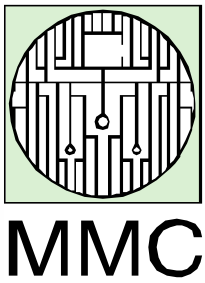

SUBMISSION

by

ARTICLE 19, SUPRO, MMC and BNNRC

on

The (Draft) Right to Information Ordinance 2008 of Bangladesh

London and Dhaka
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ARTICLE 19 · 6-8 Amwell Street · London EC1R 1UQ · United Kingdom
Tel +44 20 7278 9292 · Fax +44 20 7278 7660 · info@article19.org · http://www.article19.org

TABLE OF CONTENTS

SUMMARY OF RECOMMENDATIONS

Scope:
- Everyone should have the right to demand and receive all information held by any public body, subject only to the regime of exceptions.
- The legislative and judicial branches of government, along with other constitutionally established bodies, should be included with the scope of public bodies and consideration should be given to including private bodies which conduct public functions.

Routine Disclosure:
- The routine publication rules should be significantly expanded so that public bodies are required to make far more information public and to disseminate this information widely and in different formats so as to promote access by the whole public.

Processing of Requests:
- It should be possible to lodge requests for information electronically and orally, and information officers should be required to assist requesters who need help formulating their requests.
- The fee system should be revised to do away with the application fee and to institute a central set of fee rules, applicable to all public bodies, which provide for a certain amount of information to be provided for free, as well as fee waivers for impecunious requesters and for requests in the public interest.

Exceptions:
- Section 8(d), which covers all information relating to, among other things, income tax and interest rates, and the monitoring or administration of economic bodies, and section 8(i), which rules out disclosures against the public interest, should be removed, along with the references to 'honour' in section 8(a), and to violating the secrecy of information and influencing the decision-making process in section 8(e).
- The level of harm required to trigger the different exceptions should be standardised and require a high risk of substantial harm to the protected interest.
- The public interest override should be substantially strengthened so that it is mandatory and applies whenever the public interest in disclosure overrides the risk of harm to the protected interest.
- The exceptions should be reviewed to make sure that they protect all legitimate confidentiality interests.

Appeals:
- The process for appointing members of the Information Commission should be transparent and allow for greater involvement of the public and civil society, and the number of government appointees, particularly the Cabinet Secretary, on the appointments committee should be reduced.
- The procedure whereby the President may, on his or her own motion, remove Commissioners, set out in section 16(c), should be removed.
- The Commission, not the government, should be responsible for overseeing its staff.

Punishments and Protections:
- Consideration should be given to adding protection for whistleblowers into the law.

Promotional Measures

- The law should stipulate a wider promotional role for the Information Commission. Among other things, the Commission should be required to prepare and widely disseminate a guide for the public on how to use the law, and the Commission, or some other central body, should have the power to set binding standards in relation to the management of records.
- The law should place an obligation on public bodies to conduct appropriate training activities.

1. INTRODUCTION

This Submission provides an analysis by ARTICLE 19, Global Campaign for Freedom of Expression, Shushashoner Jonno Procharavijan (SUPRO), Mass Line Media (MMC) and Bangladesh NGOs Network for Radio and Communication (BNNRC) of Bangladesh's (Draft) Right to Information Ordinance 2008 (draft Law).[1] The focus of the Submission and the recommendations are the extent of compliance of the draft Law with international standards.

The analysis and comments in this Submission are made within the framework of international standards governing freedom of expression and information, with particular reference to Bangladesh's treaty obligations under the *International Covenant on Civil and Political Rights* (ICCPR), to which Bangladesh became a party in 2000. They are also informed by consultations held in some 20 districts and at the national level in Dhaka involving a wide range of stakeholders, including lawyers, journalists, academics, politicians and NGO activists, hosted by SUPRO and MMC.

We understand that the draft Law analysed here, which has been made available through the website of the Ministry of Information, has been approved by the Right to Information Law Drafting Committee and is currently the subject of consultations leading up to a roundtable involving different stakeholders. This Submission is intended as input to the consultation and is offered with the hope that the law finally adopted will be consistent with international standards on the right to information.

We are of the view that the draft Law has a number of very progressive features and the potential to provide a framework for a very progressive right to information in Bangladesh. Among other things, it overrides inconsistent provisions in other laws and specifically in the Official Secrets Act 1923, it provides protection against liability for civil servants implementing its provisions, and it provides for an independent and high-level Information Commission with broad powers to remedy failures to implement the law.

At the same time, we note that the draft Law could still be further improved. Our main concerns are as follows:

- The right of access is limited to citizens, instead of applying to everyone, and the openness obligations do not apply to legislative and judicial bodies.
- The proactive publication obligations are too limited, both as to the scope of information covered and as to the means by which this information is to be disseminated.
- The regime of exceptions is too broad. In particular, it contains some exceptions which are not legitimate, it lacks a consistent standard of the harm from disclosure that would justify refusing a request and the rules for providing information in the public interest notwithstanding an exception are weak. At the same time, some important confidentiality interests are not protected.
- The measures to protect the independence of the Information Commission, while developed, could still be further improved, for example by removing the Cabinet

[1] The draft Law is in Bengali and we have used an English translation provided to us by Asif Nazrul and Paul La Porte. This translation can be accessed at: http://www.article19.org/pdfs/laws/bangladesh-draft-rti.pdf. ARTICLE 19 takes no responsibility for the accuracy of the translation or for comments based on mistaken or misleading translation.

Secretary from the appointments committee, by providing for greater civil society input and by further limiting the conditions under which members can be removed.
- The package of promotional measures could be further improved, for example by allocating a wider promotional role to the Information Commission, including to disseminate a guide for the public on how to use the law, and by imposing specific obligations on public bodies to conduct adequate training.

We also note some concerns about the process of preparing the draft Law and, in particular, the fact that it did not provide for sufficient representation from civil society. We also note generally that the draft would benefit from some careful review. Certain provisions are overlapping and conflicting, while others are unduly vague, a potentially serious problem in a law of this sort. We thus recommend that a more consultative and careful process be put in place for the next stage of revisions.

This Submission draws heavily on two key ARTICLE 19 publications, *The Public's Right to Know: Principles on Freedom of Information Legislation*,[2] which provides an elaboration of international standards, along with best national practice, and *A Model Freedom of Information Law*,[3] which translates the Principles into concrete legal form.

2. ANALYSIS OF THE DRAFT LAW

2.1. Scope of the draft Law

The scope of a right to information law has three key aspects: who has the right to request information; what types of information are covered; and which bodies are covered by the obligation to disclose. Section 4 (a), which is the key provision granting a right to demand and receive information from public bodies, suggests that only Bangladeshi citizens benefit from this right, although section 6, providing for requests for information, does refer to any person who desires information.

Progressive right to information laws give *everyone* the right to request information, in line with Article 19 of the ICCPR, which confers the right to freedom of expression and information on everyone. This is consistent with the overall aim of the law, which is transparent government. Non-citizens may well play a role in promoting accountable, good government, for example by exposing corruption in the procurement of arms from abroad. Furthermore, limiting the scope to citizens has the effect of depriving some long-standing residents from the right of access, for example because they are refugees or stateless. On the other hand, there are few risks or costs associated with extending the right to everyone, as evidenced by the experience of the many countries which do this. In practice, only a few non-

[2] (London: ARTICLE 19, 1999). Available at: http://www.article19.org/pdfs/standards/righttoknow.pdf. These Principles were the result of a study of international law and best practice on the right to information and have been endorsed by, amongst others, the UN Special Rapporteur on Freedom of Opinion and Expression in his report to the 2000 session of the United Nations Commission on Human Rights (UN Doc. E/CN.4/2000/63, annex II), and referred to by the Commission in its 2000 resolution on freedom of expression (Resolution 2000/38). They were also endorsed by the Special Rapporteur on Freedom of Expression of the Organization of American States (OAS). See the 1999 Report, Volume III of the Report of the Inter-American Commission on Human Rights to the OAS.
[3] (London: ARTICLE 19, 2001). Available at: http://www.article19.org/pdfs/standards/modelfoilaw.pdf.

citizens can be expected to make requests for information, so little burden will be imposed on public authorities.

Information is defined in section 2(a) as "any material in any form", and this phrase is followed by a long list of possible forms of information. However, section 4(a) provides that any citizen shall have the right to request information on any "decision, written proceedings of or any work performed or proposed to be performed by any authority". This appears to limit the scope of the right, which should apply simply to any information held by any public body.

Section 2(a) goes on to stipulate that information includes "any information obtained under any law for the time being in force about any authority". The purpose of this is not clear. If it refers to information already held by a public body, it is a very narrow definition. Although, formally, on this understanding it would be additional to the main definition, and so would not limit it, at the same time this might cause confusion. Another interpretation is that this provision is intended to extend the scope of information covered to include information not actually held by a public body, but which a public body has a right to access pursuant to a law. If this is the intention, we recommend that it be moved to a different sub-section to avoid any confusion. Furthermore, consideration should be given to extending it to cover any information that a public body has a legal right to access, whether by law, by contract or by some other legal means.

Section 2(c) of the draft Law defines an 'authority' for purposes of the Law (we use the term public body in this Memorandum). We note that the draft Law sometimes refers to a 'public authority' and sometimes simply to an 'authority' (both terms are, for example, employed in section 4(b)). Section 2(c)(i) defines an authority to include any ministry or public office, department or statutory body, or "bodies constituted under public or private ownership" or bodies administered under public finance which are established by law. Section 2(c)(ii), in conjunction with section 2(c)(iii) (it is assumed that they are supposed to be one provision), adds to this a variety of private bodies, commercial and non-profit, which conduct public work under contract or otherwise on behalf of the government. Finally, section 2(c)(iv) provides for further authorities to be designated by notification.

This is a very wide definition. Indeed, section 2(c)(i) would appear to cover all private bodies. We urge some caution in applying the law to all private bodies. While there are strong reasons in principle why private bodies should be open, there are a number of reasons for caution. This is a largely untested area. Of the over 70 existing right to information laws, only South Africa covers private bodies and even then only where the information is required for the exercise or protection of a right. Despite this limitation, implementation there has been problematical and has arguably undermined general implementation of the law. We therefore recommend that in this first stage, the scope of the law be restricted to public bodies. At the same time, consideration could be given to adding bodies which perform public functions, even though they do not do so under contract or with public funding. Modern governments privatise a wide range of services, including some which are clearly public in nature. Such privatisation should not, of itself, take the activity outside of the scope of a right to information law. If it did, this would be an additional, and clearly illegitimate, motivation for governments to privatise.

It would appear from the definition that the legislative and judicial branches are not covered. This would be a serious shortcoming, given that these branches are part of the State just as

much as the executive is, and international law requires all public bodies to be subject to openness obligations. Furthermore, although section 2(c)(i) of the draft Law refers to statutory bodies, it does not clearly include constitutionally established bodies, such as the office of the President, the Public Service Commission, the Election Commission, the Office of the Comptroller and the Auditor General.

Recommendations:

- Everyone should have the right to demand and receive information under the right to information law.
- It should be very clear in the law that the right to information extends to all information held by a public body.
- Assuming that the reference in section 2(a) to information obtained under any law refers to information not actually held by a public body, consideration should be given to moving this to a separate sub-section and extending it to cover all information a public body has a legal right to access.
- It should be clear from the definition that any reference to an 'authority' is intended to mean a 'public authority'.
- The legislative and judicial branches of government, along with all other constitutionally established bodies, should be included with the scope of public bodies.
- The law should not cover all private bodies, although these might be placed under openness obligations in due course, but consideration should be given to including private bodies which conduct public functions.

2.2. Routine disclosure

Most right to information laws impose a proactive obligation on public bodies to make certain key categories of information public even in the absence of a request, sometimes referred to as automatic or routine disclosure. Section 6 of the draft Law provides a list of categories of information that all public bodies must publish, at least once every two years, in a report. The list includes particulars about the structure and activities of the public body, the categories of information it holds, a description of any licenses, permits or other facilities which citizens might obtain, and the names and other particulars of information officers.

This is a very modest list of routine disclosure obligations which falls far short of the more extensive obligations found in many of the more recent right to information laws. Furthermore, unlike more progressive right to information laws, there is no obligation on public bodies to disseminate this information widely, or in a form which is accessible for ordinary citizens. Publication of a report is useful but more flexible and up-to-date forms of information disclosure, such as the Internet, should also be employed and efforts should be made to ensure that information reaches the whole public, for example by dissemination via local bulletin boards. Furthermore, publication of a report only once every two years is not frequently enough.

In the United Kingdom, rather than provide a list of documents which must be disclosed on a routine basis, the law requires each public body to adopt a publication scheme, setting out the documents it proposes to make available. This scheme must be approved by the Information Commissioner, who may attach a time limit to his or her approval. This serves two important

objectives. First, it allows routine publication to be adapted to the particular information held by each public body. For example, bodies dealing with environmental matters have a special obligation to disclose certain types of environmental information. Second, it allows for the scope of disclosure to be increased over time, as the body gains capacity in this area. This allows full advantage to be taken of new technologies, which allow for essentially unlimited routine disclosure of information.

Recommendations:

- The routine publication rules should be significantly expanded so that public bodies are required to disseminate far more information, particularly information relating to financial maters.
- Consideration should be given to placing public bodies under an obligation to disseminate information widely and in different formats so as to promote access by the whole public.
- Consideration should be given to requiring public bodies to publish information in a report format every year instead of two years.
- Consideration should be given to including a system of publication schemes, along the lines of that in place in the United Kingdom, to allow for progressive increases in the scope of information being made available on a routine basis over time.

2.3. Processing of requests

The draft Law sets out detailed rules regarding the processing of requests for information. Many of these provisions are very positive. For example, information relating to life or death or the liberty of a person in jail must be provided within 48 hours and requests must normally be satisfied in the form desired by the requester. At the same time, further improvements could be made.

Section 6(b) provides that an application for information shall be made in the form provided. This is unduly rigid and the law should allow for applications in other forms, including on plain paper, as long as they contain the minimum requisite information. We note that, in some countries, any request for information is required to be treated as a formal request under the right to information law. Furthermore, it would be useful to specify that requests may be made electronically and even orally. Finally, it would be preferable for any form to be standardised across public bodies to promote uniformity and ease of access.

Section 2(b) provides for the appointment of information officers by public bodies. Where such officers have not yet been appointed, the head of the public body or of "any branch, directorate, wing, department, or its administrative unit" shall be deemed to be the information officer. This is a bit confusing. In particular, it is not clear whether only one information officer needs to be appointed for each public body or whether each sub-unit of a public body (branch, directorate, etc.) needs to appoint an information officer.

Section 7(c) provides for assistance to be provided to requesters who are disabled. In many right to information laws, the obligation to provide assistance is much broader, covering not only cases of disabled requesters but any case in which a requester needs help making his or her request. The draft Law does not make it clear that requesters should not have to provide

reasons for their requests. Such a rule is found in most better practice right to information laws.

Section 2(d) refers to various forms of accessing information, including taking notes or samples, and obtaining copies, including electronic ones. Section 6(a), on the other hand, refers only to inspection, taking notes and obtaining copies. The existence of two provisions on form of access could be confusing and lead to discrepancies in the way the law is applied. The wider reference in section 2(d) should be retained, rather than the shorter list in section 6(a). However, it should be made clear that section 2(d) also includes a right of inspection, something which is not presently made explicit in that section.

Section 6(c) provides for requests to be processed within 20 days. While this is not necessarily inconsistent with international practice, we believe that a shorter timeframe such as has been adopted in many countries, for example of 15 days, would be more appropriate. In addition to the provision for a shorter timeframe for requests involving life or liberty, consideration should be given to shorter timeframes for requests which involve important public interests, for example where information is requested by a journalist to expose corruption or by an NGO investigating environmental issues.

Section 6(a) provides that applications must be accompanied by the prescribed fee. Application fees simply for making a request can deter individuals from lodging requests in the first place. It would be preferable, particularly in a poorer country like Bangladesh, for there only to be fees for actual provision of information. Regarding this latter, the rules in the draft Law are not entirely clear. Section 6(c) provides that fees shall be based on the actual cost of providing information, while section 7(d) provides that any fee shall be reasonable, that it shall not exceed the actual cost of photocopying, and also that is shall not exceed the highest amount as determined by rules. It is positive that fees are restricted to copying costs but it would be preferable to bring these provisions together and simply to require fees to conform to a central schedule of fees, as set out by regulation. This would avoid a patchwork of different fees structures across the civil service. Section 7(d) also refers to fees in the context of provision of information electronically. Given the providing information electronically is free, no fee should be imposed for this.

A better practice followed in many countries is to provide a certain amount of information for free. This imposes only a minimal burden on public bodies and greatly facilitates the making of smaller requests. Finally, the draft Law fails to take into account certain public interest cases, such as where a requester cannot afford to pay for the information or where the information is sought for a public interest purpose, for example where an NGO is researching the environmental impact of a development project. The law should make provision, in such cases, for lower fees or for information to be provided for free.

Section 6(d) requires the relevant officer, when refusing a request, to inform the requester of the reasons for the refusal. This is positive but it would be helpful to specify that this notice must be in writing, and that it should specify the provision of the law being relied upon for the refusal, and also include information on the requester's right to appeal the refusal.

The draft Law fails to specify how a request will be dealt with where the public body does not hold the information. Many laws provide for the transfer of requests, in such cases, to the public body which does hold the information, where this is known. The draft law also fails to provide for consultation with third parties where their interests might be affected by a

proposed disclosure. This can be important to ensure that their rights and interests are properly taken into account.

Recommendations:

- More flexibility should be allowed regarding the form for making requests, which should be able to be made electronically and even orally. Consideration should be given to providing for a standardised form to be used by all public bodies.
- The requirements for the appointment of information officers should be clarified.
- The law should impose a wider obligation on information officers to provide assistance to requesters who need help.
- The law should make it clear that no reasons are required to be provided for requests.
- The longer list of forms of accessing information provided in section 2(d) should be retained and the (different but somewhat repetitive) list in section 6(a) should be dropped, although a right to inspect should be added to section 2(d).
- Consideration should be given to reducing the timeframe for responding to a request to 15 days and to providing for shorter timeframes for public interest requests.
- Consideration should be given to doing away with an application fee for requests. Consideration should also be given to reworking the fee system for provision of information so that it is based on a central set of fee rules, applicable to all public bodies. These could provide for a certain amount of information, for example 50 pages, to be provided for free. They could also provide for fee waivers for impecunious requesters or for requests in the public interest. It should also be clear that no fee may be charged where information is provided electronically.
- More detail should be added to the law regarding the notice to be provided upon refusal of a request, for example specifying that this must be in writing, and that it must indicate the specific provision of the law relied upon to refuse the request, along with information on the right of appeal.
- Consideration should be given to adding provisions on transfer of requests and consultation with third parties.

2.4. The regime of exceptions

The regime of exceptions is set out in sections 8-10 of the draft Law. Section 8 sets out nine specific exceptions which, taken together, are seriously overbroad, allowing for the withholding of a wide range of non-sensitive information. Section 9 provides for the partial release of information while section 10 contains a species of public interest override.

Systemic Rules

As noted above, section 3 provides that, in case of conflict with other laws, the right to information law shall prevail. This is a welcome rule that will help ensure that the new right to information law really can change the status quo regarding openness.

Section 8 appears to contain the only grounds for refusing a request for information so in this sense the draft Law contains a comprehensive list of the grounds for refusing a request. There are, however, both some exceptions which go beyond what is considered necessary under international law and in other countries, and some exceptions which are commonly found in

other countries (see below, under Specific Exceptions). Most of the exceptions contain a form of harm test. One exception is section 8(d), which covers all information relating to income tax, customs, currency exchange rates, interest rates and the monitoring or administration of economic bodies.

International standards are very clear that limitations on the right to information should be conditioned by harm. It is only where disclosure poses a serious risk of harm to a legitimate interest that withholding the information may be legitimate. While some income tax information may legitimately be considered confidential to protect privacy, this is not always the case and tax information that is not private should be released; the draft Law already includes an exception in favour of privacy. Any other potentially legitimate interests protected by this exception – such as where premature release of information on interest rate changes would provide undue advantage to the receiving party – are already covered by section 8(c). The blanket exclusion of information relating to the monitoring or administration of economic bodies is of particular concern. These bodies, like all public bodies, need to be open to public scrutiny, although there may be grounds for secrecy in certain cases covered by the other exceptions.

The level of harm required for different exceptions varies considerably and formulations employed in the draft Law range from a mere 'apprehension' of harm (section 8(a)) to 'likely to disturb' (section 8(c)) to would harm or impede (sections 8(b) and (e)). The level of requisite harm should be both consistent and high, preferably something like 'would or would be likely to cause substantial harm'.

The draft Law does include a form of public interest override, to the effect that a public body may disclose information in the public interest. There are several problems with this. First, it is discretionary, in the sense that the public body *may* disclose the information but it is *not required* to. Second, it fails to set out any conditions whatsoever to guide public bodies in considering when to apply this rule. It would be preferable if it were to apply whenever the public interest in disclosure outweighed the likely harm to the protected interest. Third, it is cast as a discretion vested in public bodies, so that the Information Commission would not appear to be able to apply it. Instead, it should operate so as to override the exceptions.

The public interest override provided for in the ARTICLE 19 Model Law, for example, provides:

> Notwithstanding any provision in this Part [containing the exceptions], a body may not refuse to indicate whether or not it holds a record, or refuse to communicate information, unless the harm to the protected interest outweighs the public interest in disclosure.

Section 9 of the draft Law appears to provide for the disclosure of part of a document where only part of the information it contains is covered by an exception. This is positive although the provision, at least in translation, is not very clear.

The draft Law lacks an overall time limit beyond which exceptions presumptively expire. In the ARTICLE 19 Model Law, for example, exceptions to protect public interests, as opposed to private ones, expire after 30 years. In the absence of such a limit, exceptions like the one in favour of internal deliberation processes may lead to endless secrecy.

<u>Specific Exceptions</u>

Apart from these structural problems, some of the specific exceptions are also overbroad or unnecessary. The problems with section 8(d) have already been noted. Section 8(a) protects, among other things, 'honour' of foreign States and organisations, a concept which is not found in other democratic right to information laws and which is probably not legitimate in any case (it is not proper to speak of States having honour as such). It should also be clarified that the reference in Section 8(a) to 'organisations' is limited to inter-governmental organisations. Section 8(e) appears to include a circular provision, inasmuch as it rules out disclosure of information which would 'violate the secrecy of an information'. It is also far too overbroad, inasmuch as it rules out information the disclosure of which would 'influence' the decision-making process. It is perfectly legitimate for requesters to use the information they obtain to influence decisions; indeed, this is an important reason for making a request.

Section 8(i) rules out the disclosure of information where this is 'against public interests'. This is highly problematical and, in practice, effectively the reverse of international standards, which call for the release of information in the public interest (see the comments above on the public interest override). International standards make it very clear that the regime of exceptions should protect only clearly defined social interests, not vague concepts like the public interest, which could easily be abused to undermine the right to information.

On the other hand, the draft Law appears to omit certain exceptions which are commonly found in right to information laws and which may be needed to protect certain legitimate interests. For example, the draft Law does not appear to allow for legally privileged information to be withheld, although it is possible that this might be covered by section 8(g), referring to the orders of a court. The draft Law also appears to fail to protect the commercial interests of third parties, while clearly protecting its own commercial interests in section 8(b). This is a serious omission.

Recommendations:

- Section 8(d), which covers all information relating to income tax, customs, currency exchange rates, interest rates and the monitoring or administration of economic bodies, and section 8(i), which rules out disclosures against the public interest, should be removed.
- The level of harm required to trigger the different exceptions should be standardised and require a high risk of substantial harm to the protected interest.
- The public interest override should be substantially strengthened so that it is mandatory, applies whenever the public interest in disclosure overrides the risk of harm to the protected interest and operates so as to defeat the exception, rather than being cast as a discretion vested in public bodies.
- Section 9, providing for severability, should be redrafted more clearly.
- An overall time limit beyond which exceptions presumptively no longer apply should be introduced into the law.
- The references to 'honour' in section 8(a), and to violating the secrecy of information and influencing the decision-making process in section 8(e) should be removed.
- The reference in Section 8(a) to 'organisations' should be limited to inter-governmental organisations.
- The exceptions should be reviewed to make sure that they do protect all legitimate confidentiality interests.

2.5. Appeals

Independent Oversight

The draft Law provides for an Information Commission, members of which are appointed by the President upon nomination by a committee consisting of a judge nominated by the Chief Justice, who shall be the Chair of the Commission, the Chair of the Public Service Commission, the Cabinet Secretary and the Chair of the University Grant Commission. This is a viable system for appointments, but three of the four officials are effectively appointed by the government, which fails adequately to secure the independence of the Commission. Furthermore, and the involvement of a senior judge may lead to negative perceptions as they are represented in many committees, some of which have not been very successful. It may be noted that ensuring independence is one of the more challenging aspects of a right to information law. As a result, it would be preferable not to have the Cabinet Secretary as a member. Furthermore, there is very limited civil society representation on the Committee. Finally, there is no requirement that the process be transparent or allow for public input of any kind, both key means of promoting integrity within the process.

Section 12(b) provides for the Commission to consist of a Chief Information Commissioner and a maximum of two other Commissioners. This is a small number for such a populous country as Bangladesh and, furthermore, the rules do not appear to provide for any minimum number of Commissioners other than the requirement to have at least a Chair.

The system for removal of Commissioners consists of two entirely different procedures. Pursuant to section 16(a), the procedure for removal is the same as it is for a judge in accordance with the constitution, which is designed to protect judges against political interference. Pursuant to section 16(c), however, the President can remove any Commissioner, apparently in his sole discretion, for, among other things, being unfit to continue in office or being guilty of gross misconduct. These are highly subjective notions. Furthermore, it is unclear why it was considered necessary to add the second procedure for removal, which is far less protected against interference than the first.

Section 15 provides that the government shall arrange for the employees of the Commission and set their conditions of service. Where this has been done in a few other countries, it has proven to be highly problematical for the independence and effectiveness of the Commission. Instead, as is the case in more progressive right to information regimes, the Commission should have the power to oversee its own staffing requirements. Similarly, the Commission should have the power to set its own rules, not the government, as is presently the case pursuant to section 27.

Processing of Appeals

Section 19(a) of the draft Law provides for internal appeals to the head of the relevant administrative unit which shall be decided upon within 15 days. A further appeal may be lodged with the Information Commissioner, either after receiving a decision on an internal appeal or directly. While the internal appeal lies against any decision of an Information Officer, the draft Law only appears to envisage one remedy at this level, namely providing the information to the requester. The Information Commission, on the other hand, has a long list of possible remedies (see section 19(g)). Similarly, section 19(d), in a positive provision, places the onus on the information officer to justify any denial of a request, but does not speak to the onus in cases where, for example, the complaint relates to the charging of excessive fees.

Section 20 provides for parties to an appeal to appoint a lawyer to represent them but then goes on to state that the Commission should, as far as possible, take an enquiry, rather than an adversarial, approach. These seem contradictory and may lead to a situation where unduly legalistic arguments are being presented before the Commission.

As a practical matter and to promote access by all to Commission, it should be empowered to set up district officers.

Finally, section 24 provides that no appeal to the courts shall be available in respect of any order made under the law. The Indian courts have refused to recognise a similar provision in their law and it is likely that the Bangladeshi courts would do the same. It is actually helpful to have the courts review Commission decisions as this helps ensure focused consideration of key problems, which only courts can provide, and also helps give authority to the Commission, at least where its decisions are upheld. Furthermore, this leads to a situation where there is no remedy in cases where the Information Commission refused to provide information upon request, in accordance with the law.

Recommendations:

- The Cabinet Secretary should not serve on the appointments committee for the Information Commission, which should include fewer government appointees. Consideration should be given to adding civil society representatives to the committee.
- The process for appointing members of the Information Commission should be transparent and allow for public input.
- Consideration should be given to increasing the maximum number of Commissioners, for example to five, and to providing for a minimum number as well, for example of three.
- The procedure whereby the President may, on his or her own motion, remove Commissioners, set out in section 16(c), should be removed.
- The Commission, not the government, should be responsible for overseeing its staff and for setting its own operating rules.
- Heads of administrative units should be able to order a wider range of remedies for breach of the law, such as lowering the fees charged, providing the information in the form sought and so on.
- The onus should be on the information officer to justify any alleged breach of the rules, not just a refusal to provide information.
- Consideration should be given to removing section 20 in its entirety, or at least to removing the reference therein to appointing lawyers to represent parties before the Commission.
- The Commission should have the power to set up district offices.
- Consideration should be given to removing section 24, barring the courts from hearing appeals from orders made pursuant to the law.

2.6. Punishments and Protections

Section 13 of the draft Law protects individuals from any legal suit or sanction for any good faith act done pursuant to the law. On the other hand, section 21 establishes a regime of sanctions for obstruction of access that appears to be closely modelled on the Indian approach.

It provides for the Commission to impose daily fines up to a maximum of BDT25,000 (approximately USD370) for a number of unreasonable failures in relation to the law, and for the Commission to recommend disciplinary action against any officer who has, unreasonably and persistently, engaged in a number of listed failures.

This is a reasonable package of punishments and protections. We note, however, that the maximum fine is extremely low, too low to deter many officials from obstructing access. The level of the fine should be increased and consideration should be given, in line with the practice in many countries, to providing for imprisonment of officials for wilful obstruction of access to information.

Furthermore, advantage might be taken of the passage of this law to insert some protection for whistleblowers, namely individuals who release information on wrongdoing, or information that discloses a serious threat to health, safety or the environment. Provided that the person acts in good faith and in the reasonable belief that the information is in fact true, such persons should be given protection. Whistleblowers can play an important part in fulfilling the public's right to know, particularly in a country where the right to information law is a recent introduction and a culture of secrecy still pervades many public bodies.

Recommendation:

- The maximum fine for obstruction of access should be increased and consideration should be given to the possibility of imprisonment for wilful obstruction.
- Consideration should be given to adding protection for whistleblowers into the law.

2.7. Promotional Measures

The draft Law contains a somewhat weak package of promotional measures. It does provide for the preparation, by the Commission, of an Annual Report containing extensive information on the request process, appeals and their outcomes, implementation measures and recommendations (section 26). Pursuant to section 26(b), each ministry or department shall, in relation to public bodies falling under their mandate, provide such information to the Information Commission 'as is required'. It is not clear, however, who determines what is 'required' and it should be clear that the Commission sets these standards.

Section 4(b) requires public bodies to maintain their records in an appropriate manner, while section 4(c) places an obligation on the Information Commission to prepare 'a guideline' for public bodies to assist them with this. While positive, a better system would be to allocate responsibility to one body – for example the Information Commission – to set binding standards in this area.

The draft Law is silent as to training and it does not require the Commission to prepare a guide to assist individuals in making requests for information. These types of provisions are commonly found in other right to information laws. More generally, the Commission appears to be envisaged primarily as a complaints body rather than having a broader promotional role. Although there is nothing specifically in the draft Law that rules out a wider role, and ultimately this is more likely to be dependent on funding than legal provisions, it would be helpful to signal this wider role in the law.

Recommendations:

- It should be clarified in the law that the Commission determines the scope of information it needs from ministries and departments to complete its section 26 Annual Report.
- The Information Commission, or some other central body, should have the power to set binding standards in relation to the management of records.
- The law should place an obligation on public bodies to conduct appropriate training activities.
- Consideration should also be given to spelling out in the law a wider promotional role for the Commission. In any case, the law should require the Commission to prepare and widely disseminate a guide for the public on how to use the law.

3. INTERNATIONAL STANDARDS

3.1. The importance of access to information

The right to access information held by public bodies, often referred to as 'freedom of information' or the 'right to information', is a fundamental human right recognised in international law. It is crucial as a right in its own regard as well as central to the functioning of democracy and the enforcement of other rights. Without a right to information, State authorities can control the flow of information, 'hiding' material that is damaging to the government and selectively releasing 'good news'. In such a climate, corruption thrives and human rights violations can remain unchecked.

In the earlier international human rights instruments, the right to information was not set out separately but included as part of the fundamental right to freedom of expression, which includes the right to seek, receive and impart information. Article 19 of the *Universal Declaration on Human Rights* (UDHR), adopted as a United Nations General Assembly resolution in 1948,[4] states:

> Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

While the UDHR is not directly binding on States, parts of it, including Article 19, are widely regarded as having acquired legal force as customary international law.[5] Article 19 of the *International Covenant on Civil and Political Rights* (ICCPR), a formally binding legal treaty ratified by some 160 States,[6] ensures the right to freedom of expression and information in terms similar to the UDHR.

These provisions are increasingly seen as imposing an obligation on States to enact right to information laws. The United Nations Special Rapporteur on Freedom of Opinion and Expression,[7] for example, has repeatedly called on all States to adopt and implement right to information legislation.[8] In 1995, the UN Special Rapporteur stated:

> The Special Rapporteur, therefore, underscores once again that the tendency of many Governments to withhold information from the people at large … is to be strongly checked.[9]

[4] UN General Assembly Resolution 217A (III), adopted 10 December 1948.
[5] For judicial opinions on human rights guarantees in customary international law, see *Barcelona Traction, Light and Power Company Limited Case* (Belgium v. Spain) (Second Phase), ICJ Rep. 1970 3 (International Court of Justice); *Namibia Opinion*, ICJ Rep. 1971 16, Separate Opinion, Judge Ammoun (International Court of Justice); *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980) (US Circuit Court of Appeals, 2nd Circuit). For an academic critique, see M.S. McDougal, H.D. Lasswell and L.C. Chen, *Human Rights and World Public Order*, (Yale University Press: 1980), pp. 273-74, 325-27. See also United Nations General Assembly Resolution 59 (1), 1946.
[6] UN General Assembly Resolution 2200A (XXI), adopted 16 December 1966, in force 23 March 1976. The figure for ratifications is as of November 2006. Bangladesh acceded to the ICCPR in September 2000.
[7] The Office of the Special Rapporteur on of Opinion and Expression was established by the UN Commission on Human Rights, the most authoritative UN human rights body, in 1993: Resolution 1993/45, 5 March 1993.
[8] See, for example, the Concluding Observations of the Human Rights Committee in relation to Trinidad and Tobago, UN Doc. No. CCPR/CO/70/TTO/Add.1, 15 January 2001. 14. The comments of the UN Special Rapporteur on freedom of Opinion and Expression are discussed at length below.
[9] Report of the Special Rapporteur, 4 February 1997, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/1997/31.

His comments were welcomed by the UN Commission on Human Rights, which called on the Special Rapporteur to "develop further his commentary on the right to seek and receive information and to expand on his observations and recommendations arising from communications".[10] In his 1998 Annual Report, the Special Rapporteur reaffirmed that the right to information includes the right to access information held by the State:

> [T]he right to seek, receive and impart information 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…."[11]

The UN Special Rapporteur was joined in his call for legal recognition of the right to information by his regional counterparts – the Representative on Freedom of the Media of the Organisation for Security and Cooperation in Europe and the Special Rapporteur on Freedom of Expression of the Organisation of American States – in a Joint Declaration issued in November 1999. The three reiterated their call in December 2004, stating:

> The right to access information held by public authorities is a fundamental human right which should be given effect at the national level through comprehensive legislation (for example Freedom of Information Acts) based on the principle of maximum disclosure, establishing a presumption that all information is accessible subject only to a narrow system of exceptions.[12]

The right to information has also been explicitly recognised in all three regional systems for the protection of human rights. Within the Inter-American system, the Inter-American Commission on Human Rights approved the *Inter-American Declaration of Principles on Freedom of Expression* in October 2000.[13] The Principles unequivocally recognise a right to access information held by the State, as both an aspect of freedom of expression and a fundamental right on its own:

> 3. Every person has the right to access information about himself or herself or his/her assets expeditiously and not onerously, whether it be contained in databases or public or private registries, and if necessary to update it, correct it and/or amend it.
>
> 4. Access to information held by the state is a fundamental right of every individual. States have obligations to guarantee the full exercise of this right. This principle allows only exceptional limitations that must be previously established by law in case of a real and imminent danger that threatens national security in democratic societies.

In a very recent decision, the Inter-American Court of Human Rights has held that Article 13 of the *American Convention on Human Rights*,[14] which guarantees freedom of expression, specifically includes a right to access information held by public bodies.[15]

The African Commission on Human and Peoples' Rights recently adopted a *Declaration of Principles on Freedom of Expression in Africa*,[16] Principle IV of which states, in part:

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[10] Resolution 1997/27, 11 April 1997. 12(d).
[11] Report of the Special Rapporteur, 28 January 1998, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/1998/40. 14.
[12] 6 December 2004. Available at: http://www.cidh.org/Relatoria/showarticle.asp?artID=319&lID=1.
[13] 108th Regular Session, 19 October 2000.
[14] Adopted at San José, Costa Rica, 22 November 1969, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force 18 July 1978.
[15] *Caso Claude Reyes and Others v. Chile*, 19 September 2006.
[16] Adopted at the 32nd Session, 17-23 October 2002.

1. Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law.
2. The right to information shall be guaranteed by law in accordance with the following principles:
   - everyone has the right to access information held by public bodies;
   - everyone has the right to access information held by private bodies which is necessary for the exercise or protection of any right;
   - any refusal to disclose information shall be subject to appeal to an independent body and/or the courts;
   - public bodies shall be required, even in the absence of a request, actively to publish important information of significant public interest;
   - no one shall be subject to any sanction for releasing in good faith information on wrongdoing, or that which would disclose a serious threat to health, safety or the environment save where the imposition of sanctions serves a legitimate interest and is necessary in a democratic society; and
   - secrecy laws shall be amended as necessary to comply with freedom of information principles.

Within Europe, the Committee of Ministers of the Council of Europe adopted a Recommendation on Access to Official Documents in 2002.[17] Principle III provides generally:

> Member states should guarantee the right of everyone to have access, on request, to official documents held by public authorities. This principle should apply without discrimination on any ground, including that of national origin.

The rest of the Recommendation goes on to elaborate in some detail the principles which should apply to this right. The Council of Europe is presently engaged in preparing a binding treaty on the right to information.[18]

The Commonwealth has also recognised the fundamental importance of the right to information and taken a number of significant steps to elaborate on the content of that right.[19]

Implementation of the right to access to information is also a key requirement imposed on States parties to the UN Convention against Corruption. Bangladesh acceded to this Convention on 27 February 2007.[20] Article 13 of the Convention requires that States should "[ensure] that the public has effective access to information".

National right to information laws have been adopted in record numbers over the past ten years, in countries which include India, Israel, Jamaica, Japan, Mexico, Pakistan, Peru, South Africa, South Korea, Thailand, Trinidad and Tobago, and the United Kingdom, as well as most of East and Central Europe. These nations join a number of other countries which enacted such laws some time ago, such as Sweden, the United States, Finland, the Netherlands, Australia and Canada, bringing the total number of States with right to information laws to nearly 70. A growing number of inter-governmental bodies, such as the European Union, the UNDP, the World Bank and the Asian Development Bank, have also adopted policies on the right to information. With the adoption of a strong right to information

[17] Recommendation No. R(2002)2, adopted 21 February 2002.
[18] The Group of Specialists on Access to Official Documents is responsible for this work.
[19] See the *Communiqué*, Meeting of Commonwealth Law Ministers (Port of Spain: 10 May 1999).
[20] See http://www.unodc.org/unodc/en/treaties/CAC/signatories.html.

law, Bangladesh would join a long list of nations which have already taken this important step towards guaranteeing this fundamental right.

3.2. The content of the right to information

A survey of international law and best practice shows that, to be effective, right to information legislation should be based on a number of general principles. Most important is the principle of maximum disclosure: any information held by a public body should in principle be openly accessible, in recognition of the fact that public bodies hold information not for themselves but for the public good. Furthermore, access to information may be refused only in narrowly defined circumstances, when necessary to protect a legitimate interest. Finally, access procedures should be simple and easily accessible, and persons who are refused access should have a means of challenging the refusal before an independent body.[21]

In his 2000 Annual Report to the UN Human Rights Commission, the UN Special Rapporteur endorsed ARTICLE 19's overview of the state of international law on the right to information as set out in the ARTICLE 19 Principles and called on Governments to revise their domestic laws to give effect to this right. He particularly directed States' attention to nine areas of importance:

> [T]he Special Rapporteur directs the attention of Governments to a number of areas and urges them either to review existing legislation or adopt new legislation on access to information and ensure its conformity with these general principles. Among the considerations of importance are:
>
> - Public bodies have an obligation to disclose information and every member of the public has a corresponding right to receive information; "information" includes all records held by a public body, regardless of the form in which it is stored;
>
> - Freedom of information implies that public bodies publish and disseminate widely documents of significant public interest, for example, operational information about how the public body functions and the content of any decision or policy affecting the public;
>
> - As a minimum, the law on freedom of information should make provision for public education and the dissemination of information regarding the right to have access to information; the law should also provide for a number of mechanisms to address the problem of a culture of secrecy within Government;
>
> - A refusal to disclose information may not be based on the aim to protect Governments from embarrassment or the exposure of wrongdoing; a complete list of the legitimate aims which may justify non-disclosure should be provided in the law and exceptions should be narrowly drawn so as to avoid including material which does not harm the legitimate interest;
>
> - All public bodies should be required to establish open, accessible internal systems for ensuring the public's right to receive information; the law should provide for strict time limits for the processing of requests for information and require that any refusals be accompanied by substantive written reasons for the refusal(s);
>
> - The cost of gaining access to information held by public bodies should not be so high as to deter potential applicants and negate the intent of the law itself;
>
> - The law should establish a presumption that all meetings of governing bodies are open to the public;

[21] See the ARTICLE 19 Principles, note 2.

- The law should require that other legislation be interpreted, as far as possible, in a manner consistent with its provisions; the regime for exceptions provided for in the freedom of information law should be comprehensive and other laws should not be permitted to extend it;

- Individuals should be protected from any legal, administrative or employment-related sanctions for releasing information on wrongdoing, viz. the commission of a criminal offence or dishonesty, failure to comply with a legal obligation, a miscarriage of justice, corruption or dishonesty or serious failures in the administration of a public body.[22]

This constitutes strong and persuasive guidance to States on the content of right to information legislation.

3.3. Limits to the right to information

One of the key issues in a right to information law is defining when a public body can refuse to disclose information. Under international law, restrictions on the right to information must meet the requirements stipulated in Article 19(3) of the ICCPR:

> The exercise of the rights [to freedom of expression and information] 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 reputations of others;
> (b) For the protection of national security or of public order (ordre public), or of public health or morals.

The requirements of Article 19(3) translate into a three-part test, whereby a public body must disclose any information which it holds and is asked for, unless:

1. The information concerns a legitimate protected interest listed in the law;
2. Disclosure threatens substantial harm to that interest; and
3. The harm to the protected interest is greater than the public interest in having the information.[23]

The same approach is reflected in Principle IV of the Council of Europe Recommendation on this issue, which states:

> **IV. Possible limitations to access to official documents**
>
> 1. Member states may limit the right of access to official documents. Limitations should be set down precisely in law, be necessary in a democratic society and be proportionate to the aim of protecting:
> i. national security, defence and international relations;
> ii. public safety;
> iii. the prevention, investigation and prosecution of criminal activities;
> iv. privacy and other legitimate private interests;
> v. commercial and other economic interests, be they private or public;
> vi. the equality of parties concerning court proceedings;
> vii. nature;
> viii. inspection, control and supervision by public authorities;
> ix. the economic, monetary and exchange rate policies of the state;

[22] *Ibid*., para. 44.
[23] See ARTICLE 19's *The Public's Right to Know*, note 21, at Principle 4.

> x. the confidentiality of deliberations within or between public authorities during the internal preparation of a matter.
>
> 2. Access to a document may be refused if the disclosure of the information contained in the official document would or would be likely to harm any of the interests mentioned in paragraph 1, unless there is an overriding public interest in disclosure.[24]

This incorporates a clear list of legitimate protected interests, and permits information to be withheld only where disclosure would harm the interest and where this harm is greater than the public interest in disclosure.

1. Legitimate Protected Interest

Right to information laws should contain an *exhaustive* list of all legitimate interests which might justify a refusal to disclose information. This list should be limited to matters such as law enforcement, the protection of personal information, national security, commercial and other confidentiality, public or individual safety, and protecting the effectiveness and integrity of government decision-making processes.[25]

Exceptions should be narrowly drawn to avoid capturing information the disclosure of which would not harm the legitimate interest. Furthermore, they should be based on the content, rather than the type of document sought. To meet this standard, exceptions should, where relevant, be time-limited. For example, the justification for classifying information on the basis of national security may well disappear after a specific national security threat subsides.

2. Substantial Harm

Even if information falls within the scope of a legitimate aim listed in the legislation, it is only where disclosure of the information would cause substantial harm to that legitimate aim that such disclosure may be refused. It is not enough for the information simply to fall within the scope of a listed legitimate interest. This would create a class exception that would seriously undermine the free flow of information to the public. This would be unjustified since public authorities can have no legitimate reason to withhold information the disclosure of which would not cause harm. Instead, the public body must demonstrate that the disclosure of the information would cause substantial harm to the protected interest.

3. Harm outweighs public interest benefit in disclosure

The third part of the test requires the public body to consider whether, even if disclosure of information causes serious harm to a protected interest, there is nevertheless a wider public interest in disclosure. For instance, in relation to national security, disclosure of information exposing instances of bribery may concurrently undermine defence interests and expose corrupt buying practices. The latter, however, may lead to eradicating corruption and therefore strengthen national security in the long-term. In such cases, information should be disclosed notwithstanding that it may cause harm in the short term.

Cumulatively, the three-part test is designed to guarantee that information is only withheld when it is in the overall public interest. If applied properly, this test would rule out all blanket exclusions and class exceptions as well as any provisions whose real aim is to protect the government from harassment, to prevent the exposure of wrongdoing, to avoid the concealment information from the public or to preclude entrenching a particular ideology.

[24] Note 17.
[25] *Ibid.*