



## **Note on the Pakistan Right of Access to Information Bill, 2017<sup>1</sup>**

**October 2017**

**Centre for Law and Democracy  
info@law-democracy.org  
+1 902 431-3688  
www.law-democracy.org**

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 67 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 91<sup>st</sup> position globally out of the 111 RTI laws currently assessed on the RTI Rating.<sup>2</sup> In 2013, the Pakistani province of Khyber Pakhtunkhwa showed important leadership in this area by adopting a very strong right to information law, scoring 137 points 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.<sup>3</sup> In October 2016, CLD was provided with another draft, called the Right of Access to Information Act, 2016, which our sources indicated was adopted by the

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<sup>2</sup> The RTI Rating was prepared by the Centre for Law and Democracy (CLD) and Access Info Europe and is applied to all national RTI laws. See: [www.RTI-Rating.org](http://www.RTI-Rating.org).

<sup>3</sup> The analysis is available at: [www.law-democracy.org/live/pakistan-aims-for-top-position-in-the-rti-rating/](http://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 was not made public).<sup>4</sup> That draft represented a modest improvement over the current law, earning 97 points on the RTI Rating.

We have now been provided with another draft, the Pakistan Right of Access to Information Bill, 2017 (Bill), passed by the National Assembly in early October 2017. This would appear to be identical to the draft passed by the Senate in May 2017. This Note provides an analysis of the Bill based on international standards and better national practice, along with a number of recommendations for improvement. A quick assessment of the Bill based on the RTI Rating has been prepared, and the results are provided in the table below. It received a score of 105 points out of the possible total of 150 points, just over two-thirds of the total, putting it in 26<sup>th</sup> place globally out of the 111 countries.

Section	Max Points	Score	Percentage
1. Right of Access	6	6	100
2. Scope	30	25	83
3. Requesting Procedures	30	21	70
4. Exceptions and Refusals	30	17	57
5. Appeals	30	21	70
6. Sanctions and Protections	8	4	50
7. Promotional Measures	16	11	69
<b>Total score</b>	<b>150</b>	<b>105</b>	<b>70</b>

## Right of Access and Scope

The Bill implements the constitutional guarantee of the right to information, found in Article 19A of the Constitution, which gives it quasi-constitutional status. It creates a clear presumption in favour of access to information, in section 3(1), while section 3(2) calls for it to be interpreted in line with the purposes set out in the preamble.

An important shortcoming of the Bill in terms of scope is that applies only to citizens (see sections 2(ii), 3(1) and 11(1)), unlike better practice laws which give everyone the right to make requests for information. The Bill also fails to extend a right to make requests for information to legal entities.

The way information is defined in the Bill is very problematical. Section 2(v) defines “information” as “information based on record”, while section 2(x) defines a record as a

<sup>4</sup> A copy of that draft Act is available on CLD’s website at: [www.law-democracy.org/live/pakistan-federal-access-to-information-bill-just-average](http://www.law-democracy.org/live/pakistan-federal-access-to-information-bill-just-average).

“public record as defined in section 6”. Instead of providing for a broad definition of information, section 6 provides for a list of categories of 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 the “right of access to information”, at section 2(xii) is broader, referring to information which is “held by or under the control of” a public body, but this is not the operational definition in terms of the right of access.

### Recommendations:

- 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.

### Requesting Procedures

There are a number of ways in which the requesting procedures could be improved. The provisions on assistance could be clearer. Section 10(2) calls for assistance to be provided to those who need it due to a disability and section 13(2)(b)(i) only allows requests that do not meet the standards of the law to be rejected after assistance has been offered. The latter formulation is broad, but it is not quite the same as a positive obligation to provide assistance, while the former 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 this sort of situation. Furthermore, better practice is to require the public body to transfer the request to another body which does hold the information, when 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. This would seem to preclude a fee being levied simply for making a request, but it would be preferable for the Bill to make this clear. The Bill provides for the Commission to adopt a schedule of fees, but it fails to provide for a certain number of pages of photocopying, for example 10 or 20 pages, to be provided for free.

The following issues are simply not mentioned in the Bill:

- 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).

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- 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 clearer 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 lodging a request is free, that a certain number of pages of photocopies – for example 10 or 20 pages – will be provided for free and that fees will be waived for poorer requesters.
- 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 Bill does least well, scoring only 17 out of the possible 30 points, or 57%. Section 7 provides that the definition of a public record in section 6 shall not apply to a number of records, thereby creating a regime of exceptions, many of which are too broad or lack a harm test. In stark contrast to this, section 16 sets out a very tight and largely 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, minutes of meetings and intermediary opinions, until a final decision is reached;
- records declared to be classified by the Minister-in-charge;
- records of banking companies and financial institutions relating to the accounts of their customers (which are not required to be private in nature);
- records relating to defence (which is not harm tested); and
- records provided on a confidential basis.

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The exception in favour of law enforcement at section 16(1)(j) is also not harm tested but, otherwise, all of the exceptions in section 16 are recognised as legitimate under international law and all are harm tested.

There are a number of other shortcomings with the regime of exceptions in the Bill, 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, providing for the release of information otherwise covered by an exception where this would be in the overall public interest (i.e. notwithstanding harm to a protected interest), a serious shortcoming. The only reference to the public interest is in section 7(f), which requires the Minister, when declaring information to be classified, to record reasons as to why the harm from disclosure would override the public interest.
- There is no provision for consultation with third parties to obtain their consent for release of information they provided to a public body on a confidential basis, or to allow them to object to the release of information.

### **Recommendations:**

- Section 7 should be removed from the law and the regime of exceptions in section 16 should apply on its own (albeit amended to incorporate a harm test for the exception in favour of law enforcement).
- 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 provide for consultation with third parties when a request relates to information provided by them on a confidential basis, and it should make it clear that while they do not have a veto over the release of information, any objections they raise will be taken into account.

### **Appeals**

The Bill provides for an independent oversight body in the form of the Pakistan Commission on Access to Information (Commission) (section 18), 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 Bill also fails to make it clear that parties have a right to appeal the decisions of the Commission to the courts, although this is implicit in the Pakistani legal system.

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The Commission is formally an autonomous body, but it is not independent in the more structural sense of the government not being able to control the appointments process for commissioners. The Prime Minister appoints all three commissioners, which comprise a person qualified to be a High Court judge, a person who has been a civil servant of rank BS-22 or equivalent and a person from civil society (section 19(3)). Better practice is to involve a wider range of actors in the appointments process and also to preclude civil servants from being appointed, as part of a wider guarantee for the independence of members. Furthermore, the budget of the Commission is allocated directly by the government, instead of being protected from political interference, for example by being approved by the legislature (section 21).

The Commission has important powers but it lacks the power to conduct inspections of public bodies (section 20(1)(d)). It is also not as clear as it should be that its decisions are binding in nature. According to section 20(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 also seems that the Commission does not have 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, the process for appointing members should be more independent, there should be prohibitions on individuals with strong political connections from being appointed, and measures should be put in place to protect the independence of the budget process.
- 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.

### Sanctions and Protections

The Bill 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 or for protection for whistleblowers.

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### Recommendations:

- Sanctions for public bodies which systemically breach 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 Bill does respectably well in terms of promotional measures but the following measures are missing or could be improved:

- It would be useful to make it clear that public bodies are required to comply with any standards governing records management which are set by the Commission. At the moment, public bodies are required to comply with instructions in this area from the government, but not necessarily the Commission (section 4(2), although the Commission does have the power to set standards (section 27(a)).
- 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 a direct obligation to provide adequate 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:

- The law should make it clear that public bodies are required to comply with any records management standards set by the Commission.
- 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.
- All public bodies should be required to report annually on what they have done to implement the law.