

Legislating For Access to Information



Commonwealth Human Rights Initiative
working for the practical realisation of human rights in the countries of the Commonwealth



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Commonwealth Human Rights Initiative

The Commonwealth Human Rights Initiative (CHRI) is an independent, non-partisan, international non-governmental organisation, mandated to ensure the *practical* realisation of human rights in the countries of the Commonwealth. In 1987, several Commonwealth professional associations founded CHRI. They believed that while the Commonwealth provided member countries a shared set of values and legal principles from which to work and provided a forum within which to promote human rights, there was little focus on the issues of human rights within the Commonwealth.

The objectives of CHRI are to promote awareness of and adherence to the Commonwealth Harare Principles, the Universal Declaration of Human Rights and other internationally recognised human rights instruments, as well as domestic instruments supporting human rights in Commonwealth member states.

Through its reports and periodic investigations, CHRI continually draws attention to progress and setbacks to human rights in Commonwealth countries. In advocating for approaches and measures to prevent human rights abuses, CHRI addresses the Commonwealth Secretariat, member governments and civil society associations. Through its public education programmes, policy dialogues, comparative research, advocacy and networking, CHRI's approach throughout is to act as a catalyst around its priority issues.

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Legislating for Access to Information

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“[F]reedom of information should be guaranteed as a legal and enforceable right permitting every individual to obtain records and information held by the executive, the legislative and the judicial arms of the state, as well as any government owned corporation and any other body carrying out public functions.”

Commonwealth Expert Group on the Right to Know, 1999¹

It is the duty of governments to promote and protect the internationally recognised human right to access information. This is most effectively done by enacting specific legislation. To evolve a law that is truly in tune with the context and the needs of users, the process of making law in partnership with people is as important as what the law contains. Over the years, international organisations and civil society have developed principles and guidelines that encapsulate minimum standards to assist the development of effective laws. While many of the access laws within the Commonwealth leave much to be desired, there are also many examples of good practice to draw on.

USEFUL INTERNATIONAL STANDARDS

United Nations

The right to access information is firmly set in the body of international human rights law. Soon after its inception, the United Nations recognised that people have a human right to access information from their government. They acknowledged that this right is at the core of all human rights because it enables citizens to participate in the elections and in governance processes in an informed manner, know about their entitlements, recognise when their rights are being violated, and demand that their government fulfils its duties under domestic and international law to protect and secure those rights.

“Freedom of information is a fundamental human right and the touchstone for all freedoms to which the United Nations is consecrated”.

United Nations’ General Assembly, 1946²

Article 19 of the Universal Declaration of Human Rights reiterates access to information as a basic human right. Promoting and protecting this valuable right was made obligatory on States Parties that ratified or acceded to the

International Covenant on Civil and Political Rights (ICCPR). Article 19 of the ICCPR states that:

“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and **to seek, receive and impart information** and ideas through any media and regardless of frontiers”.³

In furtherance of its early recognition of the right to information as a human right, in 1993 the UN Commission on Human Rights appointed a Special Rapporteur on Freedom of Opinion and Expression whose mandate included monitoring and reporting on the implementation of the right. The Special Rapporteur unequivocally clarified that freedom of information under Article 19 of the ICCPR imposes “a positive obligation on States to ensure access to information, particularly with regard to information held by Government in all types of storage and retrieval systems.”⁴ In 1998, the Commission passed a resolution welcoming this view.⁵ In 2000, the Special Rapporteur endorsed a set of principles on freedom of information,⁶ of which the Commission has taken note.⁷

In 2004, a Joint Declaration on International Mechanisms for Promoting Freedom of Expression was released by the United Nation’s Special Rapporteur on Freedom of Speech and Expression, the Organization of American States and the Organisation for Security and Cooperation in Europe.⁸ This Declaration affirmed that access to information is a “fundamental human right” for all citizens and stated that governments should respect this right by enacting laws that allow people to access as much information from them as possible – this is the principle of “maximum disclosure”.⁹ The Declaration also recognised how important access to information is for supporting people’s participation in government, promoting government accountability and preventing corruption.¹⁰

Sri Lanka acceded to the ICCPR in 1980. The Government has a legal obligation to guarantee people’s right to information by putting in place an effective mechanism for people to access information from public authorities.

“Implicit in freedom of expression is the public’s right to open access to information and to know what governments are doing on their behalf, without which truth would languish and people’s participation in government would remain fragmented.”

Mr Abid Hussain, UN Special Rapporteur, 1999¹¹

UN Principles on Freedom of Information (2000)

- *Maximum Disclosure:* Public bodies have an obligation to disclose information and every member of the public has a corresponding right to receive information; “information” includes all records held by a public body, regardless of the form in which they are stored.
- *Obligation to publish:* Public bodies should publish and widely disseminate documents of significant public interest, for example, on how they function and the content of decisions or policies affecting the public.
- *Promotion of open government:* At a minimum, the law should make provision for public education and the dissemination of information regarding the right, and include mechanisms to address the problem of a culture of secrecy within government.
- *Limited scope of exemptions:* A refusal to disclose information may not be based on trying to protect government from embarrassment or the exposure of wrongdoing. The law should include a complete list of the legitimate grounds which may justify non-disclosure and exemptions should be narrowly drawn to avoid including material which does not harm the legitimate interest.
- *Processes to facilitate access:* All public bodies should be required to establish open, accessible internal systems for ensuring the public’s right to receive information; the law should provide strict time limits for processing requests and require that any refusal be accompanied by substantive written reasons.
- *Costs:* Fees for gaining access should not be so high as to deter potential applicants and negate the intent of the law.
- *Open meetings:* The law should establish a presumption that all meetings of governing bodies are open to the public.
- *Disclosure takes precedence:* The law should require that other legislation be interpreted, as far as possible, in a manner consistent with its provisions. The exemptions included in the law should be comprehensive and other laws should not be permitted to extend them.
- *Protection for Whistleblowers:* Individuals should be protected from any legal, administrative or employment-related sanctions for releasing information on wrongdoing.¹²

Although the International Covenant on Economic Social and Cultural Rights (ICESCR) does not explicitly mention the right to information, its monitoring body- the Committee on Economic, Social and Cultural Rights (CESCR) has made several ‘general comments’ about the practical implementation of rights included in the Covenant, and has drawn attention to the importance of information accessibility and transparent governance. For example, General Comment #14 on the right to the highest attainable standard of health states that: “The right to health in all its forms and at all levels contains the following interrelated and essential elements... Information

accessibility: accessibility includes the right to seek, receive and impart information and ideas concerning health issues”.¹³ The Committee has made similar a connection between the right to information and to the right to water (General Comment #15)¹⁴, the right to education (General Comment #13)¹⁵ and the right to food (General Comment #12)¹⁶. Access to these basic entitlements is understood to include information accessibility so that people empowered with relevant information may participate right from the policy planning stage through the implementation of specific measures for the realisation of these rights and monitor and evaluate their impact. Sri Lanka ratified the ICESCR in 1977 and has a legal obligation to ensure that its people have access to information about the measures taken to ensure the fulfilment of these rights.

Newer human rights conventions concerned with the protection of particular groups of people have also recognised the importance of the right to information. For example, the Convention on the Elimination of All Forms of Discrimination Against Women¹⁷ (CEDAW), the Convention on the Rights of the Child¹⁸ (CRC) and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families¹⁹ (CMW), all place an obligation on States Parties to guarantee specific segments and constituents of society their right to access information from governments. Sri Lanka ratified CEDAW in 1981 and the CRC ten years later in 1991. Sri Lanka acceded to the CMW in 1996. The Sri Lankan Government has a legal obligation to take steps to ensure that women, children, migrant workers and their families have access to information held by public authorities as of right.

Recognition of the value of the right to access information is not merely limited to the human rights discourse and practice. It is an essential component of the programme for sustainable and equitable development and democratic and corruption-free governance agreed to by the international community.

In 1992 for example, the Rio Declaration on Environment and Development recognised that: “[E]ach individual shall have appropriate access to information on hazardous materials and activities in their communities...States shall facilitate and encourage public awareness and participation by making information widely available”.²⁰ In 1997, the UN General Assembly endorsed the Rio Declaration’s provision on access and specifically resolved that: “Access to information and broad public participation in decision-making are fundamental to sustainable development”.²¹ The Plan of Implementation adopted at the Rio+10 World Summit on Sustainable Development in Johannesburg in 2002 also called upon governments to “ensure access, at the national level, to environmental information and judicial and administrative proceedings in environmental matters”.²² Likewise, following the World Summit for Social Development, the Copenhagen Programme of Action affirmed the obligation to “enable and

encourage access by all to a wide range of information” and recognised that “an open political and economic system requires access by all to knowledge, education and information”.²³

Access to information is also a central element of the UN Convention Against Corruption (2003). Article 13 recognises the importance of the participation of society in the prevention of and the fight against corruption.²⁴ In order to facilitate people’s participation State Parties are required to enhance transparency in public decision-making processes and ensure effective access to information to the people. Sri Lanka signed and ratified this Convention in 2004. The Sri Lankan Government has a legal obligation to deliver on its commitment made to the international community to institutionalise transparency as a means for containing corruption.

The Commonwealth

Sri Lanka is a member of the Commonwealth- “a voluntary association of 53 countries that support each other and work together towards shared goals in democracy and development”.²⁵ The members of the Commonwealth have collectively recognised the fundamental importance of the right to access information on a number of occasions. As far back as 1980, the Commonwealth Law Ministers declared: “public participation in the democratic and governmental process was at its most meaningful when citizens had adequate access to official information”²⁶. Policy statements since then have encouraged member countries to “regard freedom of information as a legal and enforceable right.”²⁷

In 1999, the Commonwealth Secretariat set up the Expert Group on the Right to Know and the Promotion of Democracy and Development. Based on the Expert Group’s final report, the Commonwealth Law Ministers adopted the Commonwealth Freedom of Information Principles, recognising the right to access information as a human right whose “benefits include the facilitation of public participation in public affairs, enhancing the accountability of government, providing a powerful aid in the fight against corruption as well as being a key livelihood and development issue.”²⁸

Unfortunately, the final set of Principles adopted by the Commonwealth Law Ministers is much less comprehensive and liberal than those recommended by the Expert Group. The principle of *maximum disclosure* was watered down, and the exemptions provision does not include the requirement that information be withheld “only when disclosure would harm essential interests [and] provided that withholding the information is not against the public interest”. Also, the guidelines recommended by the Expert Group, which focus on ensuring that appropriate administrative provisions are in place to ensure effective implementation, largely did not find their way into the Law Ministers’ final set of Principles.

Commonwealth Freedom of Information Principles (1999)

- Member countries should be encouraged to regard Freedom of Information as a legal and enforceable right;
- There should be a presumption in favour of disclosure and governments should promote a culture of openness;
- The right of access to information may be subject to limited exemptions, but these should be drawn narrowly;
- Governments should maintain and preserve records;
- In principle, decisions to refuse access to records and information should be subject to independent review.

The Commonwealth Law Ministers encouraged the Commonwealth Secretariat to actively promote these Principles, which the Commonwealth Heads of Government approved in November 1999.²⁹ To this end, the Secretariat has designed a Model Law on Freedom of Information³⁰ to serve as a guide to law-making. Overall, the Model Law is progressive and contains a good set of provisions. However, it has some limitations and omissions, which do not accord with generally recognised international standards.

The Commonwealth's standards are less comprehensive than those endorsed by other international bodies. For example, the African Union recognises the right to access information from private bodies, the need to amend secrecy laws in order to enable access to information, and accepts the need for an independent appeals body. The principles endorsed by the UN Commission for Human Rights incorporate the government's obligation to protect whistleblowers and make provision for public education. None of these requirements are present in the Commonwealth Model Law.

International Financial & Trade Institutions: Not Exempt From Disclosure

International financial and trade institutions such as the World Bank, International Monetary Fund (IMF) and World Trade Organization (WTO) preach openness as a key factor in national government reform and development, but have themselves been resistant to giving information. Yet this is vital – as much to ensure the effectiveness of their interventions, as for the maintenance of their institutional image. Many Commonwealth countries are members of these international institutions and are bound by their policies. Conversely, membership and associated voting rights offer them the opportunity to encourage these institutions to implement the principles of good governance that they preach.

The international financial and trade institutions have long maintained that they are not subject to international rights regimes or national laws and that they are accountable only to member states. In recent times though, however reluctantly, in response to the demand for greater accountability, the institutions have been putting in place information disclosure policies. The policies require varied degrees of openness; much continues to be secret and

information is more readily given about structure and function than about governance and decision-making.

Ironically, the very volume of information released can make pinpointing relevant information difficult, and a lack of familiarity with the complex workings of their systems and the technical jargon used can make documents difficult to interpret.³¹ To be valuable for democracy and development, information from influential international institutions must be accessible to the people to whom it matters, meaningful enough to allow input into the decision-making process, and detailed enough to enable citizens to hold these powerful institutions and member governments accountable for their policies.

World Bank: Allowing for much greater access to information than before, the World Bank has adopted a new access to information policy that became operational from 1 July 2010. This policy is a product of widespread consultations with various stakeholders and marks a major shift in the Bank's approach to information disclosure, transparency and accountability. It underscores the principle of "presumption of openness" where all information is disclosed unless it falls within a narrow list of categories of information that will be kept confidential. Under the new policy, previously held information about the minutes of board meetings, summaries of discussions, implementation status and result reports, concept notes and consultation plans for policy reviews that are subject to external consultations are all open for public scrutiny. Further to this, a three member independent Appeals Board has been constituted to adjudicate appeals in case information has been "unreasonably or improperly" denied.

The World Bank states that its commitment to openness is "driven by a desire to foster public ownership, partnership and participation in operations and is central to achieving the Bank's mission to alleviate poverty and to improve the design and implementation of their projects and policies.

International Monetary Fund: The IMF has been severely criticised for operating in secret. Its 1998 disclosure policy lists documents that can be made available; but disclosure is only possible if concerned governments consent. Agendas and minutes of meetings of the governing board are excluded from what is already a very bare list of documents for disclosure. Successive managing directors have stated that the IMF is only accountable to its member countries, and increased openness will require consensus among governments.³² On the positive side, the IMF is currently examining the legalities of requiring member states to make mandatory disclosures.

World Trade Organization: Information about the governing structure and descriptions of key bodies and functions is easily available. All final agreements are available, as well as summaries of governing body decisions and statements, but all trade negotiations and dispute settlements are closed

to the public. Critics argue that providing access to agreements only after they are signed is unsatisfactory because without knowing what really goes on during negotiations, it is difficult to hold the WTO or country representatives to account. The WTO's 2002 Derestriction Policy³³ though, is very comprehensive, shortening the timeframe in which documents can be released from an average of eight to nine months to six to eight weeks.³⁴ Some documents can still be withheld (most commonly, documents the member itself has provided to the WTO) if a WTO member-government demands non-disclosure, but the list of undisclosed documents has been cut down.

Although these institutions are now beginning to pay more attention to transparency in their operations, there are still some fundamental flaws in their information disclosure policies. Firstly, all conform to the principle that member states must consent to information disclosure regarding their activities and that a change in policy requires a consensus of member states. Secondly, there is no provision for independent review where requests for information have been refused. Thirdly, the documents released are usually geared towards informing people of decisions after they have been made, rather than providing information throughout the decision-making process. Information supplied after decisions are taken does not help broaden participation. While progress has been made towards opening up, clearly there is still work to be done.

STANDARDS IN SOUTH ASIA

Unlike Europe, Africa and the Americas which have regional mechanisms for the promotion and protection of human rights South Asia lacks one. Nevertheless the South Asian Association for Regional Cooperation (SAARC) is a regional platform that aims to accelerate the process of economic and social development in Member States. Sri Lanka is a founder member of this association. The Social Charter adopted by Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka in 2004 commits their governments to ensuring "...transparent and accountable conduct of administration in public and private, national and international institutions."³⁵ They have recognised that "Empowerment requires the full participation of people in the formulation, implementation and evaluation of [developmental] decisions and sharing the results equitably." Special emphasis has been placed on the taking of steps to ensure greater participation of women and youth in the designing of development policies. If these formulations are not to remain pious words, SAARC governments must take credible steps to ensure that people have access to information about their policies and programmes from the stage of conceptualisation to implementation. Pakistan (2002), India (2005), Nepal (2007) and now Bangladesh (2009) have undertaken legislative and executive measures to make information available to their citizens as of right. Sri Lanka was at the threshold of having an information access law in 2003 but the preoccupation of subsequent

governments with the ethnic conflict has put this programme in cold storage.³⁶

DEVELOPING National legislation

The right to information can be protected through a variety of legal mechanisms, from explicit constitutional safeguards to individual departmental orders that allow for access. For example, information can be obtained through the provisions of citizens charters adopted voluntarily by departments or through codes or executive orders. The United Kingdom provided access to information through the 1997 *Open Government Code*, until the *Freedom of Information Act 2000* came into effect in 2005. However, enabling access to information through executive orders and administrative directions is not ideal, as they can be easily overturned at any time. Specific access legislation remains the ideal legal mechanism by which to entrench the right to information.

Even where there is no specific access legislation, sector-specific laws sometimes mandate disclosure. For example, environmental laws may require publication of impact assessments, or corporate laws may require the dissemination of annual reports and financial statements. Constitutional protection is also often provided. The constitutions of Ghana, Malawi, Mozambique, Papua New Guinea, South Africa, Tanzania and Uganda³⁷ all explicitly protect the right to information. Elsewhere, a number of Commonwealth constitutions recognise the right to receive and communicate information as a part of the fundamental right to freedom of speech and expression.³⁸ Amongst the South Asian countries, only Nepal and Maldives mention access to information as a standalone fundamental right or as a part and parcel of other fundamental rights.

Even where there is a constitutional guarantee of access to information, there is still a need for legislation to detail the specific content and extent of the right, and to ensure the possible restrictions on the right are narrowly defined. The Constitutions of Fiji, South Africa and Uganda specifically require governments to draft legislation to protect the right to information, although unfortunately in Fiji this is yet to occur. Legislation sets a clear framework for putting in place systems and creating a culture of openness which is uniform across public bodies. A right to Information law cannot be effectively enforced if restrictive laws exist.

In Sri Lanka, the Supreme Court has on different occasions interpreted the fundamental rights to freedom of speech and expression and freedom of thought as inherently containing the right to receive information.³⁹

In neighbouring India the Supreme Court recognised for the first time in 1975 the implied existence of the right to seek and obtain information from government as a precondition for the fundamental right to free speech and

expression guaranteed by the Constitution.⁴⁰ Later in 1981 the apex Court held that the right to information was a necessary component of the right to life guaranteed under Article 21 of the Constitution.⁴¹ The Court has since reiterated its recognition of the existence of the right to access information in several decisions. The statement of objects and reasons attached to the Right to Information Bill introduced in Parliament in 2004 mentioned that the legislation was intended to give effect to the right to information that had become an implied fundamental right.

In Bangladesh the Supreme Court interpreted Article 39(2) which guarantees the right to freedom of speech and expression as including the citizens' right to receive information.⁴² Drawing inspiration from the Indian jurisprudence the Court held that denying access to information amounted to denying the freedoms guaranteed under Article 39(2). The preamble of Bangladesh's Right to Information Act passed by Parliament in 2009 recognises that the right to information is an inalienable part of the right to freedom of thought, conscience and speech guaranteed by the Constitution.⁴³

Not Just Any Old Law

It is not enough just to pass any legislation acknowledging the right to information – to be meaningful in reality, the legislation needs to accord with international best practice. Unfortunately, some jurisdictions pass laws as a form of window dressing, and the actual provisions fall far short of openness standards. For example, in Pakistan, the *Freedom of Information Ordinance 2002* covers only a limited number of bodies and documents, grants excessively broad exemptions and a refusal to disclose the requested information is not subject to the test of whether the public good would be significantly harmed by nondisclosure of the information. In addition, the provision for appeals is unsatisfactory - neither the hearing procedures before the appellate authority nor the authority's investigative powers have been specified.

Tamil Nadu, the first state in India to have an access to information law in 1997, identified 23 categories of information that would be exempt from disclosure. This law has been withdrawn subsequent to the more progressive Right to Information Act passed by Parliament.

Objectives of legislation

The law must begin with a clear statement that establishes the rule of maximum disclosure and a strong presumption in favour of access. Well-worded objectives clauses serve to unequivocally commit the government to certain key principles, and assist administrative and judicial interpretation.

Preambles and objectives clauses detail the reasons for passing an access law and broadly indicate its scope. Strong statements supporting the principles of maximum disclosure, transparency, accountability, and explicitly recognising the peoples' right to information send the right message to citizens and public officials that the government is committed to open governance. Conversely, failure to explicitly recognise the citizen's right to information or an emphasis on the limits of the right tempts officials to interpret the Act restrictively.

India's *Right to Information Act 2005* specifically states that the Act is intended to "promote transparency and accountability in the working of every public authority" and recognises that "democracy requires an informed citizenry and transparency of information which are vital to its functioning and also to contain corruption and to hold Governments and their instrumentalities accountable to the governed".⁴⁴ Australia's *Freedom of Information Act 1982* expressly states that its object is to "extend as far as possible the right of the Australian community to access to information".⁴⁵ However, at the other end of the spectrum, the Pakistan Ordinance fails to explicitly declare that individuals have the right to information at all.

Objectives clauses also provide guidance on striking the balance between disclosure and non-disclosure. The Trinidad and Tobago *Freedom of Information Act 1999* clarifies that discretions regarding the provision of information "shall be exercised as far as possible so as to facilitate and promote, promptly and at the lowest reasonable cost, the disclosure of information".⁴⁶ The Canadian *Access to Information Act 1983* makes it clear that "government information should be available to the public, that necessary exceptions to the right of access should be limited and specific, and that decisions on the disclosure of government information should be reviewed independently of government".⁴⁷

The 2003 Draft Freedom of Information Bill (FOI Bill) of Sri Lanka by and large fulfils this requirement. The objectives the FOI Bill mentioned in the preamble are: fostering a culture of transparency and accountability in public authorities and actively promoting a society where Sri Lankans have effective access to information in order to be able to exercise and protect all their rights.⁴⁸

Extent of coverage

The principle of maximum disclosure must underpin the law, and the extent of coverage should be defined as widely and inclusively as possible.

Who is covered?

The law should cover all public bodies, as well as private bodies and non-government organisations that carry out public functions or spend public funds or where their activities affect people's rights.

Traditionally, access laws have concentrated on getting information out from the executive branch of government, rather than the legislature and the judiciary, although even within the executive, exemptions have been granted for heads of state.⁴⁹ The need for these blanket exemptions in a modern electoral democracy is questionable.

In setting out the coverage of access to information legislation, a definition of “public authorities” or “prescribed authorities” is usually provided. The majority of Commonwealth access laws cover ministries, government departments, public bodies, local authorities, state-owned corporations, commissions of inquiry and public service commissions. The Indian Act extends to any authority or body established under the Constitution or by Government law, or any body “owned, controlled or substantially financed by Government funding”.⁵⁰ The definition of information in the Indian Act includes “information relating to any private body which can be accessed by a public authority under any other law for the time being in force”. This rare formulation enables the public to demand that public authorities obtain and provide them with reports, statistics and data if they are required to do so under any existing law or bye-law.

Increasingly, access laws are being extended to directly cover information held by private bodies. The provisions of the South African *Promotion of Access to Information Act* and the more recent Antigua and Barbuda *Freedom of Information Act 2004* are indicative of this trend, granting access to information held by private bodies if that information is required “for the exercise or protection of any [legally enforceable] rights”.⁵¹ The Act also specifically covers records “in the possession or under the control of...an independent contractor engaged by a public body or private body” which is subject to the Act.⁵² The United Kingdom *Freedom of Information Act 2000* extends its definition of “public authority” to cover information held by other persons “on behalf of [an] authority”,⁵³ thus including government

contractors in the duty to give information. The Act also permits orders to be passed which will extend the law to cover private bodies “which appear to exercise functions of a public nature, or are providing any service whose provision is a function of an authority under a contract made with that public authority”.⁵⁴ The *Jamaican Access to Information Act 2002* gives the responsible minister the discretion to make the law applicable to any other body or organisation that provides “services of a public nature which are essential to the welfare of Jamaican society”.⁵⁵ Of course, under these provisions not all information concerning private bodies will be released. Traditionally accepted limits include privilege (for example, information shared between a doctor and patient, lawyer and client or husband and wife), personal privacy, and commercial confidentiality and may still tip the balance against disclosure.

The Sri Lankan FOI Bill clearly lays down criteria to determine whether or not a body has disclosure obligations. Section 2 states that citizens have the right to access information from public authorities. The interpretation section clarifies the scope and ambit of the term ‘public authority’. Government ministries and departments; bodies of offices established by or under the Constitution; public corporations; companies where the State is a shareholder; local authorities; and departments or institutions established by a provincial council are covered.⁵⁶ However Parliament and the Cabinet of Ministers have been excluded from this definition. This is not a good practice because these supreme decision-making bodies act in the name of the Sri Lankan people and are funded by the tax payer. These bodies must also be subject to public scrutiny. Access laws in India, Nepal and Bangladesh cover Parliament and the Cabinet, but specific exemptions are available to protect sensitive information whose disclosure may harm the public interest.

Who can access?

Any person at all should be able to obtain information under the access legislation of any country, regardless of whether they are a citizen or not. People should not be required to provide a reason for requesting information.

Some laws permit any person at all to ask for information,⁵⁷ while others require the requester to be a citizen,⁵⁸ a lawful permanent resident⁵⁹ or to furnish an address in the country for the purpose of correspondence.⁶⁰ The *New Zealand Official Information Act 1982* specifically includes corporate bodies or those having a place of business in that country in the list of potential requesters.⁶¹ Where the laws permit access to personal information, such as medical records, tax files or social security documents, stricter conditions apply; the need to protect individual privacy usually permits only the person whose records are at issue to have access.

In no Commonwealth country is the requester required to state the reasons for their request, although in some jurisdictions reasons are sought if the requester is making a case for an urgent response.⁶² In Nepal a requestor is required to give reasons for seeking information or show that he/she is a stakeholder in relation to the information sought.⁶³ Bureaucrats resisting disclosure often argue that they need to know requestors' reasons because there may be mischievous motives behind information applications. But the motive for requesting information is irrelevant; access to information is not a needs-based notion, but a rights-based concept premised on the fact that information is a public resource available for the free use of individuals and groups.

The Sri Lankan FOI Bill extends the right to access only to citizens.⁶⁴ This is in tune with the practice in Bangladesh, India, Nepal and Pakistan where information access rights are determined by citizenship of the State. This is not good practice because access to information is an internationally recognised basic human right and should be available even to non-citizens irrespective of nationality in the same way as the rights to life and liberty are guaranteed to all persons irrespective of citizenship status. Unlike the Indian Act the FOI Bill does not contain a specific provision that prohibits a designated information officer from compelling a requestor to disclose the reasons for seeking information. However requestors are barred from publishing the information obtained under the law without authorisation from the public authority concerned.⁶⁵ This is not good practice as such restrictions amount to limiting the citizens' constitutionally guaranteed right to freedom of speech and expression. The fact that information has been provided indicates that none of the exemptions could be invoked to withhold access. Under such circumstances what is fit for disclosure to one citizen is fit for disclosure to every citizen. If the requestor publishes the information obtained, it may reduce the number of requests for the same information that may be made by other citizens, lessening the burden on the public authority. As democracy is increasingly being understood as 'government by discussion'⁶⁶ right to information must be used to encourage public debate on the policies, actions and decisions of the Government, not discourage it.

What is covered?

The definition of "information" should be wide and inclusive.

In law, every word counts. Hence in determining what can be made available, access to "information" rather than access to "documents" or "records" is preferred because, if narrowly interpreted, the latter options are more limiting. The notion of "information" includes more than just written documents, and covers things like samples of materials used in construction or scale models of buildings, which may be of importance to someone

seeking knowledge of government sponsored projects or the quality of materials used for construction.

Allowing access to “information” will mean that applicants will not be restricted to only accessing information which is already in the form of a document or hard copy record at the time of the application. Notably, the India *Right to Information Act 2005* has a very broad definition of information and even permits the inspection of public works and taking samples from public works. This recognises the fact that corruption in public works is a major problem in many countries, which could be tackled by facilitating greater public oversight.

In more practical terms, the “information” on a subject chosen by the requestor may not always be contained in one “document” or “record”. For example, the number of times a contractor has been awarded government contracts (which gives a more complete picture about their relationship with government) may be scattered in various documents throughout different departments but the “information” is still held by the government. Likewise, people asking for information may not know which specific “document” they are looking for, or may want information that will be useful only if obtained from many sources. Thus, statistical information, such as the annual incidence of a disease, may not be available in one or several documents and may only become intelligible “information” after several records held by different agencies are collated.

Unfortunately, many Commonwealth laws refer only to official “documents” or “records”.⁶⁷ In New Zealand, however, the *Official Information Act 1982* provides access to “official information”, which is a phrase that has been interpreted broadly by the courts to even allow access to information not yet recorded in writing by an official but which should have been. Likewise, the United Kingdom Act refers to a broad right to information and does not specifically limit access to documents or records.⁶⁸ Access laws should cover information contained in a variety of media and be drafted broadly to cover new technological innovations for creating and storing information.

The Sri Lankan FOI Bill is progressive as it intends to provide access to ‘official information’ instead of merely official documents and records. The definition of the term ‘official information’ is inclusive, not restrictive, and covers correspondence, memorandum, draft legislation, book, plan map, drawing, diagram, pictorial or graphic work, photograph, film, microfilm, sound recording, video tape, machine readable record, computer records and other documentary material, regardless of its physical form or character and any copy of these materials.⁶⁹

Proactive Disclosure

The law should impose an obligation on the government to routinely and proactively disseminate information of general relevance to citizens, including updates about structure, norms and functioning of public bodies, the documents they hold, their finances, activities and any opportunities for consultation.

Implicit in the notion of the right to information is the duty of public bodies to actively disclose, publish and disseminate as widely as possible, information which is of a general public interest, even when it may not have been specifically requested. This is so important because often people have little knowledge about the information which is in the government's possession, and little capacity to know how to seek it. A significant supply of information, publicised routinely, also reduces the number of requests made under access to information laws. Particularly valuable are laws which make it compulsory for all government agencies and departments to regularly publish: their structure and activities; information about all classes of records under each department's control; a description of all manuals used by employees for administrative purposes; and the names and addresses of officers who deal with information requests.

A number of Commonwealth laws require departments to publish basic information detailing: their organisation and structure; functioning, including decision-making powers of various officers; arrangements that exist for consultation with the public on policy formulation; and categories of documents held by them.⁷⁰ In South Africa, contact details of departmental information officers must be published in every telephone directory – an effective and low-cost option for dissemination.⁷¹ The Belize *Freedom of Information Act 1994* requires that, if a document containing basic departmental procedures is *not* made available, any person can be excused for any shortfall in conduct arising from the non-availability of that document.⁷²

The Indian *Right to Information Act 2005* has gone farther than other Commonwealth laws and designed a proactive disclosure regime which aims to utilise the active publication of government information as a means of promoting public accountability. In addition to standard disclosure requirements, the Act requires regular publication of: staff directories and contact details; laws, rules and bye-laws enforced; duties and powers of officers; norms applicable to their functioning; officials' salaries and allowances; departmental budgets and expenditure; and the recipients of government subsidies, concessions and licenses.⁷³ It also requires public authorities to provide reasons for their administrative or quasi-judicial decisions to people affected by those decisions and likewise while formulating any important policy or announcing decisions which affect the public in general.⁷⁴ The Act makes it explicit that public authorities should strive to proactively publish as much information as possible, in languages and forms that will ensure it is able to be accessed and understood by ordinary people.

The Sri Lankan FOI Bill requires the President and every Minister to ensure proactive disclosure of specific categories of information specific to the public authorities under their jurisdiction every two years.⁷⁵ Information such as organisation and functions of a public authority; powers, duties and functions of Ministers and other officials; the norms set by the public authority for discharging its functions; rules, regulations, instructions, manuals and other records used by the officers in the course of their work; name, designation and contact details of designated information officers and facilities available in the public authority for citizens to obtain information must be voluntarily disclosed. The FOI Bill also places a duty on the President and the Ministers to proactively disclose all information about development projects to the general public, especially to people likely to be affected by such projects, before initiating work on them.⁷⁶ However reasons for its administrative or quasi-judicial decisions will be disclosed by a public authority to the affected persons only on request.⁷⁷ Under the Indian Act such reasons are required to be disclosed proactively.⁷⁸

Limits on disclosure

The limits on disclosure need to be tightly and narrowly defined. Any denial of information must be based on proving that disclosure would cause serious harm and that denial is in the overall public interest.

The acid test of any access law lies in the limits it imposes on disclosure. Of course, not all information held by governments and private bodies can be released to the public, but disagreements arise when determining the boundaries of "protected" information. Deciding on what information should

be exempt from disclosure involves a complex balancing of different legitimate interests. Too often, provisions which allow officials to keep information away from the public eye are used to withhold more information than is justifiable.

The overriding principle must be that all information should be disclosed, unless the harm caused by disclosure is greater than the public interest in disclosure. The key purpose of every exemption to disclosure must be that it will genuinely protect and promote the public interest. All exemptions should therefore be concerned with whether disclosure would be likely to or actually cause harm. Blanket exemptions, which protect documents of a certain type, such as a Cabinet document, or a document belonging to an intelligence agency, are not justifiable. The key focus is whether disclosure would cause serious damage to a legitimate interest which deserves to be protected. The government should bear the burden and cost of proving that disclosure is not in the public interest.

In accordance with international best practice (as articulated by Article 19, an organisation at the forefront promoting the right to information), every exemption should be considered 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?

The Sri Lankan FOI Bill lists 13 types of exemptions to disclosure.⁷⁹ These include restrictions on information whose disclosure may harm national security or defence; invade an individual's privacy; endanger the life and safety of a person; prejudice international relations; reveal trade secrets or harm commercial interests; reveal medical secrets; or prevent detection of crime or apprehension or prosecution of offenders. Any matter relating to: a decision that is pending with the Government; assessment or collection of revenue; professional privilege or information that must be kept confidential due to the existence of a fiduciary relationship (trust-based relationship) and information relating to examinations including results required to be kept confidential, are exempt from disclosure. With the exception of India, the FOI Bill has a shorter list of exemptions when compared with other access laws in the region.

Keeping things under wraps

Too many access laws allow governments to keep information secret relating to investigations and proceedings conducted by public authorities. Secrecy provisions usually cover commissions of inquiry which are set up to examine matters of urgent public concern such as riots, financial scams and political scandals. Long drawn out inquiries can become an expedient means of overcoming periods of public outrage, while ensuring that damaging facts are still kept secret. In Pakistan, this was evidenced in the handling of the Commission of Inquiry set up to examine the 1971 War. The Commission was set up in December 1971, but its report, produced in July 1972, was not made public. Only a few copies were prepared and the distribution list was kept secret. In August 2000, an Indian newspaper disclosed a lengthy excerpt from the report – which was then widely reproduced by newspapers in Pakistan. Eventually, in 2001, almost thirty years after the Commission was held, a major part of the report was declassified and released. However, at that late stage, accountability issues were almost impossible to pursue, frustrating the very objectives of the Commission.⁸⁰

No exemptions by person/organisation or class/category

Legislation should avoid broad, blanket exemptions. In most cases, each document and the context of its release is unique and should be judged on its merits.

Access laws often provide blanket exemptions to those holding a particular government position or even entire government agencies such as national security and intelligence organisations.⁸¹ The Head of State is often entirely outside the scope of the Act – a colonial overhang from the days when the monarch reigned supreme. But excluding public officials and whole organisations from any duty to give information allows them unjustified protection from any public accountability. Only a very narrow band of information held by military, security, and scientific agencies is “sensitive” in nature and this kind of information will be protected by specific exemptions clauses. The remainder of the information is pretty routine fare. For example, recruitment criteria of a national security organisation or travel allowances paid to members of parliament hardly merit secrecy. There is also a risk that the protection of such blanket provisions will be extended too far. In Australia, for example, even the Sydney Organising Committee for the Olympic Games⁸² and the Australian Grand Prix Corporation⁸³ were exempted from the coverage of certain state access regimes.

Frequently, documents are automatically exempted because they relate to certain topics or belong to a certain class of information. This is not appropriate because documents should only be exempt from disclosure if

their release would cause actual harm – not just because they *relate* to a certain topic. Among the most common categories of exempt documents are those which would affect: defence; national security; foreign policy and international relations; deliberative processes of government and cabinet; investigations and proceedings conducted by public authorities, such as commissions and inquiries; law enforcement and the prevention or detection of crime; federal-provincial relations; legal privilege; personal privacy; public safety; the safety of individuals; confidential inter and intra-departmental dealings; and sensitive economic and commercial information.

Additional grounds include documents whose release would: endanger public health; cause material loss to members of the public; affect the sanctity of constitutional conventions; impair the confidentiality of ongoing research; or impair the confidentiality of information contained in the electoral rolls. In a narrow category of cases, such as those affecting national security or when information is supplied by an intelligence agency, governments can even refuse to confirm or deny that information exists.⁸⁴

Even provisions permitting exemption to disclosure must be subject to a sunset clause. Not all exempt information will continue to remain sensitive years after their creation. Often the bureaucracy will favour grant of exemptions in perpetuity. When the information contained in classified documents that are marked 'top secret' or 'confidential' is no longer sensitive in nature, they must be declassified and disclosed to people. Newer information access laws stipulate a time limit for the operation of exemptions. For example, the Indian Act limits the operation of seven out of ten exemptions to twenty years.⁸⁵ Any information that is older must be disclosed even if it attracts any of these seven exemptions.

The Sri Lankan FOI Bill excludes Parliament and the Cabinet of Ministers from its purview. If this provision becomes law, Sri Lankans will not be able to access information from these bodies as of right. The FOI Bill also contains some class exemptions which are contrary to international best practice. For example, information relating to pending government decisions and information relating to assessment and collection of revenue by the Inland Revenue Department are required to be kept secret in every instance.⁸⁶ However ten out of thirteen exemptions will cease to apply for any information that is more than 10 years old. The benefit of exemptions will continue to be available to information relating to trade secrets and commercial interests; medical records and secrets of any person and information that is subject to professional privilege. Unlike in India, it will not be possible to invoke the exemption related to national security, defence-related matters and international relations for information that is more than 10 years old.

Openness Is Its Own Reward

Politicians and bureaucrats closely guard the “deliberative process”, or and the formulation or development of government policy, on the basis that disclosure would affect the “frankness and candour” of discussions. While it may sometimes be necessary to protect official information from disclosure at certain stages of policy-making, the same degree of confidentiality is not necessary once the policy has been finalised. Recognising this, in 1994 the United Kingdom Government decided to release the minutes of the monthly meetings between the Chancellor of the Exchequer and the Governor of the Bank of England – information that had previously been kept a closely guarded secret – six weeks after each meeting. Initial fears that the policy would create self-censored and bland discussions proved ill-founded. The *London Times* has commented: “Instead of papering over disagreements with platitudes, the minutes are impressively clear and sharp.”⁸⁷

No bureaucratic discretion and Ministerial veto

Any discretionary tests should be carefully and clearly limited and conclusive Ministerial vetoes should not be permitted.

Disclosure of information is often subject to broad discretionary exemptions or veto by Ministers. Putting wide discretionary powers in the hands of departments to make decisions against disclosure, without outlining clear parameters, and without any provision for appeal before an independent body, amounts to being the judge in one’s own cause. This can be a major defect in an access to information regime if the law provides for such discretionary powers. The most unacceptable of these types of discretionary provisions give ministers the power to unilaterally issue certificates that prevent the disclosure of information, usually in specified areas such as national security or foreign affairs. The Australian and Jamaican provisions are much wider and even include cabinet proceedings, law enforcement, public safety and the economy. Ministerial certificates are usually conclusive and cannot even be revoked by the appeals tribunals which oversee the legislation.⁸⁸

When discretionary powers are granted to officials without being subject to any supervision or scrutiny, their use can be arbitrary and contrary to the fundamental purpose of access legislation. Unfettered discretionary powers are not always used sensibly, as seen in Australia, disclosure of information about the costs of a proposed national identity card and a review of the effectiveness of certain health programmes was vetoed; and in New Zealand, information regarding the successful tender price for wall plugs, unemployment estimates and an evaluation of computer use in schools was also vetoed.⁸⁹ In the United Kingdom, the veto power against disclosure was invoked when the Prime Minister’s Office refused to comply with an

Ombudsman recommendation that it release a list of gifts received by ministers. The Ombudsman revealed that the Lord Chancellor, who favoured disclosure, was overruled when the Prime Minister's Chief of Staff decided that press coverage of "a huge list of gifts" would be embarrassing.⁹⁰

The Sri Lankan FOI Bill follows international best practice in this regard and does not provide spaces for the exercise of bureaucratic discretion to withhold access or allow a Minister to veto a decision of disclosure made by the Information Commission.

Public Interest Override and Harm Tests

Exemptions should be subject to content-specific case-by-case review and non-disclosure should only be permitted where it is in the public interest and release would cause serious harm.

All exemptions should be subject to a "public interest override" clause. In other words, information which attracts an exemption provision must still be disclosed if the public interest to know in that case outweighs the interest that is sought to be safeguarded. This ensures that every case is considered on its individual merits and public officials do not just assume that certain documents will always be exempt. It ensures that the "public interest" is always at the core of any right to information regime. The access laws of India and Antigua and Barbuda include a broad public interest override provision applicable to all exemptions clauses.⁹¹ In other jurisdictions such as South Africa and Trinidad and Tobago the public interest requires disclosure of exempt information where it would reveal evidence of: substantial contravention of the law; injustice to an individual; unauthorised use of public funds; an imminent and serious safety or environmental risk; an abuse of authority or neglect in the performance of an official duty by a public servant.⁹²

It is also important to recognise that the timing of a request has a bearing in making an assessment about the sensitive nature of the information sought. This is a good basis on which to make a determination about the harm likely to be caused by disclosure instead of dumping specific categories of information or documents into the realm of the 'inaccessible'. For example, information about where army divisions are stationed will likely be considered too harmful to disclose during war, but years later, disclosure of the same information may cause no harm and be deemed to be in the public interest, for example, if there is a public demand to know the reasons behind high casualty figures.

Balancing the public interest

A case from New Zealand illustrates the practical value of a public interest override. Following a boating accident in which two men were killed, the Maritime Safety Authority, a government body, conducted an investigation. When a copy of the investigation report was sought, the Authority declined the request after consulting the widows of the victims who asked that the information be kept out of the public domain. On appeal, the Ombudsman agreed that the information in question was indeed protected by a privacy interest, but he noted that there was also a public interest in the release of the information, as it would help in preventing similar accidents in the future. He therefore ruled that the public interest in disclosure was stronger than the privacy interest in withholding.⁹³

The Australian, Trinidad and Tobago and South African Acts are quite liberal in their use of public interest overrides. They adopt an open-ended approach, allowing the interest in release to be balanced against non-disclosure. The New Zealand Act adopts a multi-tiered approach, under which withholding some types of information is justified if disclosure would “prejudice” certain interests,⁹⁴ whilst in other cases a higher threshold of “serious damage” is required before information can be withheld.⁹⁵ The Canadian override is narrower, coming into play exclusively in relation to third party commercial information; but even then, the only public interest issues that can be taken into account are those of public health, public safety or protection of the environment.⁹⁶

The access law in the United Kingdom has been heavily criticised because it allows whole classes of information to be withheld without subjecting them to any ‘harm test’ at the stage of making a decision on a request. These include information relating to the formulation and the development of government policy, investigations by law enforcement and regulatory agencies, advice received from law officers and information concerning security services. Whether or not it is in the public interest to release information, the Minister responsible for the department has one veto, even where the Information Commissioner orders the concerned department to produce a certain document, and can overrule the decision and stop its release. However the Information Tribunal- a higher appellate body, has the power to override such vetoes.⁹⁷

The Sri Lankan FOI Bill includes harm tests of varying degrees in five out of the thirteen exemptions to disclosure.⁹⁸ Harm or prejudice tests are applicable to personal information; defence matters, national security and international relations; trade secrets and commercial interests and information relating to law enforcement including court processes. Public interest override is applicable only to five exemptions namely, personal information; defence matters, national security and international; life and safety of a person and trade secrets or commercial interests.

Partial Disclosure

If a document contains some information attracting one or more specified exemptions as well other information that does not attract any exemption, the non-exempt portion must be severed and released while the sensitive information may be kept confidential.

Sometimes documents may contain *some* information that falls within an exempt category, but the remainder of the document may not attract any exemption. There is no justification for withholding access to the non-exempt information when a request is made. Most laws recognise the principle of 'severability', where information that does not attract any exemption may be separated from other sensitive portions of the document and provided to the requestor.⁹⁹ Openness can be supported by the creative use of available legal tools, such as partial disclosure, disclosure to a limited number of people or staggered disclosure over a period of time.

The Sri Lankan FOI Bill provides for partial disclosure by severing exempt portions from non-exempt portions of a record or document.¹⁰⁰

Procedural requirements

A key test of an access law's effectiveness is the ease, inexpensiveness and promptness with which people seeking information are able to obtain it. The law should include clear and uncomplicated procedures that ensure quick responses at affordable cost to the requestor.

How to make a request

Access procedures should be quick, simple and appropriate for the local context.

Most laws require requests to be made in writing, although the Jamaican Act permits requests to be made by telephone.¹⁰¹ The access laws in India, Antigua and Barbuda, Uganda and South Africa are well-crafted to facilitate access by the poor and unlettered. They specifically provide that where a request cannot be made in writing, officials shall render all reasonable assistance to the requestor to put their oral request in writing.¹⁰² Nearly all access laws oblige government departments to render reasonable assistance to applicants so as to minimise refusal rates, including assisting applicants to formalise their request, referring them to another department or transferring their request to the right department(s).¹⁰³ The Indian Act also makes it clear that applications can be made in local official languages, which

is important in ensuring that all people are able to make requests in the official language with which they are familiar.

Dial an Information Request: Telecommunications technology at the service of RTI

In the northern Indian state of Bihar where illiteracy is a serious problem the government in collaboration with NGOs and telecommunication experts has taken steps to make it easier for citizens to file information requests with any office. The Government has advertised a telephone number which people can dial in order to orally record their information requests. This number is accessible only from a use and pay public telephone. A well-trained team attends to the phone calls, writes down the requests, forwards them to the concerned department and posts a copy of the application to the requestor. After completing the call the requestor is required to pay the application fee along with the call charges to the owner of the public telephone who in turn transfers the amount to the government treasury. This system has created enormous convenience to citizens who are unable to submit written requests.

In order to discourage “fishing expeditions” and to reduce the time taken to process requests, requestors are usually required to provide sufficient information about the document or record they seek, so that authorities are able to identify it.¹⁰⁴ Allowing people to inspect documents and requiring departments to maintain lists of available documents moderates the strictness of such provisions by making it easier for applicants to identify the information they are looking for and formulate a specific request.

The Sri Lankan FOI Bill requires that information requests to be made in writing under ordinary circumstances.¹⁰⁵ When oral requests are made by physically challenged or unlettered requestors, the designated information officer has a duty to reduce it to writing. The officer also has a duty to render all possible assistance to citizens seeking information.¹⁰⁶

Forms of access

Access should be provided in the form desired by the applicant unless it would harm the preservation of the document or impose a disproportionate burden on the resources of the entity required to comply with the request.

User-friendly access laws accommodate the diverse capabilities of information-seekers, by allowing applicants to inspect, read, view or listen to official records, or ask for photocopies, transcripts or computer print-outs.¹⁰⁷ The New Zealand Act expressly permits the government to furnish applicants with oral information about the contents of any document.¹⁰⁸ This allows people the opportunity to get information without waiting for a written copy. The South African and Ugandan access laws confer a right on disabled requesters to receive information in a form which they can read, view or hear.¹⁰⁹ The Indian Act requires officials to assist sensorily disabled applicants to access information, including by assisting them in the inspection of the information.¹¹⁰ The United Kingdom Act leaves open the form of access, allowing the authorities room to comply with any “reasonable” request.¹¹¹

In places where there is more than one official language, many access laws provide for information to be kept in several languages and provided in the language of choice. Without such provisions, whole groups would otherwise be excluded from accessing information. In Canada for example, information is routinely kept in French and English. There is also a provision allowing heads of departments to provide a translation if it is “in the public interest”.¹¹² The South African law requires that information be provided in the language of choice if the records are maintained in that language.¹¹³ Surprisingly, the new Indian Act is silent on this matter, despite India having eighteen officially recognised languages.¹¹⁴

The Sri Lankan FOI Bill states that access will be provided in the form desired by the requestor unless doing so would harm the safety or preservation of the document.¹¹⁵ Where a designated information officer is unable to provide access in the form requested he/she has a duty to provide all possible assistance to the requestor in order to facilitate compliance to the request.¹¹⁶ There are no provisions regards providing access to information in a specific language if so desired by the requestor.

Fees

Ideally, no fees should be imposed for accessing information. Alternately, at the very least, fee rates should be set with a view to ensuring that the fees charged for providing access are not so high as to deter potential applicants.

All Commonwealth access laws allow for fees to be charged, although in Australia at least, the federal freedom of information regime did not impose fees in the first four years of operation.¹¹⁷ Fees are now said to be an important element in deterring frivolous requests. Governments also sometimes contend that it costs money and takes time to develop and maintain records and information systems and that the public must bear some of this cost when seeking information. These arguments are of questionable merit. Record-keeping and information dissemination are basic and essential functions of effective government and public authorities are anyway already funded by public money. For poor people, fees can be a serious obstacle.

Nevertheless, most access laws charge a fee at the time of application, as well as an additional charge based on the time taken by officials to search for¹¹⁸ and/or replicate the information.¹¹⁹ But if imposed at all, fees should only cover the actual cost of reproducing the information requested; they should not be charged for an application, nor for the time taken to search for information and process a request. 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. The Indian access law requires that fees charged for providing information must be reasonable. A requestor living below the poverty line determined by the governments can access information free of cost.¹²⁰

Some laws provide for fees to be waived or reduced, either at the discretion of the authorities¹²¹ or on specified grounds, such as where insistence on payment would cause financial hardship to the requester or where the grant of access is in the interest of a substantial section of the public.¹²² Under the Trinidad & Tobago and Indian Acts, even where fees are imposed, if a body fails to comply with the time limits for disclosure, access is provided free of charge.¹²³ In some jurisdictions, where the costs of collecting the fee outweigh the actual fee payable (for example, where only a few pages of information are requested), fees are waived.¹²⁴

The Sri Lankan FOI Bill prescribes two types of fee that a designated officer may charge from a requestor for providing access to information.¹²⁵ However there is no clarity on the circumstances under which such fees could be charged. The Minister responsible for implementing the law has the power to specify through a gazette notification when a fee waiver may be allowed. Every public authority is required to display in a conspicuous place in its premises the fees that will be charged for providing access to information.

Guidelines on fee rates will be provided by the Information Commission.¹²⁶ These are uniquely progressive provisions not found in any other access law in South Asia.

Time Limits

Access should be provided as expeditiously as possible and time limits strictly enforced.

Bureaucratic delay is a prime device for defeating requests for information. To prevent these delays, all access laws should set timeframes within which information must be given— usually between 14 and 30 days from the date of filing of the request. In order to avoid the habit of giving information at the very last minute, some laws also usefully direct public officials to give information “as soon as practicable” or “as expeditiously as possible”.¹²⁷

Certain types of information can be requested within shorter timeframes. For example, the access laws in India and Bangladesh make a distinction between information concerning the life and liberty of a person, which is required to be provided within 48 hours, and other information, which is to be provided within 30 days.¹²⁸ The Canadian, Indian and South African Acts try to force timely compliance by providing that if a decision on a request is not communicated to the requestor within the stipulated time limits it will be construed as a deemed refusal and the right of the requestor to approach the appellate body is activated automatically.¹²⁹

The Sri Lankan FOI Bill stipulates 14 working days for making a decision regards disclosure. The designated information officer has a duty to either provide the information or issue a written rejection order within this time limit.¹³⁰ There is no provision for dealing with urgent information requests in the FOI Bill.

Appeals and Enforcement

Effective enforcement provisions ensure the success of access legislation. Any body denying access must provide reasons. Powerful independent and impartial bodies must be given the mandate to address non-compliance with the law and make binding orders accordingly. The law should impose penalties and sanctions on those who wilfully obstruct access to information.

Reasons for decisions

Decision notices should justify non-disclosure with reference to the terms of the Act and advise applicants about their appeal rights.

It is not sufficient for officers simply to refuse information requests without assigning reasons. They must state why a request has been denied, so that the aggrieved applicant may approach the appellate authority for redress. In fact, the duty to give reasons for refusing information is increasingly a general requirement under administrative law in many Commonwealth countries, with the courts coming down heavily upon public authorities who fail to comply with this basic requirement of fair play. Most Commonwealth access laws require public authorities to give reasons for their decisions to refuse access, to clarify grounds in support of those reasons (that is, the specific exemption provision(s) relied upon and any material facts taken into consideration) and to inform the requester about remedies available to them by way of internal review, appeal or complaint to an independent body or judicial review.¹³¹

The Sri Lankan FOI Bill requires the designated information officer to communicate his/her decision of rejection to the requestor in writing.¹³² Rejection is permissible only by invoking one or more exemptions mentioned in section 4.

Appeals

Best practice supports the establishment of a dedicated and independent Information Commission(er) with a mandate to review refusals to provide information, compel disclosure and impose sanctions for non-compliance. Internal appeals and appeals to the courts should also be permitted.

The natural tendency of governments to confuse their own interests with the public interest requires that appeals go beyond departmental reviews which make the government both judge and jury in its own cause. All laws provide for some form of appeal against a decision to reject a request for information. Most use a tiered method that first allows for an internal review which can be appealed to an independent specialist tribunal, followed by a review by the courts.

While internal appeals provide an inexpensive first opportunity for review of a decision, oversight by an independent adjudicator free from government pressure is a major safeguard against administrative lethargy, indifference or narrow-mindedness and is particularly welcome in an age where court-based action is still relatively slow, costly and uncertain. The

fear of independent scrutiny ensures that exemption clauses are interpreted responsibly and citizens' requests are not unnecessarily obstructed. Special independent oversight bodies that review or decide complaints of non-disclosure are a cheaper, more efficient alternative to courts and these bodies enjoy public confidence when they are robustly independent, well-funded and procedurally simple.

Commonwealth laws often provide for quick, time-bound internal reviews; specialist external review mechanisms like Information Commissioners, Ombudsmen and Information Tribunals, which may have a mix of powers and duties to both promote the law, review its working and deal with individual complaints of non-disclosure; or court-based appeals. In South Africa, those unhappy with the outcome of an internal review can approach the High Court.¹³³ The Australian Act has an option to approach the Ombudsman for mediation, and if the Ombudsman fails to resolve the issue, appeals can then be made to the Administrative Appeals Tribunal.¹³⁴ The Belize, New Zealand and Trinidad and Tobago Acts similarly allow first recourse to their Ombudsman, followed by appeal to the courts.¹³⁵

Ideally, a specialised Information Commission(er) may be established to handle appeals under the law – and more generally, to operate as the “champion of openness”. Within the Commonwealth, India, Canada, the United Kingdom and some jurisdictions in Australia (Queensland, Western Australia and the Northern Territory) have established Information Commissions and/or Commissioners.¹³⁶ The Canadian Act only allows the Information Commissioner to mediate disputes between requestors and agencies and make recommendations, but the Commissioner has no power to order agencies to release information. Requestors and the Information Commissioners can, however, take their complaint to the courts in the event of non-compliance.¹³⁷ The United Kingdom Act provides for initial appeals to the Information Commissioner, a second appeal to the Information Tribunal, and appeals on points of law to the courts.¹³⁸ The Indian access law gives Information Commissions (which have been established centrally and in all States) very broad powers of adjudication, as they can handle complaints “in respect of any other matter relating to requesting or obtaining access to records under this Act”.¹³⁹ The Commissions also have broad powers to investigate and make binding decisions requiring public authorities “to take any such steps as may be necessary to secure compliance with the provisions of the Act”.¹⁴⁰ The Commissions can also order compensation and impose penalties on erring officials.¹⁴¹ The access laws in Nepal and Bangladesh also provide for similarly empowered Information Commissions.

The Sri Lankan FOI Bill provides for a 3-tiered system of appeals.¹⁴² The first level appeal against a decision of rejection taken by the designated officer lies within the public authority. Unlike in India where the Act specifies that the appellate authority shall be an officer senior in rank to the designated

information officer there is no guidance provided in the FOI Bill as to who shall entertain internal appeals. A second appeal shall lie with the Information Commission if the appellant is not satisfied with the decision of the first appellate authority. An aggrieved appellant may approach the Supreme Court if he/she is not satisfied with the decision of the Information Commission. Where an applicant is unable to file an appeal on his/her own at any stage he/she may authorise any other person to act on his/her behalf.¹⁴³ This is a unique provision not found in any other South Asian access law.

The Sri Lankan FOI Bill provides for the establishment of a three-member Information Commission appointed by the President on the recommendations of the Constitutional Council.¹⁴⁴ The Commission has only recommendatory powers in addition to duties of adjudicating information access disputes and overseeing the implementation of the access law. The Commission is also required to lay down guidelines for public authorities for charging fees for providing access to information.

Enforcement & Penalties

Penalties – by way of fine or imprisonment – are useful to tackle non-compliance with the law.

All rights must have corresponding remedies where they are breached. At a minimum, penalties for unreasonably delaying, withholding, or obstructing access to information, as well as destroying information that was the subject of a request, are crucial, if an access law is to have any real meaning. Absence of provisions allowing for the imposition of sanctions against errant officials weakens the very foundation of the access regime. Sanctions are particularly important as deterrents to ensure the timely disclosure of information in jurisdictions where the bureaucracy is not used to hurrying at the request of the public. Without penalties, it is easy for bureaucrats and their political masters, especially in countries with lax or corrupt administrative systems, to subvert the purpose of the law.

Unfortunately, only some access laws in the Commonwealth provide tough sanctions for non-compliance. The laws in India, Nepal and Bangladesh provide for the imposition of monetary penalties on officers who are expected to pay up from their own pockets.¹⁴⁵ Ideally, heads of departments should be made personally responsible for their departments complying with access laws. In certain circumstances, there is every justification for insisting that responsible officers be fined and made to pay out of their own pockets for non-compliance, with further sanctions under the criminal law in more extreme cases where there has been wilful obstruction of access or serious harm resulting from their actions. It is an offence under many Commonwealth access laws to destroy, conceal, erase, alter or falsify records and penalties are set out in the law to punish such actions.¹⁴⁶

New Zealand's Privacy Commissioner who is also the appellate authority under the country's information access law has pointed out though, that "[i]f an Official Information Act request is not delivered in a timely fashion, the most that will happen on review is that the documents ultimately are required to be handed over",¹⁴⁷ and has suggested that consideration be given to whether victims of delay might also be entitled to damages.¹⁴⁸ The Indian Act makes it a punishable contravention of the law to refuse to accept an application or unreasonably delay the provision of information, and imposes a daily fine for such delays. The erring official is required to cough up the sum.¹⁴⁹ It also gives the Information Commissions the power to order compensation.¹⁵⁰ Under the access law in the United Kingdom, if an enforcement notice issued by the Information Commissioner is ignored or a public authority knowingly or recklessly makes a false statement in purported compliance with the notice, the matter can be dealt with by the High Court as contempt of court.¹⁵¹ However, on public policy grounds, the Act expressly bars any civil suits for non-compliance, such that disappointed requesters cannot launch civil actions for damages.¹⁵²

Most laws protect government officials and agencies from legal action regarding acts carried out in good faith in exercise of their functions.¹⁵³ These measures make it difficult to uncover where political pressure has been exerted to obstruct requests.

The Sri Lankan FOI Bill contemplates monetary penalties against errant officials. A fine of not less than five thousand rupees may be imposed on a designated information officer if he/she rejects a request without assigning reasons or on grounds other than those provided in the exemptions or fails to make a decision on a request within the stipulated deadline.¹⁵⁴ However fines may be imposed only upon conviction by a court of law. Unlike in other South Asian countries, the Information Commission does not have the power to impose monetary penalties or recommend initiation of disciplinary action against errant officials. An official may be penalised by a court of law if he/she discloses information covered by the exemptions.¹⁵⁵ However the FOI Bill protects officers for action taken in good faith.

Facilitating Implementation

A body should be given specific responsibility for monitoring and promoting the Act. The law should obligate governments to actively undertake training for government officials and public education about the right to access information. Records management systems should be created and maintained which facilitate the objectives of the Act.

Monitoring

Regular monitoring of compliance and reporting to Parliament is necessary to promote improvements in the implementation of access laws.

Independent monitoring of implementation ensures that the purposes of the law are met and the law is not subverted or watered down over the course of time. Most Commonwealth laws require some form of monitoring and annual reporting, while others also permit ad hoc reports to be published on specific topics. The reports are usually compiled by the same independent body which handles appeals and/or the Minister who administers the law. For example, under the Belize Act the responsible minister must annually table a report in the National Assembly.¹⁵⁶ Under the Ugandan *Access to Information Act 2005*, each Minister must submit an annual report on the implementation of the law to Parliament.¹⁵⁷ Under the Canadian Act, the Information Commissioner is required to present an annual report to the national legislature and heads of government departments must also present Parliament with annual reports.¹⁵⁸ The South African Human Rights Commission monitors the implementation of the South African Act.¹⁵⁹ The Information Commissions in Nepal and Bangladesh are also required to submit annual performance and compliance reports to Parliament through the respective governments.¹⁶⁰

Most annual reports include basic statistics about applications and appeals. However, best practice also requires annual reports to include recommendations for improving implementation. Such recommendations are required under the access laws in India, Antigua and Barbuda, South Africa, Nepal and Bangladesh.¹⁶¹ In any case, to assist with the compilation of the Report, a specific duty needs to be placed on all public authorities to provide the relevant reporting body with whatever statistics they need to compile the Annual Report. This requires the establishment of proper systems to ensure ongoing monitoring and the collection of statistics.

To ensure that the Annual Report is acted upon, and does not merely sit on the shelves of the parliamentary library, some laws specifically require that Annual Reports are also referred to a Parliamentary Committee for consideration and review. The Committee can then call on the Government to take action on key issues as necessary. This is the practice in Canada, where Information Commissioner's reports are sent to a Parliamentary Committee designated or established to review the administration of the Act.¹⁶²

The Sri Lankan FOI Bill requires all public authorities to submit annual compliance reports to the Information Commission empowered to monitor their performance.¹⁶³ The reports must contain data about the number of requests received; the number of instances where access granted or denied; the reasons for rejection; number of first appeals submitted and the total amount of fees collected for providing access to information. The Information

Commission is also required to publish an annual report on its activities and submit it to Parliament for scrutiny.¹⁶⁴

Education & Training

Training of officials should be legally required to ensure budget support is provided accordingly. Public education on people's rights under the Act should be promoted.

Raising awareness and creating a demand for information are vital prerequisites of an effective access regime. It is increasingly common for access legislation to include provisions which mandate an independent body not only to handle appeals and monitor implementation of the Act, but to also actively promote the concept of open governance and the right to information within the bureaucracy and to all members of the public. Recognising this, the South African Act requires its Human Rights Commission and the Indian Act obligates the Government, to: produce user guides for the public for accessing information; conduct public education programmes, particularly in disadvantaged communities on the benefits of the Act; and encourage private and public bodies to exercise their rights to information.¹⁶⁵ The access law in Nepal requires the Nepal Information Commission to protect, promote and popularise people's right to information.¹⁶⁶ The access law in Bangladesh places a similar obligation on the newly established Information Commission.¹⁶⁷

The South African and Indian Acts also encourage the training of government information officers. The Antigua and Barbuda Act goes further and has a separate provision which specifically requires all officials to be trained on the law.¹⁶⁸ Under the access law in the United Kingdom, the Information Commissioner is under a duty to promote good practice by public authorities, as well as to disseminate information to the public about the operation of the Act.¹⁶⁹ These provisions are useful in directing specific attention – as well as tangible resources – towards optimal implementation. The Indian Act places obligation on the governments at the Central and State level to develop training curricula and conduct training programmes for government officials.¹⁷⁰

The Sri Lankan FOI Bill requires the Information Commission to publicise its provisions and popularise the rights available under it.¹⁷¹ The Commission is also required to train officials for effectively implementing the access legislation.¹⁷²

Records Management

Records should be required to be maintained in such a manner that they facilitate access to information in accordance with the law.

The huge volume of information in governments' hands requires that information be carefully managed so that authorities can locate and provide requested information in a timely and efficient way. The key is to ensure a comprehensive framework is in place that is capable of supporting the objectives of the access regime. The Indian and Pakistani Acts specifically require public authorities to maintain records "in a manner and ... form which facilitates the right to information... and ensure(s) that all records that are appropriate to be computerised are, within a reasonable time and subject to availability of resources, computerised and connected through a network all over the country on different systems so that access to such records is facilitated".¹⁷³

In addition to establishing proper systems, access laws require continuous guidance to ensure that records management systems are regularly reviewed and improved, taking into account evolving technologies and any changes in the way information is created and managed. The United Kingdom's Act specifically requires the development of a code of practice to provide guidance to authorities on appropriate practices for "the keeping, management and destruction of their records".¹⁷⁴ Under the Canadian Act, the responsible minister is required to keep under review the manner in which records are maintained and managed to ensure compliance with the Act.¹⁷⁵ In Australia, a separate National Standard on Records Management provides guidance to all public bodies.¹⁷⁶ The access law in Bangladesh places on the Information Commission the responsibility of taking steps to improve records management in public bodies.¹⁷⁷ The Indian Act requires every public authority to take steps to ensure computerisation and networking of all records management systems so that providing access to information to people becomes easier.¹⁷⁸

The Sri Lankan FOI Bill places a duty on all public authorities to index, catalogue and maintain their records in an efficient manner.¹⁷⁹ All records that may be generated after the access law comes into force and those which existed at the time of its coming into force are required to be preserved for at least 10 years.¹⁸⁰

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Sri Lanka's FOI Bill drafted in 2003 has several positive and unique features incorporating international best practices. There is room for further improvement. With the ethnic conflict having come to halt in the northern and eastern provinces, Sri Lanka has a very real opportunity to pull the FOI

Bill out of cold storage and parley with civil society advocates to strengthen its provisions. An access law prepared in consultation with the people in general and civil society in particular will be owned, used and defended better unlike laws that are crafted behind closed doors.

Life Insurance Corporation of India and Union of India and another v Prof. Manubhai D. Shah and Cinemart Foundation, 1992¹⁸¹

While deciding on two appeals challenging censorship imposed by State agencies, the Supreme Court reiterated the significance of the general public's fundamental right to know the developments that take place in a democratic process. In the first case a public sector insurance company had refused to publish, in its in-house magazine, an expert's article criticising its discriminatory policies. The second appeal relates to the refusal of a state-owned television broadcaster to screen an award winning documentary film.¹⁸²

In 1978 Prof. Manubhai Shah, a well known proponent of and expert on consumer rights, published and widely disseminated a research article on the discriminatory practices adopted by the Life Insurance Corporation of India (LIC). Using statistical data he showed how LIC was charging unduly high premiums and denying insurance cover to people who could not afford it. A member of the LIC published an article in response to Prof. Shah's views in a popular English daily. Prof. Shah published a rejoinder in the same paper to counter LIC's arguments. Later LIC published its employee's response article in *Yogakshema*- its in-house magazine. Prof. Shah requested that his rejoinder also be published in the same magazine. LIC refused to publish the rejoinder on the ground that *Yogakshema* was an in-house magazine intended to inform its staff about its activities and was not available for sale to the general public. The Corporation argued that Prof. Shah could not claim the right to be published in that magazine. After his request for publication was spurned by the head of LIC, Prof. Shah filed a writ petition in the Gujarat High Court claiming that his fundamental right to freedom of speech and expression had been violated.

The Gujarat High Court examined the matter and held that LIC was an agency of the State and had a constitutional duty not to act in a manner that would violate people's fundamental rights. It found that *Yogakshema* did not qualify to be called an in-house magazine as copies were available for sale to the general public and articles from people other than staffers were invited for publication. The magazine was published using public funds and should therefore be equally accessible to both staffers and general public to publish their views. The High Court held that Prof. Shah's right to freedom of speech and expression had been violated and ordered LIC to publish the rejoinder.

LIC challenged this decision before the Supreme Court of India on the same grounds as it did before the High Court. Later it also contended that the article had become too outdated to be published.

Referring to the Universal Declaration of Human Rights, the Supreme Court held that freedom of speech and expression is a natural right which a human

being acquired on birth and is protected by the Constitution. Drawing inspiration from the jurisprudence in India and the USA, the Court held that this right includes the freedom to disseminate views through the mass media. The Court observed, "The constitutional guarantee of the freedom of speech and expression is not so much for the benefit of the press as it is for the benefit of the public. The people have a right to be informed of the developments that take place in a democratic process and the press plays a vital role in disseminating this information. Neither the Government nor any instrumentality of the Government or any public sector undertaking run with the help of public funds can shy away from articles which expose weaknesses in its functioning and which in given cases pose a threat to their power by attempting to create obstacles in the information percolating to the members of the community."

Further, the Court explained that LIC was created by an Act of Parliament in order to carry on life insurance business for the best advantage of the community. So it has a duty to function in the best interest of the community. People are entitled to know whether or not this statutory requirement is being satisfied in the functioning of LIC. The Court held: "The respondent's effort in preparing the study paper was to bring to the notice of the community that the LIC had strayed from its path by pointing out that its premium rates were unduly high when they could be low if the LIC avoided wasteful indulgences. The endeavour was to enlighten the community of the drawbacks and shortcomings of the corporation and to pin-point the areas where improvement was needed and was possible." The Court explained that LIC's refusal to publish is unfair and unreasonable because fairness demanded that both view points be placed before the public to enable them to draw their own conclusions. "By denying information to the consumers as well as other subscribers the LIC cannot be said to be acting in the best interest of the community" the Court declared.

As regards LIC's argument that the article was outdated, the Court observed as follows: "By refusing to print and publish the rejoinder the LIC had violated the respondent's fundamental right. A wrong doer cannot be heard to say that its persistent refusal to print and publish the article must yield the desired result, namely to frustrate the respondent. The Court must be careful to see that it does not, even unwittingly, aid the effort to defeat a party's right. Besides, if the respondent thinks that the issue is live and relevant and desires its publication, we think we must accept his assessment. However, in order that the reader knows and appreciates why the rejoinder has appeared after such long years we direct that the LIC will, while publishing the rejoinder as directed by the High Court, print an explanation and an apology for the delay. With this modification, the LIC's appeal must fail."

Needless to say LIC published Prof. Shah's rejoinder in *Yogakshema*. The value of this decision lies in its recognition of every human being's right to know the contents of the democratic process and the corresponding

obligation on the State and its agencies not to curtail or violate this right in an unreasonable manner.

Notes

- ¹ Document issued by the Commonwealth Expert Group Meeting on the Right to Know and the Promotion of Democracy and Development, London, 30-31 March 1999.
- ² UN General Assembly (1946) Resolution 59(1), 65th Plenary Meeting, 14 December [http://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=A/RES/59\(1\)&Lang=E&Area=RESOLUTION](http://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=A/RES/59(1)&Lang=E&Area=RESOLUTION) as on 21 August, 2009
- ³ Emphasis added.
- ⁴ Report of the Special Rapporteur, UN Doc. E/CN.4/1998/40, 28 January 1998, para.14.
- ⁵ Res. E/CN.4/1998/42, 17 April 1998, para.2.
- ⁶ Report of the Special Rapporteur, UN Doc. E/CN.4/2000/63, 18 January 2000, paras 43, 44. The Principles were developed by the non-governmental organisation Article 19 – the International Centre against Censorship.
- ⁷ Res. E/CN.4/RES/2000/38, 20 April 2000, para 2.
- ⁸ Office of the Special Rapporteur for Freedom of Expression, Inter-American Commission on Human Rights (2004) *International Mechanisms for Promoting Freedom of Expression: Joint Declaration by the UN Special Rapporteur, Organisation of Security and Co-operation in Europe on Freedom of the Media and Organisation of American States Special Rapporteur on Freedom of Expression*, 6 December: <http://www.cidh.oas.org/relatoria/showarticle.asp?artID=319&IID=1> as on 21 August, 2009.
- ⁹ Ibid.
- ¹⁰ Ibid.
- ¹¹ Joint Declaration by the UN Special Rapporteur, Organisation of Security and Co-operation in Europe Representative on Freedom of the Media, and Organisation of American States Special Rapporteur on Freedom of Expression, adopted 26 November 1999, UN Doc. E/CN.4/2000/63, 18 January 2000, Annex 1.
- ¹² UN Doc. E/CN.4/2000/63, 18 January 2000, Annex 2.
- ¹³ United Nations (2000) Committee on Social, Economic and Cultural Rights, *General Comment no.14 E/C.12/2000/4*, para 12: [http://www.unhcr.ch/tbs/doc.nsf/\(symbol\)/E.C.12.2000.4.En](http://www.unhcr.ch/tbs/doc.nsf/(symbol)/E.C.12.2000.4.En) as on 21 August, 2009
- ¹⁴ United Nations (2003) Committee on Social, Economic and Cultural Rights, *General Comment no.15 E/C.12/2002/11*, para.45: <http://www.unhcr.ch/tbs/doc.nsf/0/a5458d1d1bbd713fc1256cc400389e94?OpenDocument> as on 21 August, 2009.
- ¹⁵ United Nations (1999) Committee on Social, Economic and Cultural Rights, *General Comment no.13 E/C.12/1999/10*, para. 56: [http://www.unhcr.ch/tbs/doc.nsf/\(symbol\)/E.C.12.1999.10.En?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(symbol)/E.C.12.1999.10.En?OpenDocument) as on 21 August, 2009.
- ¹⁶ United Nations (1999) Committee on Social, Economic and Cultural Rights, *General Comment no.12 E/C.12/1999/5*, para.23: <http://www.unhcr.ch/tbs/doc.nsf/0/3d02758c707031d58025677f003b73b9?OpenDocument> as on 21 August, 2009.
- ¹⁷ Articles 10(h), 14(b) and 16(1)(e), Website of the UN Division for the Advancement of Women, *International Convention on the Elimination of All Forms of Discrimination against Women*, <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm> as on 21 August 2009.
- ¹⁸ Articles 13(1), 28(1)(d) and 22(2), *International Convention on the Rights of the Child*, Website of the UN High Commissioner for Human Rights: <http://www2.ohchr.org/english/law/crc.htm> as on 21 August 2009.
- ¹⁹ United Nations (1990) *International Convention on the Protection of the Rights of All Migrant Workers and Their Families*: <http://www.ohchr.org/english/law/cmw.htm> as on 21 August, 2009.
- ²⁰ UN Doc. A/Conf.151/26 - Vol. 1, June 1992, Annex 1, Principle 10.
- ²¹ UN Doc. A/RES/S-19/2, 19 September 1997, para 108.

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- ²² *Plan of Implementation for the World Summit on Sustainable Development*, September 2002, para.128, http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POI%20oc.htm as on 21 August, 2009.
- ²³ *Programme of Action of the World Summit for Social Development*, March 1995, para. 16.
- ²⁴ United Nations (2003) *United Nations Convention Against Corruption*: <http://www.unodc.org/unodc/en/treaties/CAC/index.html> as 21 August, 2009.
- ²⁵ See: <http://www.thecommonwealth.org/subhomepage/191086/> as on 21 August, 2009.
- ²⁶ Communiqué, (1980) Issued by Commonwealth Law Ministers, Barbados.
- ²⁷ Communiqué, (1999) Issued by the Meeting of Commonwealth Law Ministers, Trinidad and Tobago.
- ²⁸ Communiqué issued by the Commonwealth Law Ministers, Trinidad and Tobago, May 1999, para. 21.
- ²⁹ The Durban Communiqué, Commonwealth Heads of Government Meeting, Durban, 15 November 1999, para. 57.
- ³⁰ Freedom of Information Act [], Commonwealth Secretariat Doc. LMM(02)6, Annex, September 2002.
- ³¹ G-7, civil society press for IMF world Bank transparency reforms available at <http://www.brettonwoodsproject.org/art-4569> as on 21 August, 2009
- ³² Roberts, A. (2000) "Informational commons at risk", p.15, http://www.queensu.ca/sps/publications/working_papers/08.pdf as on 21 August, 2009.
- ³³ WTO (2002) *Procedure for the Circulation and Derestriction of WTO Documents*, Doc. WT/L/452, decision of 14 May 2002, <http://docsonlinewto.org/DDFDocuments/t/WT/L/452.doc> as on 21 August, 2009.
- ³⁴ WTO (2002) *Explanatory note on old and new procedures*, http://www.wto.org/english/forums_e/ngo_e/derestr_explane_e.htm as on 21 August, 2009.
- ³⁵ Article II.2.xvi, SAARC Social Charter, website of SAARC Secretariat, <http://www.saarc-sec.org/main.php?id=13> : as on 21 August, 2009.
- ³⁶ For more details about the 2003 process in Sri Lanka, please see vol. 1 in this series: *The Right To Information: Touchstone For Democracy And Development*.
- ³⁷ Art. 21(1)(f), Constitution of Ghana; Art. 37, Constitution of Malawi; Art.74(1), Constitution of Mozambique; Art. 51, Constitution of Papua New Guinea; Art.32, Constitution of South Africa; Art.18(2), Constitution of United Republic of Tanzania; Art.41, Constitution of Uganda.
- ³⁸ See Comparative Table- Status of the Right to Information in the Commonwealth, website of CHRI: http://www.humanrightsinitiative.org/programs/ai/rti/international/laws_papers.htm as on 21 August 2009.
- ³⁹ For a more detailed discussion on the decisions of the Supreme Court of Sri Lanka please see vol. 1 in this series: *The Right To Information: Touchstone For Democracy And Development*.
- ⁴⁰ *State of Uttar Pradesh v Raj Narain*, AIR 1975, SC865.
- ⁴¹ *SP Gupta v President of India*, [1982] 2 SCR 365.
- ⁴² *Dewan Abdul Kader v Bangladesh*, 46 DLR 1994. cited in Kitora, Mika (2003), *The Right to Information in Bangladesh*, Ain o Salish Kendra (ASK): contribution to CHRI's publication- *Open Sesame: Looking for the Right to Information in the Commonwealth*, unpublished.
- ⁴³ Right to Information Act, 2009, website of CHRI: http://www.humanrightsinitiative.org/programs/ai/rti/international/laws_papers/bangladesh/bangladesh_rti_act_2009.pdf for an unofficial English language version of the law see: http://www.humanrightsinitiative.org/programs/ai/rti/international/laws_papers/bangladesh/unofficial_english_version_of_bangladesh_rti_act.pdf as on 21 August 2009.
- ⁴⁴ Preamble to the *Right to Information Act 2005*. Similar provisions can be found in the Preamble of the *Promotion of Access to Information Act 2000* (South Africa), and s.2 of the in the *Access to Information Act 2002* (Jamaica).
- ⁴⁵ Section 3.

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- ⁴⁶ Section 3(2).
- ⁴⁷ Section 2(1).
- ⁴⁸ Law Commission of Sri Lanka (2003), *Report of the Law Commission of Sri Lanka on the Draft Freedom of Information Bill*: <http://www.lawcomdept.gov.lk/info/index.asp?xp=723&xi=808> as on 21 August, 2009.
- ⁴⁹ For example, *Freedom of Information Act 1994* (Belize) excludes the Governor General (s.5); *Access to Information Act 2002* (Jamaica), excludes the Governor-General (s.5(a)); *Freedom of Information Act 1999* (Trinidad & Tobago) excludes the national President (s.5(1)(a)) and allows the President by decree to exempt other government agencies from being covered by the Act (s.5(1)(c)).
- ⁵⁰ Section 2. The *Freedom of Information Act 1999* (Trinidad & Tobago) contains a similar provision (s.4).
- ⁵¹ *Promotion of Access to Information Act 2000* (South Africa), s.50; *Freedom of Information Act 2004*, s.16(3).
- ⁵² Section 4. See also *Official Information Act 1982* (NZ), s.2(5).
- ⁵³ Section 3(2).
- ⁵⁴ Section 5(1).
- ⁵⁵ Jamaican Act s. 5(3)
- ⁵⁶ Section 36 *supra.*, n. 50.
- ⁵⁷ For example, *Freedom of Information Act 2000* (UK), s.1.
- ⁵⁸ For example, *Freedom of Information Act 2000* (India), s.3.
- ⁵⁹ For example, *Access to Information Act 1983* (Canada), s.4(1)(b). The Canadian Act also gives the Governor-General the discretion to extend the right of access to persons other than citizens and permanent residents (s.4(1), (2)).
- ⁶⁰ For example, *Freedom of Information Act 1982* (Aust), s.15(1)(c).
- ⁶¹ Section 12(1)(d) and (e).
- ⁶² For example, *Official Information Act 1982* (NZ), s.12(3).
- ⁶³ Sections 7(1) and 9(1), *Right to Information Act, 2064 B.S.*, website of the Nepal Information Commission: http://www.nic.gov.np/download/rti_act_eng_official.pdf as on 21 August, 2009.
- ⁶⁴ Section 2.
- ⁶⁵ Section 27.
- ⁶⁶ Sen Amartya (2009) *The Idea of Justice*, Allen Lane, India, chapters 15-17.
- ⁶⁷ *Freedom of Information Act 1982* (Aust), s.4(1); *Access to Information Act 2002* (Jamaica), s.6; *Promotion of Access to Information Act 2000* (South Africa) Act, s. 3. In the South African Act, “record” has been defined very widely to include any information regardless of the form or medium in which it is presented, regardless of whether it was created by a public or private body, and regardless of when it was created.
- ⁶⁸ Section 1.
- ⁶⁹ Section 36, *supra.*, n. 50.
- ⁷⁰ *Freedom of Information Act 1994* (Belize), s.6; *Freedom of Information Act 2002* (India), s.4(b); *Promotion of Access to Information Act 2000* (South Africa), s.14.
- ⁷¹ *Promotion of Access to Information Act 2000* (South Africa), s.16.
- ⁷² Section 6. See also *Freedom of Information Act 1982* (Aust), s.10.
- ⁷³ Section 4.
- ⁷⁴ Section 4(c) and (e)
- ⁷⁵ Section 7, *supra.*, n. 50.
- ⁷⁶ Section 8.

⁷⁷ Section 9(2).

⁷⁸ Section 9(2).

⁷⁹ Section 4.

⁸⁰ Based on: (2001) *Global Trends on the Right to Information: A survey of South Asia*, ARTICLE 19, CHRI, CPA, HRCP, pp.91-2.

⁸¹ For example, section 24 of the *Right to Information Act 2005* (India) provides a blanket exemption to “intelligence and security organisations” which are specified in a schedule to the Act. This schedule includes such bodies as the Narcotics Control Bureau and the Aviation Research Centre. Section 7 of the *Freedom of Information Act 1982* (Aust) adopts a two-tiered to exemptions, listing: (i) agencies which are fully exempt from its purview (eg. the Auditor-General, the Australian Security Intelligence Organisation, the Australian Shipping Commission); and (ii) agencies which are exempt in respect of particular documents (eg. Reserve Bank of Australia, in relation to its banking operations and exchange control matters).

⁸² *Freedom of Information Act 1989* (NSW) Schedule 1, Clause 22.

⁸³ *Australian Grand Prix Act 1994* (Vic), s.49

⁸⁴ *Freedom of Information Act 2000* (UK), ss. 24, 26, 27.

⁸⁵ Section 8(3).

⁸⁶ Section 4(1)(a) and (d).

⁸⁷ “Minutes of Interest”, *The Times*, 14 April 1994.

⁸⁸ For example, *Freedom of Information Act 1982* (Aust), s.58(3); *Freedom of Information Act 1994* (Belize), 35(4); *Access to Information Act 2002* (Jamaica), s.32(6)(b).

⁸⁹ **CFOI (2002) “Campaign warns about ministers' 'disclosure veto'”, 11 January 2002,** <http://www.cfoi.org.uk/scotctteerpt110102pr.html>

⁹⁰ Frankel, M. (2003) “A window on the mind of No 10: Open Government would have prevented the Iraq war debacle”, <http://www.cfoi.org.uk/gdnarticle290803.html> as on 21 August, 2009.

⁹¹ *Right to Information Act 2005* (India), s.8(2); *Freedom of Information Act 2004* (Antigua & Barbuda), s.24.

⁹² *Promotion of Access to Information Act 2000* (South Africa), s.46; *Freedom of Information Act 1999* (Trinidad & Tobago), s.35.

⁹³ *Ombudsman Quarterly Review* (NZ), 1:2 June 1995, cited in CFOI (1997) “Freedom of Information: Key Issues”, www.cfoi.org.uk/opengov.html#issues as on 21 August, 2009..

⁹⁴ For example, security and national defence interests (s.6(a)).

⁹⁵ For example, where the national economy is concerned (s.6(d)).

⁹⁶ *Access to Information Act 1983* (Canada), s..20(6).

⁹⁷ Section 60.

⁹⁸ Section 4(1), *supra.*, n. 50.

⁹⁹ For example, *Freedom of Information Act 1982* (Aust), s. 17; *Freedom of Information Act 1994* (Belize), s.19; *Official Information Act 1982* (NZ), s. 17; *Freedom of Information Act 2002* (India), s.10; *Promotion of Access to Information Act 2000* (South Africa), s.28.

¹⁰⁰ Section 5, *supra.*, n. 50.

¹⁰¹ Section 7(2)(a).

¹⁰² *Right to Information Act 2002* (India), s.6; *Freedom of Information Act 2004* (Antigua & Barbuda), s.17; *Access to Information Act 2005* (Uganda), s.11; *Promotion of Access to Information Act 2000* (South Africa), ss.18(3)(a).

¹⁰³ For example, *Freedom of Information Act 2002* (India), s. 5(2); *Promotion of Access to Information Act 2000* (South Africa), ss.19, 20; *Freedom of Information Act 1994* (Belize), ss.12(5), 13; *Freedom of*

Information Act 1999 (Trinidad & Tobago), s.14; *Freedom of Information Act 1982* (Aust), s. 15; *Access to Information Act 2002* (Jamaica), s.8.

¹⁰⁴ For example, the *Official Information Act 1982* (NZ) s.12(2) requires the requestor to specify the information sought "with due particularity". Section 6 of the *Access to Information Act 1983* (Canada) requires requesters to "provide sufficient detail to enable an experienced employee of the institution with a reasonable effort to identify the record." Similar phraseology is used in the *Freedom of Information Act 1982* (Aust) (s.15(2)(b)) and *Freedom of Information Act 1999* (Trinidad & Tobago) (s.13(2)).

¹⁰⁵ Section 20(1), *supra.*, n. 50.

¹⁰⁶ Section 19(2).

¹⁰⁷ For example, *Freedom of Information Act 1982* (Aust), s.16; *Official Information Act 1982* (NZ), s.18; *Freedom of Information Act 1999* (Trinidad & Tobago), s.4.

¹⁰⁸ Section 16(1)(f).

¹⁰⁹ *Promotion of Access to Information Act 2000* (South Africa), s.29(5); *Access to Information Act 2005* (Uganda), s.20(5)-(7). Section 12(3) of the *Access to Information Act 1983* (Canada) also contains a provision which permits special access for requestors with "sensory" disabilities.

¹¹⁰ Section 7(4).

¹¹¹ Section 11(4).

¹¹² *Access to Information Act 1983* (Canada), s.12(2)(b).

¹¹³ Section 31.

¹¹⁴ Constitution of India, Sch. VIII, read with Arts. 344(1) and 351. As well as the 15 languages listed here, English is also an officially recognised language in India.

¹¹⁵ Section 23(1), *supra.*, n. 50.

¹¹⁶ Section 23(2), *supra.*, n. 50.

¹¹⁷ Ricketson, M. (2002) "Keeping the lid on information", *The Age*, 28 November 2002, <http://www.mail-archive.com/cypherpunks@minder.net/msg29658.html>. as on 21 August, 2009

¹¹⁸ For example, *Access to Information Act 1983* (Canada), s. 11(2), which charges for any search time incurred beyond an additional free first five hours; *Promotion of Access to Information Act 2000* (South Africa), ss.22(2) and(6).

¹¹⁹ For example, *Access to Information Act 2002* (Jamaica), s.12(1); *Promotion of Access to Information Act 2000* (South Africa), s.22(7).

¹²⁰ Section 7.

¹²¹ For example, *Access to Information Act 1983* (Canada), s.11(6); *Access to Information Act 2002* (Jamaica), s.12(2).

¹²² For example, *Freedom of Information Act 1982* (Aust), s.29(5).

¹²³ *Access to Information Act 2002* (Jamaica), s.17(3); *Right to Information Act 2005* (India), s.7(6).

¹²⁴ For example, *Freedom of Information Act 2004* (Antigua & Barbuda), s.20.

¹²⁵ Section 21, *supra.*, n. 50.

¹²⁶ Section 22.

¹²⁷ For example, *Freedom of Information Act 2002* (India), s.7(1); *Official Information Act 1982* (NZ), s.15(1); *Promotion of Access to Information Act 2000* (South Africa), s.25(1).

¹²⁸ Section 7(1) of the Indian RTI Act, 2005 and Section 9 of the Bangladeshi RTI Act, 2009.

¹²⁹ *Access to Information Act 1983* (Canada), s. 10(3); *Right to Information Act 2004*, s.7(2); *Promotion of Access to Information Act 2000* (South Africa), s.27.

¹³⁰ Section 21, *supra.*, n. 50.

¹³¹ For example, *Freedom of Information Act 1982* (Aust), s. 26(1); *Freedom of Information Act 1994* (Belize), s.21; *Freedom of Information Act 2002* (India), s.7(3); *Official Information Act 1982* (NZ), s. 19.

¹³² Section 24, *supra.*, n. 50.

¹³³ Part V.

¹³⁴ Part IV, in particular ss.55-57.

¹³⁵ *Freedom of Information Act 1994* (Belize), Part V; *Official Information Act 1982* (NZ), Part V; *Freedom of Information Act 1999* (Trinidad & Tobago), ss.38A and 39.

¹³⁶ The Antigua & Barbuda Act also requires the establishment of an Information Commissioner, but at the time of writing it is not known whether this requirement has been complied with.

¹³⁷ Sections 30-37.

¹³⁸ Parts IV and V.

¹³⁹ Section 18(1)(f).

¹⁴⁰ Section 19(8)(a).

¹⁴¹ Section 19(8)(b) and (c).

¹⁴² Sections 28, 29 and 30 *supra.*, n. 50.

¹⁴³ Section 31.

¹⁴⁴ Section 11(1) and 11(2)

¹⁴⁵ Section 20 of the Indian RTI Act, 2005, Section 27, of the Bangladeshi RTI Act, 2009 and Section 32 of the Nepali RTI Act, 2007.

¹⁴⁶ For example, *Access to Information Act 1983* (Canada), s.67.1; *Access to Information Act 2002* (Jamaica), s.34; *Promotion of Access to Information Act 2000* (South Africa), s.90; *Freedom of Information Act 2000* (UK), s.77

¹⁴⁷ Slane, B.H. (1997) "Submission by the Privacy Commissioner to the Law Commission in relation to a 'fine-tuning' review of the Official Information Act 1982", 14 April 1997, para. 4.17, <http://www.privacy.org.nz/official-information-act/> as on 21 August, 2009.

¹⁴⁸ *Ibid.*

¹⁴⁹ Section 20(1).

¹⁵⁰ Section 19(8)(b).

¹⁵¹ Section 54.

¹⁵² Section 56.

¹⁵³ For example, *Freedom of Information Act 1982* (Aust), s.92; *Right to Information Act 2005* (India), s.21; *Freedom of Information Act 1999* (Trinidad & Tobago), s.36.

¹⁵⁴ Section 33, *supra.*, n. 50.

¹⁵⁵ Section 5(3).

¹⁵⁶ Section 6.

¹⁵⁷ Section 43.

¹⁵⁸ Sections 38 and 72.

¹⁵⁹ Part V.

¹⁶⁰ Section 30 of the Bangladeshi RTI Act, 2009 and Section 25 of the Nepali RTI Act, 2007.

¹⁶¹ See *Right to Information Act 2005* (India), s.25(1); *Access to Information Act 1982* (Canada), ss.38 and 72; *Freedom of Information Act 2004* (Antigua & Barbuda), s.37; *Promotion of Access to Information Act 2000* (South Africa), Part V.

¹⁶² Sections 38 and 39.

¹⁶³ Sections 9 and 13(a).

¹⁶⁴ Section 32, *supra.*, n. 50.

¹⁶⁵ *Promotion of Access to Information Act 2000* (South Africa), s.83; *Right to Information Act 2005* (India), s.26(1).

¹⁶⁶ Section 11.

¹⁶⁷ Section 13.

¹⁶⁸ Section 13.

¹⁶⁹ Section 47.

¹⁷⁰ Section 26.

¹⁷¹ Section 13(f), *supra.*, n. 50.

¹⁷² Section 13(e), *supra.*, n. 50.

¹⁷³ *Right to Information Act 2005* (India), s.4(1); *Freedom of Information Ordinance 2002* (Pakistan), s.6.

¹⁷⁴ Section 46.

¹⁷⁵ Section 71(1)(a).

¹⁷⁶ *Australian Standard AS 4390-1996: Records Management.*

¹⁷⁷ Section 13.

¹⁷⁸ Section 4(1)(a).

¹⁷⁹ Section 6(1), *supra.*, n. 50.

¹⁸⁰ Section 6(2)(a)&(b).

¹⁸¹ AIR1993 SC171

¹⁸² As this case is not directly related to the people's right to know, the details are not being discussed here.

About our partner

Friedrich-Naumann-Stiftung für die Freiheit

The Friedrich-Naumann-Stiftung für die Freiheit is the foundation for liberal politics. It was founded in 1958 by, amongst others, Theodor Heuss, the first German Federal President after World War II. The Foundation currently works in some sixty different countries around the world – to promote ideas on liberty and strategies for freedom. Our instruments are civic education, political consultancy and political dialogue.

The Friedrich-Naumann-Stiftung für die Freiheit lends its expertise for endeavours to consolidate and strengthen freedom, democracy, market economy and the rule of law. As the only liberal organization of its kind world-wide, the Foundation facilitates to lay the groundwork for a future in freedom that bears responsibility for the coming generations.

Within South Asia, with its strong tradition of tolerance and love for freedom, with its growing middle classes which increasingly assert themselves, and with its liberalizing economies, the Foundation works with numerous partner organizations to strengthen the structures of democracy, the rule of law, and the economic preconditions for social development and a life in dignity.

Friedrich Naumann
STIFTUNG **FÜR DIE FREIHEIT**

Transparency International – Sri Lanka

Transparency International (TI) is the global civil society organization leading the fight against corruption. Through more than 100 chapters worldwide and an international secretariat in Berlin, Germany, TI raises awareness of the damaging effects of corruption and works with partners in government, business and civil society to develop and implement effective measures to tackle it.

Transparency International Sri Lanka (TISL) started operations in 2002. It functions as an autonomous chapter of TI with its own local strategies and priorities.

CHRI Programmes

CHRI's work is based on the belief that for human rights, genuine democracy and development to become a reality in people's lives, there must be high standards and functional mechanisms for accountability and participation within the Commonwealth and its member countries. Accordingly, in addition to a broad human rights advocacy programme, CHRI advocates access to information and access to justice. It does this through research, publications, workshops, information dissemination and advocacy.

Human Rights Advocacy

CHRI makes regular submissions to official Commonwealth bodies and member governments. From time to time CHRI conducts fact finding missions and since 1995, has sent missions to Nigeria, Zambia, Fiji Islands and Sierra Leone. CHRI also coordinates the Commonwealth Human Rights Network, which brings together diverse groups to build their collective power to advocate for human rights. CHRI's Media Unit also ensures that human rights issues are in the public consciousness.

Access to Information

CHRI catalyses civil society and governments to take action, acts as a hub of technical expertise in support of strong legislation, and assists partners with implementation of good practice. CHRI works collaboratively with local groups and officials, building government and civil society capacity as well as advocating with policy-makers. CHRI is active in South Asia, most recently supporting the successful campaign for a national law in India; provides legal drafting support and inputs in Africa; and in the Pacific, works with regional and national organisations to catalyse interest in access legislation.

Access to Justice

Police Reforms: In too many countries the police are seen as oppressive instruments of state rather than as protectors of citizens' rights, leading to widespread rights violations and denial of justice. CHRI promotes systemic reform so that police act as upholders of the rule of law rather than as instruments of the current regime. In India, CHRI's programme aims at mobilising public support for police reform. In East Africa and Ghana, CHRI is examining police accountability issues and political interference.

Prison Reforms: CHRI's work is focused on increasing transparency of a traditionally closed system and exposing malpractice. A major area is focused on highlighting failures of the legal system that result in terrible overcrowding and unconscionably long pre-trial detention and prison overstay, and engaging in interventions to ease this. Another area of concentration is aimed at reviving the prison oversight systems that have completely failed. We believe that attention to these areas will bring improvements to the administration of prisons as well as have a knock on effect on the administration of justice overall.

