MEMORANDUM

on

The Indian Freedom of Information Bill, 2000

by

ARTICLE 19
The Global Campaign for Free Expression

London
December 2000

Introduction

ARTICLE 19, The Global Campaign for Free Expression, has been asked to comment on the Indian *Freedom of Information Bill, 2000*. These comments are based on the draft of the Bill as it was on 17 July 2000.

ARTICLE 19 has long advocated the adoption of laws which promote a right to freedom of information, and in particular to access information held by public authorities. However, we are also of the opinion that in this area no law is better than a bad law and, unfortunately, the bill currently circulating in India is very seriously flawed. ARTICLE 19 believes that without substantial revisions this bill will not effectively protect and promote freedom of information and the public's right to know in India.

Although the Bill is totally or largely in accordance with international standards in many areas – including definitions, obligations to publish, technical procedures for accessing information, and overriding secrecy laws – in a number of key areas the Bill is seriously flawed. Perhaps the most serious problem with the Bill is that it fails to provide for independent review of refusals to disclose information, either by an independent administrative body or by the courts. This means that decisions on whether or not to release information rest entirely within government. A blanket exclusion of key intelligence and security organisations and an excessively broad regime of exemptions significantly undermine the potential for the Bill to promote the public's right to know. The lack of a public interest override for these exclusions and exemptions further undermines the Bill.

The following analysis elaborates ARTICLE 19's major concerns with the Bill. It draws upon our key publication in this area, *The Public's Right to Know: Principles on Freedom of Information Legislation*, which sets out principles based on international and comparative best practice and which has been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression.[1]

---

[1] UN Doc. E/CN.4/2000/63, para. 43.

International and Domestic Obligations

India is a State Party to the International Covenant on Civil and Political Rights (ICCPR). Article 19 of the ICCPR, which protects freedom of expression, states:

> 1. Everyone shall have the right to freedom of opinion.
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his choice.
> 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>   (a) For respect of the rights or reputation of others;
>   (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

Freedom of information is an important component of the international guarantee of freedom of expression, which includes the right to seek and receive, as well as to impart, information and ideas. There can be little doubt as to the importance of freedom of information. During its first session in 1946, the United Nations General Assembly adopted Resolution 59(1) which stated:

> Freedom of information is a fundamental human right and… the touchstone of all the freedoms to which the UN is consecrated.

Its importance has also been stressed in a number of reports by the UN Special Rapporteur on Freedom of Opinion and Expression, as the following excerpt from his 1999 Report illustrates:

> [T]he Special Rapporteur expresses again his view, and emphasizes, that everyone has the right to seek, receive and impart information and that this 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 - including film, microfiche, electronic capacities, video and photographs - subject only to such restrictions as referred to in article 19, paragraph 3, of the International Covenant on Civil and Political Rights.[2]

In recognition of the importance of giving legislative recognition to freedom of information, in the past five years a record number of countries from around the world – including Fiji, Israel, Japan, Nigeria, South Africa, South Korea, Thailand, Trinidad and Tobago, the United Kingdom, a number of East and Central European States, and of course India – have taken steps to enact legislation giving effect to this right. In doing so, they join those countries which enacted such laws some time ago, such as Sweden, the United States, Finland, the Netherlands, Australia, and Canada.

Freedom of expression is also protected in Article 19 of the Constitution of India:

> 1. All citizens shall have the right –
>   a. to freedom of speech and expression
>
>   …

[2] UN Doc. E/CN.4/1999/64, para. 12.

2. Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

In 1982, the Supreme Court of India ruled that access to government information was an essential part of the fundamental right to freedom of speech and expression. The Court stated:

> The concept of an open Government is the direct emanation from the right to know which seems implicit in the right of free speech and expression guaranteed under Article 19(1)(a). Therefore, disclosures of information in regard to the functioning of Government must be the rule, and secrecy an exception justified only where the strictest requirement of public interest so demands. The approach of the Court must be to attenuate the area of secrecy as much as possible consistently with the requirement of public interest, bearing in mind all the time that disclosure also serves an important aspect of public interest.[3]

A proper freedom of information regime is a vital aspect of open government and a fundamental underpinning of democracy. It is only where there is a free flow of information that accountability can be ensured, corruption avoided and the public's right to know satisfied. Freedom of information is also a crucial prerequisite for sustainable development. Resource management, social initiatives and economic strategies can only be effective if the public is informed and has confidence in government.

As an aspect of the international guarantee of freedom of expression, freedom of information is commonly understood as comprising a number of different elements. One such element, a key one in the present context, refers to the right of individuals to access information and records held by public authorities, both through routine government publication of information and through provision for direct access requests.

To comport fully with the right to freedom of information, the State must establish cheap and efficient procedures for the public to access official information, ensure that record-keeping procedures make this possible, and establish a practical regime regarding access that facilitates the maximum disclosure of information.

Analysis of the Draft Law

Processes to Facilitate Access

As noted above, the primary problem with the Freedom of Information Bill is that it does not provide for an independent review of refusals to disclose information by public authorities, although there is provision for internal review. This means that in most cases the decision whether or not to release information rests entirely within

---

[3] *S.P. Gupta* v. *President of India* [1982] AIR (SC) 149, p. 234.

government. It is obvious that this fundamentally undermines the whole system of access and renders the many other positive features of the Bill largely ineffective.

The System for Access in the Bill

Article 4 of the Bill requires public authorities to maintain records while Articles 5 and 6 require them to appoint Public Information Officers and assist persons wishing to access information, including reducing oral requests into written form. Pursuant to Article 7, either the information or reasons for refusing access must be provided to an applicant within 30 days of a request. It is unclear whether these reasons must be in writing or may be given orally.

Article 12 provides for appeals from an original refusal to grant access. Article 12(1) provides for a first appeal to "such authority as may be prescribed", presumably an internal appeal to a designated higher official within the same public authority. Article 12(2) provides for a second appeal to the Central Government or the State Government or – for original requests to legislative bodies, the Courts or authorities created under the Constitution – the competent authority. It is unclear where such appeals should be lodged within the Central or State Government but in any case, the effect of this provision is that in the vast majority of cases the second appeal remains internal to government.

The Bill does not set up an independent administrative body to review refusals to disclose information, as is the practice in many countries. In addition, Article 15 prevents the courts from entertaining any suit in respect of an order made under the freedom of information law and precludes such orders being challenged, except by way of an appeal under the law. In other words, there is no independent oversight of refusals to disclose information.

International and Comparative Standards Regarding Appeals

It is fairly obvious that no system for ensuring freedom of information can really be effective if decisions made by government departments and bodies are not subject to independent review, and international law and practice reflect this. In most countries, the law provides for an internal appeal to a designated individual or office within the public body to whom the original request was made. This is often an expeditious and effective way of dealing with refusals and is already reflected in the Indian Bill.

The practice in most democratic countries is also to establish an independent administrative body with the power to entertain appeals from a refusal to disclose information. The reasons for this include the fact that an appeal to an independent administrative body is normally less complicated, less time consuming, and less costly than an appeal to a court. This makes it easier for individuals – especially the less-educated and the poor – to challenge refusals to disclose. In addition, an administrative body can provide independent and expert overview of the functioning of the freedom of information law, as well as performing other useful functions such public education and the production of an annual report for submission to Parliament.

This body could be one specifically set up for the purpose, or an existing body such as an Ombudsman or a Human Rights Commission. In either case, the independence of the body should be guaranteed, both formally and through the process by which its governing board and senior staff are appointed. In order to ensure independence, such appointments should be made by representative bodies, such as an all-party parliamentary committee, and the process should be open and allow for public input and nominations. Individuals appointed to such a body should be required to meet strict standards of professionalism, independence and competence, and be subject to strict conflict of interest rules.

The administrative body should have full powers to investigate any appeal, including the ability to compel witnesses and require the public body to provide it with any information or record for its consideration, *in camera*, if necessary. It should also have the power to dismiss the appeal, to require the public body to disclose the information, to adjust the charges levied by the public body, to fine the public body for obstructive behaviour, and/or to impose costs on public bodies in relation to appeals.

There should also be the possibility of an appeal to the courts. The courts have the authority to impose standards on the governing authorities, and they are in a good position to ensure that due attention is given to resolving difficult questions and that a consistent approach to freedom of information issues is promoted.

To facilitate the appeals noted above, public authorities should be required to give reasons in writing for any refusal to disclose information.

Recommendations

- the Bill should be amended to provide for the establishment of an independent administrative body to review refusals by public authorities to disclose information, in accordance with the standards noted above
- Article 15, precluding appeals to the courts, should be deleted and replaced by a provision that makes it clear that the courts have full powers to review decisions under the law on their merits
- it should be clear in Article 7 that any refusal to disclose information should be accompanied by written reasons

Exclusions and Exemptions

Exclusions in the Bill

Article 16 provides for a blanket exclusion of all intelligence and security organisations listed in the Schedule, which the Central Government may amend by notification.

The exemptions in Articles 8(1)(a)-(c), (f), and (g) are all subject to explicit or self-evident "harm" requirements, but those found in Articles 8(d) and (e) are not. As a result, Article 8(d) establishes a class exemption for "Cabinet papers", broadly defined, and Article 8(e) does the same in relation to "minutes or records of advice … made by an officer of a public authority during the decision making process prior to the executive decision or policy formulation". None of the exemptions in Article 8 are subject to a public interest test.

Article 9(d) exempts from disclosure all information which would cause an "unwarranted invasion of the privacy of any person." It is unclear what the term "unwarranted" means in this context, but subject to interpretation of this term, Article 9 establishes a class exemption, not subject to a clear harm test or public interest override.

International Standards

Under international law freedom of information, like freedom of expression, may be subject to restrictions but only where these restrictions meet strict tests of legitimacy. International and comparative standards have established that a public authority may not refuse to disclose information unless it can show that:

(1) the information relates to a legitimate aim listed in the law;
(2) disclosure threatens substantial harm to that aim; and
(3) the harm to the aim is greater than the public interest in having the information.

The second part of this test means that it is not sufficient that information simply falls within the scope of a legitimate aim listed in the law. To exempt information on that basis would be a class exemption and would seriously undermine the free flow of information to the public. It would also be unjustified, since public authorities clearly have no reason to withhold information that would not actually harm a legitimate interest. In calculating whether harm is caused, the fact that in some cases disclosure may both benefit and harm the aim should be taken into account. For example, in relation to national security, disclosure of certain information may both undermine defence and expose corrupt buying practices. The latter, however, may lead to rooting out of corruption and the long term strengthening of the forces. To justify non-disclosure, the net effect of releasing the information must be to cause substantial harm to the aim.

The third part of the test means that information should be disclosed even if it would cause substantial harm to a legitimate aim if the public interest benefits of disclosure outweigh this harm. This part of the test requires the harm to the legitimate aim to be weighed against the greater public interest in the information being disclosed. The reason for this is fairly obvious; the legitimate aim in question is just one consideration and, before a refusal to disclose can be justified, other public interests must be taken into account.

Cumulatively, the three parts of the test are designed to ensure that information is only withheld when this is in the overall public interest. If applied properly, this test

would rule out all blanket exclusions and class exemptions, as well as any exemptions whose real aim is to protect the government from embarrassment, to prevent the exposure of wrongdoing, to conceal information from the public, or to entrench a particular ideology.

Analysis

The blanket exclusion of key intelligence and security bodies simply does not meet the international and comparative standards outlined above. Restrictions on rights, where permissible at all, must be justified on a case-by-case basis. Public authorities may have legitimate grounds for refusing to disclose certain information held by intelligence and security bodies, but there can be no reason to completely exclude these bodies from the application of the Bill.

Article 8 lists a number of legitimate aims for refusing to disclose information which are consistent with the practice in other countries and regions. However, inasmuch as Articles 8(d) and (e) and Article 9(d) establish class exemptions, they fail to respect the standard set out in the second part of the test for restrictions on freedom of information. It may be noted that while maintaining the effectiveness and integrity of government decision-making processes and preserving privacy are legitimate aims, incorporating a "harm" test into these articles would in no way undermine these legitimate aims. A second problem with Articles 8 and 9(d) is that they are not subject to any public interest test. Finally, if the party concerned consents to disclosure, no information should be withheld on privacy grounds under Article 9(d).

Recommendations

- Article 16 should be deleted from the Bill
- the exemptions provided for in Article 8(1)(d) and (e), and Article 9(d), should be subject to a specific harm test
- Article 8 and Article 9(d) should be subject to a public interest override
- information should not be withheld under Article 9(d) where the party concerned consents to disclosure

Definitions and Scope

Articles 2(d) and (h) already define "information" and "record" broadly, but it might perhaps be better to simply define "information" as any record held by a public authority, and "record" as including any form for storing information, it being clear that the list currently provided is not exclusive.

Article 2(f) defines "public authority" relatively broadly but does not clearly include bodies which carry out public functions. The definition of public authority should focus on the type of service provided rather than on formal designations or relationships.

Article 3 provides that "all *citizens* shall have freedom of information." [emphasis added] The term "citizens" is restrictive and would presumably deny access rights to certain individuals who were present in India, including some residents and refugees. Under international standards, every person present in the country has the right to access information.

Recommendations

- "information" should be defined in Article 2(d) as any record held by a public body
- "record" should be defined in Article 2(h) as including information stored in any form
- the definition of "public authority" in Article 2(f) should be expanded to make it clear that it includes nationalised industries and public corporations, non-departmental bodies or quangos (quasi non-governmental organisations), and private bodies which carry out public functions (such as maintaining road or operating rail lines)
- the term "citizen" in Article 3 should be replaced by "every person present in India" and subsequent references in the Bill to citizens in a similarly restrictive manner should also be amended

Costs

Article 7 subjects the provision of information to the "payment of such fees as may be prescribed" and a further payment "representing the cost of providing the information." The manner of prescription of the initial fee is set out in Articles 17-19. A two-tier system such as this, involving flat fees for each request along with graduated fees depending on the actual cost of retrieving and providing information, is common. However, given the primary rationale of promoting open access to information, it would be preferable to include in the Bill provisions limiting the cost of access so that it does not become so high as to deter potential applicants from making requests. In some jurisdictions, the graduated fee is waived or significantly reduced for requests for personal information or requests in the public interest. Higher fees may be levied for commercial requests to help subsidise personal or public interest requests.

Recommendation

- the Bill should make it clear that the cost of accessing information should not be so high as to deter potential applicants from making requests and that costs for personal and public interest requests should be kept low

Omissions

The Bill is missing some key elements that would strengthen access to information and the public's right to know.

Sanctions for Destruction of Records

Article 4(a) of the Bill requires public authorities to maintain their records in an appropriate manner. The corollary of this is that anyone who wilfully tampers with or destroys public records with a view to preventing them from being disclosed should be criminally punished.

Open Meetings

The public has a right to know what the government is doing on its behalf and to participate in the decision-making process. As such, the Bill should establish a presumption that all meetings of governing bodies are open to the public.

"Governing bodies" in this context should include bodies which exercise decision-making powers, such as local government committees, planning and zoning boards, education authorities, and elected bodies performing public services. However, bodies which only have advisory powers and political committees (meetings of members of the same political party) are not governing bodies.

Notice of meetings is necessary if the public is to have a real opportunity to participate. The law should, therefore, require that adequate notice of meetings is given sufficiently in advance to allow for attendance. Meetings may be closed, but only in accordance with established procedures and where adequate reasons for closure exist. Any decision to close a meeting should itself be open to the public. The grounds for closure are broader than the list of exceptions to the rule of disclosure of information, but are not unlimited. Reasons for closure might, in appropriate circumstances, include public health and safety, law enforcement or investigation, employee or personnel matters, privacy, commercial matters, and national security.

Protection for Whistleblowers

Article 13 of the Bill provides that no one shall be subject to legal proceedings for any act which is taken in good faith under the freedom of information law. This is an essential ingredient of a functioning freedom of information regime but could go much further, providing protection to "whistleblowers". Civil servants and other individuals in the public sector sometimes have access to information which may expose official wrongdoing, but they may be afraid to release it for fear of legal or employment-related sanctions. The law should therefore provide protection for individuals who release information on wrongdoing – "whistleblowers".

"Wrongdoing" in this context includes the commission of a criminal offence, failure to comply with a legal obligation, a miscarriage of justice, corruption or dishonesty, or serious maladministration regarding a public body. It also includes a serious threat to health, safety or the environment, whether linked to individual wrongdoing or not. Whistleblowers should benefit from protection as long as they acted in good faith and in the reasonable belief that the information was substantially true and disclosed wrongdoing. Such protection should apply even where disclosure would otherwise be in breach of a legal or employment obligation.

In some countries, protection for whistleblowers is conditional upon a requirement to release information to certain individuals or oversight bodies. Protection should also be available, where the public interest demands, in the context of disclosure to other individuals or even the media. The "public interest" in this context would include situations where the benefits of disclosure outweigh the harm, or where an alternative means of releasing the information is necessary to protect a key interest. This would apply, for example, in situations where whistleblowers need protection from retaliation, where the problem is unlikely to be resolved through formal mechanisms, where there is an exceptionally serious reason for releasing information, such as an imminent threat to public health or safety, or where there is a risk that evidence of wrongdoing will otherwise be concealed or destroyed.

Promotional and Educational Activities

The experience of countries which have already introduced freedom of information legislation shows that a change in the culture of the civil service from one of secrecy to one of transparency is a slow and difficult process, which can take many years. To assist in this process, it is important to educate civil servants and to promote the idea of freedom of information, both within government and in society-at-large. Possible activities in this regard include:

- training civil servants on the scope and importance of freedom of information, procedures for disclosing information and maintenance of records;
- providing incentives for public bodies which successfully apply the law;
- requiring the supervisory administrative body to submit an annual report to Parliament on the progress (achievements and problems) in implementing and applying the freedom of information law; and
- setting up a public education campaign on the right to access information, the scope of information available and the manner in which rights may be exercised under the new law.

Recommendations

- the Bill should provide for criminal sanctions for individuals who wilfully tamper with or destroy records with a view to preventing them from being disclosed
- the Bill should provide for open meetings, as described above
- provisions to protect not only those who have acted in good faith under the law but also individuals who take positive steps to release information in the public interest ("whistleblowers") should be added to the Bill

- the Bill should establish a system of education and promotion regarding freedom of information aimed both at civil servants and the general public