



Note on the draft Pakistani Right of Access to Information Act, 2016¹

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Pakistan's current right to information or RTI law, giving citizens the right to access information held by public bodies, the 2002 Freedom of Information Ordinance, is by any measure a very weak enactment. It earns only 66 points out of a possible total of 150 on the RTI Rating, an internationally recognised methodology for assessing the strength of the legal framework for RTI, putting it in 88th position globally out of the 111 RTI laws assessed on the RTI Rating.² In 2013, the Pakistani provinces of Khyber Pakhtunkhwa and Punjab both showed important leadership in this area by adopting strong right to information laws, scoring 137 and 109 points, respectively, on the RTI Rating and creating pressure for improvements in other jurisdictions in Pakistan.

Discussions about amending the federal law have been ongoing for some time and in July 2015 the Centre for Law and Democracy (CLD) released an analysis of an exceptionally strong federal draft Right to Information Act which had been prepared by a Senate committee.³ CLD has now been provided with another draft, called the Right of Access to Information Act, 2016 (draft Act), which our sources indicate was adopted by the

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² The RTI Rating was prepared by the Centre for Law and Democracy (CLD) and Access Info Europe and has been applied to all national RTI laws. See: www.RTI-Rating.org.

³ The analysis is available at: www.law-democracy.org/live/pakistan-aims-for-top-position-in-the-rti-rating/.

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Standing Committee of Federal Cabinet for Disposal of Legislative Business (we understand that the draft has not yet been made public).⁴

This Note provides an analysis of the draft Act based on international standards and better national practice, along with a number of recommendations for improvement. A quick assessment of the draft Act based on the RTI Rating has been prepared, and the results are provided in the table below. It received a rather average 97 points out of the possible total of 150 points, just under two-thirds of the total, putting it in 35th place globally out of the 111 countries, below any other country in South Asia (except Pakistan at its current position).

Section	Max Points	Score	Percentage
1. Right of Access	6	4	67
2. Scope	30	24	80
3. Requesting Procedures	30	21	70
4. Exceptions and Refusals	30	15	50
5. Appeals	30	19	63
6. Sanctions and Protections	8	4	50
7. Promotional Measures	16	10	63
Total score	150	97	65

Right of Access and Scope

The draft Act applies to implement the constitutional guarantee of the right to information, found in Article 19A of the Constitution, which somehow provides it with constitutional protection. It creates a clear presumption in favour of access to information, in section 3. Section 3 also calls for it to be interpreted in line with the purposes set out in the preamble. However, the version of the draft Act with which we have been provided does not include any preamble. We can only assume that this rule was copied from another law without due attention being provided to implementing it properly.

One shortcoming in terms of scope is that the draft Act applies only to citizens (see sections 2(ii) and 11(1)), unlike better practice laws which give everyone the right to make requests for information. The draft Act also fails to extend a right to make requests for information to legal entities.

⁴ A copy of the draft Act is available on CLD's website at: www.law-democracy.org/live/pakistan-federal-access-to-information-bill-just-average.

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The way information is defined in the draft Act is quite problematical. Section 2(v) defines “information” as “information based on record”, while section 2(x) defines a record as a “public record as defined in section 6”. The latter, instead of providing for a broad definition, includes a list of categories of public records, such as policies, grants of licences and final decisions. This has the very problematical effect of significantly limiting the scope of the right (since any information which did not fall into one of the listed categories would be excluded).

The definition of public bodies is found in section 2(ix) and, for the most part, it is quite broad. It does not refer specifically to the head of State, however, and it is not clear that every body which is controlled by any other public bodies is covered.

Recommendations:

- A preamble should be added to the law setting out clearly the wider benefits of the right to information, such as fostering participation, ensuring public accountability and helping to address corruption.
- The right to make requests should extend to everyone and to legal entities, instead of being limited to citizens.
- Information should be defined broadly to include any recorded information held by a public body.
- The law should cover the head of State and all bodies which are controlled by any other public body.

Requesting Procedures

The requesting procedures could be improved in certain respects and a few better practice procedures are missing entirely. Section 10(2) calls for assistance to be provided to those who need it due to a disability, while section 13(2)(b)(i) allows requests that do not meet the standards of the law to be rejected, but only after assistance has been offered. The latter formulation is broad, but it is not the same as a positive obligation to provide assistance, with the former provision is limited to those who need assistance due to a disability.

According to section 12, where a public body does not hold requested information, it shall inform the requester within ten working days. This is far too long a time limit for such a situation and better practice is to require the public body to transfer the request to another body which does hold the information, where it is aware of such a body.

Section 15 provides that a prescribed fee may be charged for reproducing and sending information to the requester, but the draft Act does not make it clear that no charge may

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be levied simply for making a request. The draft Act provides for the Commission to adopt a schedule of fees, but it does not stipulate that a certain number of pages of photocopying should be provided for free.

The following issues are simply not mentioned in the draft Act:

- There is no reference to an obligation on public bodies to provide access in the format preferred by the requester (such as a photocopy or an electronic version).
- There is no mention of fee waivers for poorer requesters.
- There is no mention of the right freely to reuse information provided in response to a request.

Recommendations:

- The law should place a positive obligation on public bodies to provide assistance to all requesters who need it.
- Public bodies should be required to inform requesters within a maximum of five working days where they do not hold the requested information and they should be required to transfer requests where they know of other public bodies which do hold it.
- The law should make it clear that making requests is free, that a certain number of pages of photocopies – for example 20 pages – will be provided for free and that fee waivers for poorer requesters are envisaged.
- The law should place a general obligation on public bodies to provide access to information in the format preferred by the requester, subject to limited exceptions (for example to preserve the record).
- A regime for free reuse of public information, perhaps pursuant to an open licensing system, should be provided for.

Exceptions

This is one of the categories on the RTI Rating where the draft Act does least well, scoring only 15 out of the possible 30 points, or 50 percent. Section 7 of the draft Act provides that section 6, which defines a public record, shall not apply to the records it describes, and then sets out a number of exceptions which are too broad or which lack a harm test. In stark contrast to this, section 16 sets out a very tight and uniformly harm-tested regime of exceptions (many of which overlap with those found in section 7).

The specific exceptions in section 7 which are problematical are:

- notings on the files and intermediary opinions;
- minutes of meetings;

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- records declared as classified by the government;
- records declared to be confidential in the public interest;
- records relating to defence (not harm tested);
- records relating to privacy (also not harm tested); and
- records provided on a confidential basis by third parties (which, in combination with section 17(2), creates a third party veto).

There are a number of other shortcomings with the regime of exceptions in the draft Act, as follows:

- Section 25 provides generally that the RTI law shall override other laws to the extent of any inconsistency. This is useful but it would be preferable to make it explicit that this applies to override inconsistent secrecy provisions in other laws.
- There is no public interest override, so that information would still be released where this was in the overall public interest (i.e. notwithstanding harm to a protected interest), a serious shortcoming.
- The draft Act does not make it clear that exceptions apply only while the risk of harm is current and it does not provide for an overall time limit (say of 20 years) for exceptions protecting public interests.
- Section 17 refers to the idea of contacting third parties to obtain their consent for release of information they provided to a public body on a confidential basis, and also provides that an objection by the third party in effect serves as a veto of release of the information. The latter effectively precludes extending section 17 to obtaining the views of the third party as to why information should not be released, which should then be taken into account by the public body (but should not serve as a veto).

Recommendations:

- Section 7 should be removed from the law.
- The right to information law should make it clear that its provisions override inconsistent secrecy provisions in other laws.
- A robust public interest override should be added to the law.
- The law should make it clear that exceptions apply only for as long as disclosure of the information would create a risk of harm and that exceptions protecting public interests cease to apply after a set period of time.
- Instead of giving third parties a veto over the release of information, section 17 should require public bodies to consult with them to obtain any objections to the release of the information, which should then be taken into account in the decision-making process but not serve as a veto of disclosure.

Appeals

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The draft Act provides for an independent oversight body in the form of the Pakistan Commission on Access to Information (Commission), but does not provide for internal appeals, which can be a useful way of giving the public body a chance to resolve the matter internally. The draft Act also fails to make it clear that parties have a right to appeal the decisions of the Commission to the courts.

The Commission is generally protected against official interference. However, one shortcoming is that one of the envisaged members is a retired senior civil servant (section 19(3)(b)). Better practice is to set general competency requirements for members and then to appoint independent people rather than to specify that civil servants should be members. Instead of general competency requirements, there are three independent standards (section 19(3); it is presumed that each is meant for one of the members, although formally the draft Act sets them as cumulative requirements due to the fact that it uses ‘and’ as a conjunction). It also fails to set prohibitions on individuals with strong political connections from being appointed. Finally, the budget is allocated directly by government, instead of being protected from political interference, for example by being approved by the legislature (section 22).

The Commission has important powers but it lacks the power to conduct inspections of public bodies. It is also not as clear as it should be that its decisions are binding in nature (according to section 21(2), a decision of the Commission may, if it has not been appealed against, be treated as a contempt of court but that is not quite the same as saying directly that it is binding). It is also unclear whether the Commission has the power to impose sanctions or remedial measures on public bodies *per se* (i.e. in addition to granting remedies to requesters).

Finally, the basis for an appeal is that the requester is “not satisfied by” a decision (or did not get a decision), but best practice is to allow for appeals whenever a requester feels that the rules in the law relating to requests have not been respected.

Recommendations:

- The law should provide for internal appeals and for appeals to the courts.
- To further bolster the independence of the Commission, general competency standards for members should be provided for, along with prohibitions on individuals with strong political connections from being appointed, and measures should be put in place to protect the independence of the budget.
- The law should provide the Commission with the power to inspect public bodies and to impose general remedial measures on public bodies, and it should provide explicitly that the decisions of the Commission are binding.
- Consideration should be given to amending the grounds for appeal along the lines suggested above.

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Sanctions and Protections

The draft Act provides for sanctions for obstruction of access and for protection for good faith disclosures but it fails to provide for:

- Sanctions for public bodies which systematically fail to respect the law.
- Protection for whistleblowers.

Recommendations:

- Sanctions for public bodies which are in regular breach of their right to information obligations should be provided for in the law.
- The law should set out at least a framework of rules protecting whistleblowers.

Promotional Measures

The draft Act does quite well in terms of promotional measures but the following measures are missing or could be improved:

- There is just a rudimentary system for improving records management, which could be made more fully effective if the Commission set minimum standards in this area, as it is empowered to do.
- There is no obligation on public bodies to create lists of the documents, or even the categories of documents, they hold.
- The Commission is given the power to assist with training but public bodies are not under an obligation to provide training to their staff.
- Public bodies are not required to publish annual reports on what they have done to implement the law, including by reporting on requests received and how they were dealt with.

Recommendations:

- Consideration should be given to incorporating a more developed system for records management into the law.
- Public bodies should be required to publish lists of the documents, or at least the categories of documents, they hold.
- Public bodies should be required to ensure that their staff, and in particular the designated officials that they appoint pursuant to section 9, receive adequate training on the right to information.

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- All public bodies should be required to report annually on what they have done to implement the law.