

# The Campaign for Freedom of Information

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## BRIEF COMMENTS ON PAKISTAN'S PROPOSED FREEDOM OF INFORMATION BILL 2008

### Information or records

The key term in the bill is sometimes 'record' and sometimes 'information'. The focus switches between the two: at certain points the right of access is defined in terms of records and in other places in terms of information. There is potential for confusion and unintended consequences here.

The definition of 'information' in section 2(d) seems to add to the confusion. For example, it suggests that requested records are 'information' except where the records are exempt. Information should be information in all circumstances.

It may be preferable to define both the right of access and the exemptions in terms of 'information' so there is a right of access to any information held by the bodies concerned except where the specific information is exempt information. This is the approach of the UK FOIA and I think it is a helpful one.

One advantage of this approach is that it is clear from the outset, that only the exempt information can be withheld – any other information must be disclosed.

If the right of access is to 'records' then the exemptions should as far as possible also refer to records. That is, you might have a section which states:

- 1. The right of access in section 00 does not apply to records insofar as they consist of exempt information.*
- 2. 'Exempt information' means information which [followed by a series of specific definition]*

If the Bill does, as at present, define the right of access in terms of 'records' it should make clear that where records contain both exempt and non-exempt information, the non-exempt information must be disclosed.

### **Electronic information**

It's not clear that emails and electronically held information is covered by the right of access. The definition of 'public record' in section 2 refers to records in any form, but the listed forms do not include electronic information. Section 6 states that records should be computerised and section 7 declares that all records of public bodies are public records. But I think it would be advisable to explicitly include electronically held records in the definition.

This would cover emails, information stored in databases, and electronic versions of documents which have been printed or published, where no hard copy is still retained by the public body.

Similarly, you may want to try and have the Bill state explicitly that requests for records/information can be made electronically, so that email requests or faxed requests are clearly seen to be valid. At present, section 12 suggests that the question of what constitutes a valid request will depend on prescribed rules/regulations. It may be better to have this on the face of the bill.

### **Exemptions or exclusions**

Many of the proposed exclusions are closer in nature to exemptions. It is very difficult to determine the basis for distinguishing between the two concepts. The bill would be strengthened by, wherever possible, removing the exclusions and reformulating them all as exemptions. This is much more than just a matter of presentation

**Section 19 suggests that the Mohtasib and judiciary can review the use of exemptions. But it is not clear whether they have the power to review a public body's decision to refuse a request on the grounds that the record is not a 'public record' or that the particular information is excluded from the definition of 'public record'.**

**If there is no power to review those decisions, that would be an overwhelming flaw in the Bill.**

In addition to this general concern there are a number of specific concerns about the exclusions. For example, there is a 'catch-all' exclusion from the definition of 'public record' for information whose disclosure "is recognized to be detrimental to the public interest" (para (vi)(f) of the definition of public record). This sounds like a very broad exclusion. How would decisions about this matter be made and can they be challenged?

Paragraph (vi) of the definition of "public record" defines such a record in terms of information 'in which members of the public may have a legitimate interest'. This may allow public bodies to claim that any information of any kind is outside the

scope of the Act on the grounds that the public has no legitimate interest in it. Once again, it is not clear that an authority's decision on anything relating to the definition of 'public record' could be reviewed under section 19, so this could prove a very wide loophole.

Section 3 provides that where there is a conflict between the right of access to a public record and any restriction on disclosure in any other law, the right of access to a public record takes precedence. However, this cannot apply to information which is excluded from the definition of public record altogether.

I strongly endorse what CRCP say in its preliminary comments about the exclusion of internal working documents from the definition of 'public record' until a final decision has been both taken and implemented. In addition to the points you already make, you might also consider the situation where no final decision is ever taken on a matter, which left permanently undetermined.

The equivalent exemption in the UK FOI Act is very broadly drafted but subject to a public interest test, which means that the decision depends on whether the public interest in withholding the information outweighs the public interest in disclosure. The UK Information Tribunal, which hears appeals from decisions of the Information Commissioner, has ruled that the balance of public interest will rarely favour disclosure while options are still being discussed – but has not ruled it out, even before a decision.

### **Harm tests**

Wherever possible exemptions should incorporate tests of harm. Some of these already do – as do some existing 'exclusions' eg those for information that would endanger life or safety, scientific information whose disclosure would expose the organisation to disadvantage and information whose disclosure is likely to harm the detection, prevention, investigation or inquiry into a particular case, etc. (These are, incidentally classic exemptions rather than exclusions.)

### **Specific exemptions**

There appears to be an exclusion but no exemption for defence. Defence is a classic area where a harm test is needed. Suppose there is a request for how much information has been spent on building or repairing military barracks. Under the Bill it is possible that such information might be treated as excluded from the definition of a public record on the grounds that it relates to "Defence Installations" under paragraph (vi)(f) of the definition. Yet disclosing such information is unlikely to be harmful to defence but may be essential to detecting waste or corruption. If an exemption applied only where *harm to defence* would result, such problems could be avoided.

The exemption for international relations in section 15 applies only where disclosure would cause "grave and significant damage to the interests of Pakistan". If this test is appropriate for something as sensitive as international relations then it could presumably be adopted in other exemptions also.

The international relations exemption also requires the government to explain why the exemption applies in any particular case. This requirement should apply to all exemptions, not just international relations.

There are overlapping provisions on the protection of privacy. Section 8(2)(c) states that records relating to the personal privacy of an individual are not subject to the right of access. Section 17 then exempts information whose disclosure would involve an invasion of the privacy of an identifiable individual. This should be sufficient to render s8(2)(c) unnecessary.

Our own experience with the equivalent exemption in the UK FOI Act suggests that the concept of privacy is not as clear as was assumed at the outset. For example, government has argued that the names of the officials present at a meeting should be withheld on privacy grounds, as should the names of officials signing letters or taking decisions or the expenses claims made by officials or MPs. Some countries' FOI laws address such questions in the definition of 'privacy' and it may be worth thinking about this.

### **Public interest test**

The bill contains no 'public interest test' which would allow exempt information to be disclosed if the benefits of disclosure outweigh the harm. Without such a test, information may be withheld once an exemption is satisfied even if there is an absolutely overwhelming case for its disclosure, for example, to protect health and safety or expose wrongdoing etc. Many countries' FOI laws have such a public interest test for at least some of the exemptions. The UK has it for about two-thirds of the exemptions and it is one of the most powerful provisions of the UK FOI Act.

This would be a very important change to seek, unless you think it is completely unattainable in the current climate.

### **Duty to assist**

Section 9 requires public bodies to take prescribed steps to assist requesters. This means that if no steps are prescribed there will be no duty to assist. An alternative approach would be for the Bill to create a general duty to take reasonable steps to assist requesters *and* in particular to follow any steps that may be prescribed. That way, if the government fails to prescribe the necessary steps, the general duty is still in force.

### **Fining requesters**

Section 20 permits a fine to be imposed on anyone making a malicious, frivolous or vexatious complaint to the Mohtasib. Are such fines already available in relation to complaints to the Mohtasib under existing legislation? I am not very keen on such provisions. Might it enable a public body to attempt to intimidate a requester by saying that (a) it considers the request to be malicious, frivolous or vexatious and to warn that (b) if the requester goes on to complain to the Mohtasib about the matter he or she is likely to be fined. Legitimate requesters may well be deterred by

such a warning. Would it not be sufficient just to allow the complaint to be dismissed if it was found to be malicious, frivolous or vexatious?

### **Objects and reasons**

Finally, I agree with your comments about the inappropriateness of the language used to describe the 2002 Ordinance in the 'statement of objects and reasons'.

## **YOUR QUESTIONS**

### **Ombudsman or Information Commissioner**

It is probably better to have a dedicated Information Commissioner, if resources permit. The issues involved in deciding whether exemptions apply can be very complex and there are advantages to having complaints investigated by staff who specialise in these matters. However, some countries (eg New Zealand) have made their Ombudsman responsible for FOI. The critical thing is that if the function goes to the Ombudsman, that office should have the extra resources for the new work.

### **Correspondence and file notings**

My view is that these should be available. In many cases they will be of very low sensitivity to officials and politicians but very helpful to requesters in understanding what has taken place. To permit this the exemption in question should incorporate a harm test or a public interest test.

### **FOI and the private sector**

Information about private sector bodies which is held by public bodies will normally be available under FOI, subject to any relevant exemptions. How far you attempt to go in trying to bring the private sector directly under the scope of FOI, so that companies have to respond to requests made to them, may depend on how feasible you think the exercise is in the circumstances. In the UK, private companies performing environmental functions for public authorities (eg dealing with refuse; carrying out pollution monitoring) are directly subject to our Environmental Information Regulations. (These implement a European Union directive and have been adopted across Europe.)

The UK Act allows private bodies which carry out public functions to be brought under the FOI Act individually, and the government is currently considering which if any bodies to bring under the Act. However, 'public functions' in the UK context would not include matters such as banking or insurance but would apply to things which are very close to the functions of the state, eg the regulation of the professions.

The UK Act also allows private contractors which provide services to the public on behalf of a public authority to be brought under the FOI Act, if the provision of those services is a function of the authority. The possibility of bringing particular

contractors or kinds of contractors under the Act is also currently being considered by government here.

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