



CENTRE FOR LAW
AND DEMOCRACY

Pakistan

Note on the NGO Draft Right to Information Act, 2010

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Introduction

This Note contains comments by the Centre for Law and Democracy (CLD) on a Draft Right to Information Act (draft Law) prepared by members of the NGO community in Pakistan. It aims to provide interested stakeholders with an assessment of the extent to which the draft Law conforms, and does not conform, to international standards and better comparative practice regarding the right to information. It provides recommendations for reform as relevant, with a view to helping to ensure that the NGO community can put forward a law which gives effect, as fully as possible, to the fundamental human right to information.

This Note is based on international standards relating to the right to information, as reflected in the *RTI Legislation Rating Methodology*, prepared by CLD and Access Info Europe.¹ It also reflects better practice in the laws of other democracies.²

A very general point is that the draft Law sets rules for both the federal and provincial governments. This is no longer possible, after the adoption of the 18th amendment to the Pakistani constitution, which has put in place a much stricter regime for the division of power between the federal and provincial governments, which a major shift in power towards the provinces. It would thus make sense to redraft the law as a purely federal law, or as a law which could be adapted to either level of government, but not to present it as a unified law for the whole country.

It may also be noted that in several places the draft Law refers to other provisions that either do not exist or which appear to be inappropriate. To give just one example, section 8(1) refers to rejecting requests for the reasons set out in section 4, but that section is about the duty of the government to ensure effective implementation of the Act.

Right of Access and Scope

Section 1(3) of the draft Law provides that it shall come into force at once, except for the provisions relating to the commissions, which shall come into force upon

¹ This document, published in September 2010, reflects a comprehensive analysis of international standards adopted both by global human rights mechanisms, such as the UN Special Rapporteur on Freedom of Opinion and Expression, and by regional mechanisms in Europe, Africa and Latin America. It is available at: <http://www.law-democracy.org/wp-content/uploads/2011/09/Indicatorsfinal.pdf>.

² See, for example, Toby Mendel, *Freedom of Information: A Comparative Legal Survey, 2nd Edition* (2008, Paris, UNESCO), available in English, Spanish and other languages at: http://portal.unesco.org/ci/en/ev.php-URL_ID=26159&URL_DO=DO_TOPIC&URL_SECTION=201.html and Toby Mendel, *The Right to Information in Latin America: A Comparative Legal Survey* (2009, Quito, UNESCO), available in English and Spanish at: http://portal.unesco.org/ci/en/ev.php-URL_ID=28958&URL_DO=DO_TOPIC&URL_SECTION=201.html.

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notification of the government to establish the commissions, “within three months” of the enactment of the law. It is not clear what this means, but it seems to require the government to issue a notification to establish the commissions within three months, while the actual establishment of the commissions may take place later than that.

Information is defined pursuant to section 2(f) of the draft Law as material in any form, including ‘records’. The key concept which should be included in the definition of information is that it must be recorded (as opposed to being a record), regardless of the format. Furthermore, the right to information should include the right to access both information and records (i.e. any recorded information or specific documents or other types of records).

Section 2(g) defines the right to information as the right to access information under the law. In fact, the right to information is a constitutional right, which should not be described as a mere statutory right. Furthermore, the same section goes on to describe the right as the right to access information in various formats. While this is important, it should not be confused with the right to information, writ large.

Section 2(h)(c)(i) describes bodies which are controlled or financed by government, as well as a “non-governmental organization” which is substantially financed by government. Given that the latter is simply an example of the former, it is not clear why it has been listed separately, which may give rise to the unfortunate impression that NGOs are somehow under more onerous openness obligations than other private bodies operating with government funding.

Section 2(h)(c)(ii) defines as public authorities, bodies that provide services “which are essential to the welfare of society”. This is not consistent with international standards, which call for all bodies which provide services of a public nature to be subject to openness obligations.

Section 2(h)(c)(iii) defines as public authorities, bodies which, although private in nature, hold information which is necessary for the exercise or protection of a right. The only country which extends general openness obligations under a right to information law to private bodies is South Africa and implementation of these rules has presented a challenge there. Consideration should, as a result, be given to whether or not such a rule should be promoted in Pakistan. If such a rule is deemed important in the Pakistani context, care should be taken not to include these bodies within the definition of public authorities, but to define them separately as private bodies subject to only certain of the obligations under the law, and not subject to some of the other rules, for example regarding fines for officials or proactive obligations.

Recommendations:

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- The law should establish clear timeframes for the establishment of the information commissions.
- The law should define information as any material that is recorded, but not as a record *per se*, which could create confusion. A record should also be defined in the law, and the right of access should apply to both information and records.
- The draft law should not define the right to information as the right of access as protected under the law, or as the right to receive information in various formats, while recognising that the latter is part of the right.
- The special reference to NGOs in section 2(h)(c)(i) should be removed.
- Public authorities should be defined to include all bodies which provide services of a public nature (or which undertake public functions), not only those which provide services which are essential to the welfare of society.
- Consideration should be given to whether nor not purely private bodies should be included within the scope of the law and, if so, they should not be described as public authorities and only be subject to certain openness obligations (mainly the right to request information where it is needed for the protection or exercise of a right).

Requesting Procedures

Section 7(1) provides for the release of information in English, but not Urdu or the official language of the relevant area. Section 7(1) also provides for such fee as may be prescribed to be levied simply for lodging a request. This is highly problematical. Imposing a fee for lodging a request exerts a significant chilling effect on requesters and is not, as a result, better practice around the world. Furthermore, in the Pakistani context, the modalities by which such a fee may be paid remain somewhat limited, leading to further barriers to making requests. A much better model is that requests may be made without paying any fee, including by email, which significantly reduces the effort required to make a request.

Section 7(1)(b) provides that information officers should provide such assistance as may be required to requesters to reduce their requests to writing. In most cases where this provision is engaged, the requester will require the officer to actually write out the request. It would make more sense to state this directly in the law, and also require the information officer to provide a receipt to the requester in such cases.

Section 7(3) appears to envisage the transfer of part of a request to another public authority. This is unreasonable and would make it more difficult for requesters to follow their requests. Where the original public authority holds only part of the

information, they should provide that information to the requester and indicate to him or her where he or she may expect to find the rest of the information.

Section 8(1) refers to the need to respond to requests for information concerning life or liberty within 48 hours. This appears to be taken from the Indian Right to Information Act, 2005. It would be more practical to require these requests to be responded to within two working days, since the 48 hour period could fall entirely or largely within a non-working period.

Section 8(3) provides for the levying of a fee for providing information, while section 8(5) suggests that such fees shall be 'reasonable' and shall not be levied on those below the poverty line (section 8(5) actually refers to sections 6(1) and 7(1) and (5) but, as these do not refer to fees, with the exception of section 7(1), it is assumed that this is a mistake). Unfortunately, 'reasonable' is an extremely flexible term. It would, therefore, be preferable to stipulate directly in the law that fees may only be charged to cover the costs of duplicating and/or sending information (so that information requested and provided electronically would be free), and that the tariffs for these charges will be set centrally, to avoid a patchwork of fees across different public authorities.

Recommendations:

- Consideration should be given to requiring information to be provided in Urdu, as well as English, given that it is a national official language.
- No fee should be imposed simply for making a request.
- Where a requester cannot make a request in writing, the information officer should be required to do this for him or her and to provide him or her with a receipt.
- The law should not envisage the transfer of only part of a request for information to another public authority.
- The timeline for responding to urgent requests should be two working days, instead of 48 hours.
- The law should set out key rules for fees for accessing information, including that these may only cover the costs of duplicating and sending information, and that the main tariffs should be set centrally.

Duty to Publish

Section 3 of the draft Law sets out the proactive publication obligations of public authorities. It may be noted that, from a substantive point of view, these obligations are extremely modest. Consideration should be given to significantly extending them. At the same time, and in recognition of the capacity challenges posed by proactive publication obligations, it might be useful to consider a system whereby

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the amount of information that must be proactively published could be set as a modest level but then increased year-by-year. There are various models for this which might be reviewed to assess which would make most sense in the context of Pakistan.

Section 3 also refers to the idea of computerisation of records and the need to connect records through a national system over time. This is presumably drawn from the Indian Right to Information Act, 2005. It is not clear what the purpose of this provision is, or how it contributes to the right to information over and above general systems for proactive disclosure of information.

Recommendation:

- Consideration should be given to significantly extending the very modest proactive publication requirements in the draft Law, including by putting in place a system whereby these obligations can be increased over time as capacity to do this improves.
- Consideration should also be given to removing the provisions on computerisation of records and interconnection between these records, which would appear to refer to internal governmental systems rather than the right to information.

Exceptions and Refusals

The regime of exceptions to the right of access is set out in Section 5 of the draft Law. In some cases, the exceptions are not recognised internationally as protecting legitimate interests. Thus, section 5(a) refers to a wide range of grounds, including the sovereignty and integrity of the country, the “security, strategic, scientific or economic interests of the State” and the need to prevent incitement to an offence. Not only does this mix up several very different concepts, but ideas such as sovereignty and integrity, and the strategic and economic interests of the State are unduly broad and could be abused. Instead, reference to comparatively narrow concepts such as national security and the ability of the government to manage the economy should be used. Similarly, section 5(c) allows the withholding of information the disclosure of which would breach the privileges of parliament. It is not clear how this might happen and, in any case, this is not an exception which is recognised under international law.

Some of the exceptions lack a harm test. Thus, section 5(c), which protects parliamentary privileges, does not include a harm test and nor does section 5(f), which would cover all information received in confidence from a foreign government (as opposed to information the disclosure of which would harm relations with another government).

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The draft Law is repetitive in relation to the public interest, which is found both generally at section 5(2) and also in various individual exceptions (such as 5(1)(d), (e) and (i)). This is unnecessary.

Section 5(3) sets out an overall time limit of 20 years but then provides that this does not apply to sections 5(1)(a)-(c). This is problematical because these are, for the most part, the very exceptions for which the overall time limit is most important (such as national security, relations with other States and State economic information). It would be preferable to apply the overall time limit to these exceptions, but then to provide for some sort of overriding process, whereby the government could extend the time limit in exceptional cases and where the grounds for secrecy persist beyond 20 years.

Recommendations:

- The exceptions should be reviewed and amended so that they only protect interests that are recognised as grounds to limit the right to information under international law, and so that they all include a harm test.
- The public interest override should be consolidated into one provision, along the lines of the one currently found at section 5(2).
- The overall time limit of 20 years should apply to all exceptions, with a special procedure for extending it where this is absolutely necessary.

Appeals

Section 2(a)(iii) provides that any third party may be a complainant, whereas this should be limited to third parties with a direct interest in an access to information request. Section 2(a)(iv) further provides that any “voluntary public interest group” may be considered as a complainant. There may be certain circumstances where such a group may legitimately lodge a complaint, for example in the context of a failure of a public authority to meet its proactive publication obligations. But it would be strange to allow any public interest group to make a complaint in the context of a request.

Section 2(e) sets out various grounds for a complaint (see also section 15(1)). It omits to include the ground that access to the information has not been provided in the form sought by the requester (such as a physical copy, an electronic copy or the right to inspect the document). Section 15(1)(f) does allow Information Commissions to enquire into complaints regarding “any other matter” relating to requesting or obtaining records, which would presumably cover form of access. It would, however, be preferable to specifically refer to form of access so as to remove any possible doubt as to its inclusion.

Generally speaking, the provisions on the independence of the Information Commissions are strong. However, sections 10(6) and 13(6) provide for the staff of the Commissions to be provided by the government. This is problematical both because it means that the staff will be largely if not exclusively drawn from the ranks of civil servants and because it opens up the potential for government interference.

Section 11(3) also grants the President (or Governor under section 14(3)) broad and discretionary powers to remove commissioners. These should be considerably narrowed to cover only cases where a commissioner is clearly incompetent or has behaved in a manner which is strongly incompatible with the role of being a commissioner. It would be preferable to allow such removals only after a finding to that effect by the Supreme Court, as is already the case under sections 11(1) and 14(1).

Recommendations:

- The definition of a complainant should be revised so that only parties who can claim to be directly affected by a failure to apply the law, including third parties and public interest groups, may bring a complaint.
- The law should make it explicit that requesters may lodge complaints where a public authority has refused to provide access to the information in the form sought.
- Instead of having the staff appointed by the government, the Information Commissions should be allowed to appoint their own staff.
- Stronger protection should be provided for the tenure of commissioners.

Sanctions and Protections

Section 18 provides for offences. Anyone who destroys a record which was the subject of a request or complaint with the intention of preventing its disclosure may be sentenced to imprisonment for up to two years, while anyone who, without reasonable excuse, fails to disclose a record may be fined up to Rs 25,000.

The first type of offence should be broadened to include all cases of wilful obstruction of the right to information, even if they do not include destruction of records or occur in the context of a request or complaint. On the other hand, consideration should be given to limiting the second type of offence to cases where the officer has acted persistently or somehow in bad faith. Otherwise, a mere mistake could attract this sort of reasonably significant fine.

At the same time, the law should provide protection to officials, including commissioners and their staff, where they disclose information in good faith either pursuant to the law or in the belief that it will expose wrongdoing.

Recommendations:

- Criminal sanctions should be available whenever an official obstructs the right of access contrary to the rules and with intent to deny access to information.
- Administrative sanctions or fines should be imposed only where officials act persistently or in bad faith to deny access to information.
- Rules to protect officials who disclose information in good faith should be added to the law.

Promotional Measures

The law includes only very basic promotional measures, such as a requirement to appoint information officers. Other promotional measures which should be considered include:

- Systems to promote proper record management, to facilitate both the right of access and the ability of the government more generally to operate efficiently.
- Reporting systems, so that all public bodies report annually on what they are doing to implement the law and these reports are consolidated into a central report which is laid before parliament.
- Provisions requiring all public authorities to provide appropriate training to their staff.
- The allocation of responsibility to a central body, either the commissions or a government department, to undertake broad public awareness-raising efforts.
- An obligation on all public bodies to create and publish lists of all of the documents that they hold.

Recommendation:

- A range of promotional measures, including those outlined above, should be added to the law.