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Pakistan: Note on the draft Right to Information Law

July 2010

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Pakistan adopted a Freedom of Information Ordinance in 2002 which has remained in effect since then. In April 2010, the Constitution of Pakistan was amended to provide for a right to information. The Ordinance lacks legitimacy not only because of its pedigree (i.e. not having been adopted by a democratically elected legislature) but also because it falls well short of international and now constitutional guarantees of the right to information.

There have, as a result, been various attempts to introduce new legislation on the right to information in Pakistan. A Freedom of Information Bill was promulgated around June 2008. More recently, in July 2010, a draft Right to Information Law (draft Law) was moved in the National Assembly of Pakistan by Sherry Rehman.

Overall, the draft Law represents an important improvement over the existing Ordinance and, if passed, would go a long way to bring Pakistan into line with international and constitutional standards in this area. At the same time, there are still areas where the draft could still be improved. This Note provides a brief overview of these areas for improvement.

General

The draft Law contains a few areas of repetition and overlap, as well as a few where issues are dealt with throughout the law, rather than in one place, creating the potential for confusion. Some of this is due to including certain definitions in section 2 which really deal with substantive issues. Thus, section 2(b) describes the various grounds for making a complaint, but these are repeated in section 19, on complaints.

More importantly, the regime of exceptions is spread confusingly among the definitions (section 2(f)), section 8 and sections 15-18. There is a degree of repetition in these provisions. For example, national security is protected in section 2(f)(vi)(vi) and again in section 8(b), privacy is protected in section 8(c) and section 17, and law enforcement is protected in section 2(f)(vi)(ii) and section 16. These double definitions, which are phrased differently, clearly create potential for confusion.

Further potential for confusion is introduced regarding the application of exceptions. Section 2(b)(vi) refers to complaints based on a failure to provide information not falling within the ambit of sections 2(f) and 8 (but not sections 15-18), section 7 refers to all records being public except those covered by section 8 (but not sections 2(f) or 15-18), section 13 refers to the exceptions “elsewhere in this Act as Section 2(f) or Section 8”, and section 14 refers simply to the lack of an obligation to provide exempt information.

Scope

The draft Law includes a clear statement of the right of access, in section 3, along with strong rules on interpretation. Apart from rather general statements in the Preamble about good governance and accountability, however, it lacks any detailed references to the underlying goals the law seeks to achieve.

The scope of information covered by the law is defined in section 2(f). The definition starts out very broadly, as any record held by a public authority, regardless of form. It would be preferable for the definition to refer to ‘information’, as opposed to records, since this could be read as suggesting that the right of access only extends to specific documents, as opposed to the information contained in them.

Sub-sections 2(i)-(v) provide a list of types of documents that are covered (such as property transactions, the grant of licences and concessions, and appointments and promotions). Generally, such lists are not helpful as they tend to be used to narrow rather than broaden the scope of the definition (on the basis that items not listed are not intended to be covered).

Even more serious is sub-section 2(f)(vi), which starts by referring to information “in which members of the public may have a legitimate interest”. This is not appropriate. The right of access should apply to all information held by public

bodies. Sub-section 2(f)(vi) goes on to list a number of exceptions to the right of access. This type of rule has no place as part of the definition of information. In any case, as noted above, the exceptions should all be brought together in one place for clarity and to avoid repetition. There are some serious problems with the specific nature of these exceptions, which are dealt with below, under Exceptions.

The definition of public authorities covered in section 2(g) is broad, covering the executive, legislative and judicial branches of government, as well as bodies owned, funded or controlled by government, or fulfilling a public function.

Pursuant to section 12, citizens or residents may make requests for information. Better practice laws apply to everyone.

Duty to Publish

The main provision on the duty to publish is section 5, which lists some seven categories of information subject to proactive publication. The list of categories is respectable, but more could be done to extend it, in particular in relation to financial and budget information, as well as information on the recipients of concessions and other public benefits (section 4(1)(b) of the Indian Right to Information Act 2005 provides a good example of a more extensive rule on proactive publication).

Section 5(1) includes an odd provision, which states that no information already published on a public authority's official website shall be covered by the section 5 rules, which require information to be made available for inspection and copying, as well as on the website. This would appear to give public authorities the opportunity to avoid these wider obligations simply by getting information up quickly on their websites.

Another shortcoming with the regime for proactive publication is that it has proven impractical in other countries to expect public authorities to make all of this information available within a few months or even years. This leads to a situation where public authorities are, almost from the very outset, operating in breach of the law. A system for levering up the amount of information to be provided over time can help address this problem.

Procedures

Requests must be placed with the 'designated official' (i.e. dedicated information officer), and must be accompanied by the requisite fee and 'necessary particulars', in accordance with a form that may be prescribed by the government (see section 10 and 12). It would be preferable to set out in the main legislation the information that requesters must provide, which should be as limited as possible. The draft Law provides that neither any reasons provided by a citizen nor an official's belief as to the reasons, may be taken into account. It would be preferable, however, to add that reasons may not be asked of a requester.

Where a request relates to information which is either held by another public authority or relates more closely to the work of another authority, the request shall be transferred to that authority, within fourteen days (section 12(4)). It would be preferable for transfers to be allowed only where the original authority does not hold the information (while leaving it free to consult with other authorities should it deem this necessary). Also, fourteen days is far too long to effect such a transfer (this normally has implications in terms of the overall timeline for responding). Fourteen days is also stipulated for responding to requests (section 13(1)), which is an appropriate time limit.

The part of Section 13 dealing with refusals of requests is confusing, prescribing various different scenarios in different places, namely under 13(2)(b), 13(2)(c), and 13(3). It is also not clear what a refusal notice must contain.

The draft Law does not provide for requesters to stipulate the form in which they would like to receive the information (such as inspection of the documents, an electronic copy, a photocopy). The draft Law simply provides that requesters may be required to pay a fee and that rules on fees may be set by regulation (sections 12(1) and 27(2)(a)), although section 3(ii)(ii) does provide very generally for access to be provided at the lowest reasonable cost. It would be preferable for the primary legislation to set out at least guiding rules on fees, such as that no fee may be levied simply for making a request, that the fee may not exceed the actual costs of duplicating and sending the information, if any, and that waivers will be put in place, for example for poorer requesters or public interest requests.

Exceptions

As noted above, the exceptions are spread out mainly in three parts of the draft Law, section 2(f)(vi), section 8 and sections 15-18. From a systemic perspective, many of the exceptions do not include a harm test, instead placing whole categories of information off-bounds. There are three public interest overrides. One, in section 2(f)(vi)(v), renders secret any information the disclosure of which would be “detrimental to public interest”, which section 2(f)(vi)(vii) defines as public safety and public security only. The second, in section 2(f)(vi)(viii) purports to relate to section 2(f)(vi)(vii), and provides that the exceptions therein do not apply if disclosure of the information is in the overall public interest (this does not actually make sense, since that section does not contain any exception). The third, in section 8(2), provides that the exceptions in section 8(1) do not apply where disclosure of the information is in the overall public interest. There does not appear to be any public interest override for sections 15-18.

The negative override in section 2(f)(vi)(v) is unfortunate and runs against international standards and better practice, even though it is relatively constrained. It may be noted that section 8(f)(vi) already provides protection for public safety, so this override is not necessary. Otherwise, it would be preferable for one public interest override to apply to all of the exceptions.

In terms of the specific exceptions, problematical provisions include the following:

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- Section 2(f)(vi)(i): protects “all internal working documents”. This does not provide for a harm test or even any identifiable interest to be protected (such as the free and frank provision of advice or the success of a policy). Furthermore, it is time limited until after a decision has been taken and implemented, but in other laws which include this sort of exception, the information becomes public as soon as the decision is taken.
- Section 2(f)(vi)(ii): protects all investigative reports for the prevention and detection of crime, or the collection of taxes, as well as any information received during an investigation. This does not include a harm test.
- Section 2(f)(vi)(iii): protects all scientific research which could expose a public authority to ‘disadvantage’. While this is a harm test, it is exceptionally broad.
- Section 2(f)(vi)(vi): protects information relating to national security. This does not include a harm test.
- Section 8(a): protects all banking accounts of customers. This is mostly legitimate, but could be abused and is already covered by the privacy exception(s), so is unnecessary.
- Section 8(b): protects national security. This is subject to a harm test but the test is not clear. It applies if the threat to security can be demonstrated. A better approach would be to apply the exception only where an actual threat of harm to security is demonstrated.
- Section 8(c): protects privacy. This exception lacks a harm test. While harm is to some extent implicit in the idea of privacy, it would still be useful to add a qualifier such as “disclosure would represent an unwarranted invasion of privacy”.
- Section 16(c): protects the identity of persons named in law enforcement records. This exception lacks a harm test and would cover a lot of people who may be named without creating harm (unlike the exception in section 2(f)(vi)(ii)(c), which only applies to confidential sources).

The draft Law also fails to protect certain interests that do need protection, including:

- legally privileged information or solicitor-client privilege; and
- sensitive commercial information of private third parties.

Oversight

The draft Law provides for an internal appeal to the head of a public authority and from there to the Mohtasib (ombudsman) or, in some cases, the Federal Tax Ombudsman (section 19). The grounds for an internal appeal listed in section 19 include a failure to provide the information in time or a refusal to disclose information. To these should be added a failure to provide proper notice upon refusing access, charging excessive fees and failing to provide information in the form requested.

A complaint to the Mohtasib is allowed when the head of the public authority fails to provide the requested information, within the “prescribed time”. This establishes an even narrower set of reasons for appeal. Furthermore, the law fails to specify any prescribed

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time limit for internal appeals. The power to issue rules for internal appeals is not stated explicitly in the section on regulations (section 27), although it would fall within the residual rule-making power. In any case, it is better to stipulate this in the primary legislation.

An appeal to an ombuds-type office, like the Mohtasib, is useful, but experience in other countries shows that an appeal to a body with binding decision-making power is far more effective. In this case, the law should specify exactly how decisions of the oversight body will be rendered legally binding.

Finally, the Mohtasib may impose a fine on those lodging malicious, frivolous or vexatious complaints. While it is not necessarily inappropriate to allow such complaints to be rejected on a summary basis, to avoid wasting resources, the power to fine may exert a chilling effect on those seeking to lodge legitimate complaints. This is not a power that has been found to be necessary in other countries.

Sanctions and Protections

The law makes it an offence to destroy a record which is the subject of a request or complaint with the intention of denying access, to obstruct access to a record, to interfere with the work of the monitoring body, to falsify information or, without reasonable excuse, to fail to provide access to a record (section 21). All but the last of these may attract a prison sentence of up to two years, although only the first one specifically includes a *mala fides* intention.

The draft Law includes strong positive protections, both for good faith disclosures under the law, and for whistleblowing.

Promotional Measures

The draft Law includes few promotional measures. Public authorities are required to appoint information officers (section 10). The draft Law also proposes a system for record management, in section 4, whereby the head of every public authority is required to maintain records properly and an “appropriate body” is tasked with setting guidelines in this area. It would be preferable if the “appropriate body” were identified in the law and if the standards it sets were to be formally binding, as opposed to just being guidelines.

The draft Law fails to identify a central body which is tasked with overall promotion of the right to information or with ensuring that efforts are undertaken to ensure that the public is aware of its rights under the law. There is also no requirement on public authorities to provide appropriate training for their staff. Finally, neither public authorities nor any central body is tasked with reporting on activities undertaken to implement the law, including in relation to the processing of requests.

Recommendations:

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- The draft Law should be reviewed to ensure that provisions dealing with similar topics are brought together and to remove any overlap and repetition, in particular regarding the exceptions.
- The statement of purposes of the law, currently found in the Preamble, could be strengthened, for example by referring to the need to control corruption, to promote participation and to help individuals realise their own personal goals.
- The definition of information should focus on all information held by public authorities, regardless of the form in which it is held, and avoid reference to 'records', specific types of information and limitations on the right of access.
- Everyone, not just citizens and residents, should be able to make a request for information.
- Consideration should be given to extending the list of categories of information subject to proactive publication, in particular to include more financial and beneficiary information.
- Consideration should be given to putting in place a system for levering up the amount of information to be provided on a proactive basis over time.
- The primary legislation should indicate what details requesters may be asked for when making a request, and make it quite clear that this may not include their reasons for making the request.
- Transfers of requests should be permitted only when the original public authority does not hold the information, and in that case the timeline for transfers should be shortened, for example to three or five working days.
- The rules on refusals of requests should be made much clearer (basically that a request may only be refused where the application is deficient, where the authority does not hold the information or where the information is covered by an exception) and the law should require the refusal notice to spell out clearly the reasons for the refusal, including the provision in the law relied upon, as well as the requesters right to appeal.
- Requesters should have the right to indicate the form in which they would like to receive the information.
- Basic guiding rules on fees should be added to the law.
- All of the exceptions should be brought together in one part of the law and made subject to a harm test.
- The various public interest overrides should also be brought together and should apply to all exceptions and operate only to render information public (and not confidential).
- The specific exceptions should be revised to take into account the problems noted above.
- The grounds for both internal and external appeals should be broadened to cover all sorts of potential failures by public authorities under the law.
- Clear timelines should be set out in the law for internal appeals (as they are for external appeals).
- Appeals regarding a denial of information should go to an independent body with

binding decision-making powers, and the law should state clearly how the decisions of this body will be made binding.

- The oversight body should have the power to reject vexatious requests, but not to fine those who have lodged them.
- Imprisonment should only be available as a sanction where the individual involved acted with the intention to deny access.
- A body should be identified in the law to set standards regarding record management, and the standards it sets should be mandatory in nature.
- Other promotional measures – including central monitoring and promotion of implementation, undertaking public educational efforts, providing training for officials and reporting on steps taken to implement the law – should be added to the law.