of a private body;...
- (i) the provisions...providing for the voluntary disclosure of categories of records...;
- (j) the notices...regarding fees to be paid in relation to requests for access; and
- (k) the regulations made in terms of [under the Act].
- (3) The [Information Commission] must, if necessary, update and publish [see the discussion re the meaning of "publish" at paragraph 20 above] the guide at intervals of not more than two years.

Recommendation

- *Insert a new section placing specific responsibility on a body(s) – preferably the new Information Commission - to promote public awareness, including through the publication of a Guide to RTI, and provide training to bodies responsible for implementing the Act, and requiring resources to be provided accordingly.*

Insert new section – Whistleblower Protection

74. As the tragic case of Satyendra Dubey recently demonstrated, India is in desperate need of comprehensive legislation to protect employees who “blow the whistle” on wrongdoing within their organisation. Ideally, specific legislation could be enacted to protect whistleblowers. However, at a minimum, international practice endorses the inclusion of whistleblower protection provisions in access to information laws. This is justified on the basis that maximum information disclosure requires that individuals who disclose information in contravention of the law and/or their employment contracts because they believe that such disclosure is in the public interest should be protected. The inclusion of strong whistleblower protection is important in order to send a message to the public and officials that the government is serious about opening up to legitimate scrutiny. Consideration should be given to including an additional article in the law dealing with whistleblower protection. Section 47 of the Article 19 Model FOI Law provides a good model:

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

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

Recommendation

- *Insert a new section providing protection to whistleblowers.*

For more information or to discuss this paper, please contact:

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