ARTICLE 19

GLOBAL CAMPAIGN FOR FREE EXPRESSION

MEMORANDUM

on the

Law Commission of the Republic of Bangladesh Working Paper on the Proposed Right to Information Act 2002

by

ARTICLE 19
Global Campaign for Free Expression

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I. Introduction

This Memorandum analyses the Working Paper on the Proposed Right to Information Act 2002 ("Working Paper"), prepared by the Law Commission of the Republic of Bangladesh and being circulated for public comment. The Working Paper was produced in early 2002 and underwent limited circulation for comment. It was circulated more widely in due course and ARTICLE 19 obtained a copy in late 2003. The Working Paper provides both narrative discussion on the main issues to be dealt with by a freedom of information act and also provides specific drafting suggestions. Our comments relate to these, understood as a single set of proposals.

ARTICLE 19 welcomes this initiative as a positive step to advance freedom of expression and information in Bangladesh. The Working Paper addresses many of the key issues and elements needed in an effective freedom of information law, including an obligation on government bodies actively to publish information about their activities and decisions, procedures for accessing information held by both government and private bodies, a right to appeal any refusals to disclose information, and a system of sanctions for intentional contravention of the law.

There are, however, some omissions and weaknesses that we recommend be addressed. For instance, any access to information law should supersede secrecy legislation, to the extent of any inconsistency, and this paramount status should be provided for explicitly in the legislation. Additionally, the regime of exceptions to disclosure should be subject to a public interest override clause. The Working Paper also fails to establish guarantees for the independence of the appeals tribunals. Finally, the Working Paper fails to provide for protection for whistleblowers, as well as for those who disclose information in good faith pursuant to the access to information law. We detail these and other concerns below.

This Memorandum analyses the proposals set out in the Working Paper against two key ARTICLE 19 publications in this area, *The Public's Right to Know: Principles on Freedom of Information Legislation* (the ARTICLE 19 Principles)[1] and *A Model Freedom of Information Law* (the ARTICLE 19 Model Law).[2] The former sets out principles based on international and comparative best practice and has been endorsed by, among others, the UN Special Rapporteur on Freedom of Opinion and Expression.[3] The latter translates these principles into legal form.

II. International and Constitutional Obligations

II.1 Freedom of Expression

The Introduction to the Working Paper sets out the relevant legal bases, under both national and international law, for the right to information – namely Article 19 of the *Universal Declaration of Human Rights* (UDHR),[4] Article 19 of the *International Covenant on Civil and Political Rights* (ICCPR),[5] ratified by Bangladesh in September 2000, and Article 39 of the Constitution of Bangladesh.

Article 19 of the *Universal Declaration of Human Rights* (UDHR),[6] a UN General Assembly resolution, binding on all States as a matter of customary international law, sets out the fundamental right to freedom of expression in the following terms:

> 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 regardless of frontiers.

The *International Covenant on Civil and Political Rights* (ICCPR),[7] a formally binding legal treaty guarantees the right to freedom of opinion and expression also at Article 19, in terms very similar to the UDHR. By ratifying the ICCPR, State Parties agree to refrain from interfering with the rights protected therein, including the right to freedom of

[1] (London: ARTICLE 19, 1999). Available at: http://www.article19.org/docimages/512.htm.
[2] (London: ARTICLE 19, 2001). Available at: http://www.article19.org/docimages/1112.htm.
[3] Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/2000/63, , 18 January 2000, para. 43.
[4] UN General Assembly Resolution 217A(III), 10 December 1948.
[5] Adopted and opened for signature, ratification and accession by UN General Assembly Resolution 2200A (XXI), 16 December 1966, entered into force 3 January 1976.
[6] UN General Assembly Resolution 217A(III) of 10 December 1948.
[7] UN General Assembly Resolution 2200A(XXI) of 16 December 1966, in force 23 March 1976.

expression. However, the ICCPR also places an obligation on State Parties to take positive steps to ensure that rights, including freedom of expression and information, are respected. Pursuant to Article 2 of the ICCPR, States must "adopt such legislative or other measures as may be necessary to give effect to the rights recognized by the Covenant." This means that States must create an environment in which a diverse, vigorous and independent media can flourish, and provide effective guarantees for freedom of information, thereby satisfying the public's right to know.

Freedom of expression is also guaranteed by the three regional human rights treaties, the *African Charter on Human and Peoples' Rights*,[8] the *American Convention on Human Rights*[9] and the *European Convention on Human Rights*.[10]

II.2 Freedom of Information

In the earlier international human rights instruments, freedom of information was not set out separately but included as part of the fundamental right to freedom of expression. Freedom of expression, as noted above, includes the right to seek, receive and impart information. Freedom of information, including the right to access information held by public authorities, is clearly a core element of this right. There is little doubt as to the importance of freedom of information. The United Nations General Assembly, at its very first session in 1946, adopted Resolution 59(I), which states:

> Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the UN is consecrated.[11]

The right to freedom of information as an aspect of freedom of expression has repeatedly been recognised by the UN. The UN Special Rapporteur on Freedom of Opinion and Expression has provided extensive commentary on this right in his Annual Reports to the UN Commission on Human Rights. In 1997, he 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."[12] His commentary on this subject was 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."[13] In his 1998 Annual Report, the Special Rapporteur declared that freedom of information includes the right to access information held by the State:

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[8] Adopted at Nairobi, Kenya, 26 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986.
[9] 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.
[10] Adopted 4 November 1950, E.T.S. No. 5, entered into force 3 September 1953
[11] Adopted 14 December 1946.
[12] 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.
[13] Resolution 1997/27, 11 April 1997, para. 12(d).

> [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…."[14]

In 2000, the Special Rapporteur provided extensive commentary on the content of the right to information as follows:

- 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;

- 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

[14] 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, para. 14.

> a legal obligation, a miscarriage of justice, corruption or dishonesty or serious failures in the administration of a public body.[15]

Once again, his views were welcomed by the Commission on Human Rights.[16]

In November 1999, the three special mandates on freedom of expression – the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression – came together for the first time in November 1999 under the auspices of ARTICLE 19. They adopted a Joint Declaration which included the following statement:

> Implicit in freedom of expression is the public's right to open access to information and to know what governments are doing on their behalf, without which truth would languish and people's participation in government would remain fragmented.[17]

The right to freedom of 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.[18] The Principles unequivocally recognise freedom of information, including the 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.

The African Commission on Human and Peoples' Rights recently adopted a Declaration of Principles on Freedom of Expression in Africa,[19] Principle IV of which states, in part:

> 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;

[15] Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, note 3, para. 44.
[16] Resolution 2000/38, 20 April 2000, para. 2.
[17] 26 November 1999.
[18] 108th Regular Session, 19 October 2000.
[19] Adopted at the 32nd Session, 17-23 October 2002.

- 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.[20] 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. Of particular interest in Principle IV, which states:

> **IV. Possible limitations to access to official documents**
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> 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;
> 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.[21]

The Commonwealth, of which Bangladesh is a member, has recognised the fundamental importance freedom of information on a number of occasions. As far back as 1980, the Commonwealth Law Ministers declared in the Barbados Communiqué that, "public participation in the democratic and governmental process was at its most meaningful when citizens had adequate access to official information."[22]

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[20] Recommendation No. R(2002)2, adopted 21 February 2002.
[21] *Ibid.*
[22] See:
http://www.humanrightsinitiative.org/programs/ai/rti/international/cw_standards/communique/default.htm.

More recently, the Commonwealth has taken a number of significant steps to elaborate on the content of that right. In March 1999, the Commonwealth Secretariat brought together a Commonwealth Expert Group to discuss the issue of freedom of information. The Expert Group adopted a document setting out a number of principles and guidelines on the right to know and freedom of information as a human right, including the following:

> Freedom of information should be guaranteed as a legal and enforceable right permitting every individual to obtain records and information held by the executive, the legislative and the judicial arms of the state, as well as any government owned corporation and any other body carrying out public functions.[23]

These principles and guidelines were adopted by the Commonwealth Law Ministers at their May 1999 Meeting in Port of Spain, Trinidad and Tobago. The Ministers formulated the following principles on freedom of information:

> 1. Member countries should be encouraged to regard freedom of information as a legal and enforceable right.
> 2. There should be a presumption in favour of disclosure and Governments should promote a culture of openness.
> 3. The right of access to information may be subject to limited exemptions but these should be narrowly drawn.
> 4. Governments should maintain and preserve records.
> 5. In principle, decisions to refuse access to records and information should be subject to independent review.[24]

The Law Ministers also called on the Commonwealth Secretariat to take steps to promote these principles, including by assisting governments through technical assistance and sharing of experiences.

The Law Ministers' Communiqué was considered by the Committee of the Whole on Commonwealth Functional Co-operation whose report, later approved by the Heads of Government,[25] stated:

> The Committee took note of the Commonwealth Freedom of Information Principles endorsed by Commonwealth Law Ministers and forwarded to Heads of Government. It recognized the importance of public access to official information, both in promoting transparency and accountable governance and in encouraging the full participation of citizens in the democratic process.[26]

As discussed in the Working Paper, international law recognises that the right to information is not absolute. However, restrictions on it must be narrowly circumscribed. Specifically,

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[23] Quoted in *Promoting Open Government: Commonwealth Principles and Guidelines on the Right to Know*, background paper for the Commonwealth Expert Group Meeting on the Right to Know and the Promotion of Democracy and Development (London: 30-31 March 1999).
[24] *Communiqué*, Meeting of Commonwealth Law Ministers (Port of Spain: 10 May 1999).
[25] The *Durban Communiqué* (Durban: Commonwealth Heads of Government Meeting, 15 November 1999), para. 57.
[26] *Communiqué*, Commonwealth Functional Co-operation Report of the Committee of the Whole (Durban: Commonwealth Heads of Government Meeting, 15 November 1999), para. 20.

any restriction on the right must meet a strict three-part test. This test, which has been confirmed as applying generally to freedom of expression (of which freedom of information is an essential component part) by both the UN Human Rights Committee[27] and a number of national and international courts,[28] requires that any restriction must be provided by law, be for the purpose of safeguarding a legitimate interest, and be 'necessary' to secure this interest.

Critical to an understanding of this test in the specific context of freedom of information is the meaning of "necessary". At a minimum, a restriction on access to information is "necessary" for securing a legitimate interest only if (1) disclosure of the information sought would cause substantial harm to the interest and (2) the harm to the interest caused by disclosure is greater than the public interest in disclosure.[29]

National freedom of information laws have been adopted in record numbers over the past ten years in a number of countries, some of 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 countries 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 freedom of information laws to over 55. 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 freedom of information law, Bangladesh would join a long list of nations which have already taken this important step towards guaranteeing this important right.

II.3 Constitutional Guarantees

As noted above, Article 39 of the Constitution of the People's Republic of Bangladesh guarantees freedom of expression in the following terms:

> (1) Freedom or thought and conscience is guaranteed. Freedom of thought and conscience, and of speech.
> (2) Subject to any reasonable restrictions imposed by law in the interests of 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-
> (a) the right of every citizen of freedom of speech and expression; and
> (b) freedom of the press, are guaranteed.

III. Detailed Analysis of the Working Paper

This section analyses the Law Commission's proposals as contained in the Working Paper, and makes recommendations and suggestions for improvement throughout.

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[27] For example, in *Laptsevich v. Belarus*, 20 March 2000, Communication No. 780/1997.
[28] For example, the European Court of Human Rights' decision in *Goodwin v. United Kingdom*, 27 March 1996, Application No. 17488/90.
[29] See ARTICLE 19 Principles, Principle 4.

III.1 Definitions

The Working Paper proposes that the obligation of openness apply to registered non-governmental organisations (NGOs) in light of the increasing privatisation in Bangladesh and the expanding activities assumed by NGOs.

Paragraph 14 of the Working Paper states that the law will apply to information in the possession of:

> (a) the government or a local or other authorities established by an Act or Ordinance,
> (b) a company, corporation, trust, firm, society, a cooperative society, or associations, whether owned or controlled by the government or private individuals and institutions, registered with the government under any law for the time being in force.

Paragraph 15, which sets out the proposed "Definitions" section of the law essentially repeats this provision.

ARTICLE 19 welcomes as positive the extension of freedom of responsibility to private bodies as well as to public ones. However, we are of the view that the definition of "Public Authority" needs further clarification and that there may be problems with simply applying the information obligations of public bodies to a wide range of private bodies.

First, the scope of the definition of a public authority could be interpreted unduly narrowly. For instance, it is not clear whether all elected bodies are included, along with statutory and constitutional bodies, and the judiciary. The ARTICLE 19 Principles recommend that the definition of 'public body' should:

> …focus on the type of service provided rather than on formal designations. To this end, it should include all branches and levels of government including local government, elected bodies, bodies which operate under a statutory mandate, nationalised industries and public corporations, non-departmental bodies or quangos (quasi non-governmental organisations), judicial bodies, and private bodies which carry out public functions (such as maintaining roads or operating rail lines). Private bodies themselves should also be included if they hold information whose disclosure is likely to diminish the risk of harm to key public interests, such as the environment and health.[30]

Second, if the law is to apply to privately controlled bodies, then it is unclear why this is restricted only to bodies registered with the government (that is, NGOs) and does not include all private bodies. The definition suggested above would already include any private bodies undertaking public functions but many NGOs do not do this, while many profit-making private bodies do undertake public functions. Furthermore, careful consideration needs to be given to the issue of including private bodies that do not undertake public functions. While some disclosure obligations for these bodies is desirable, at the same time they should not be subject to the full range of obligations placed on private bodies.

[30] Principle 1.

The definitions section of the proposed law (paragraph 15 of the Working Paper) defines "Information" and the "Right to information" in relatively broad and inclusive terms. However, the definition of information is limited to material "relating to" the affairs of government, etc. This is an unreasonable limitation as much information held by public authorities does not related to their affairs but should, as with all such information, be subject to disclosure. It may be noted that freedom of information laws in democratic countries normally cover all information held by public bodies, consistent with the underlying rationale for such laws, namely that public bodies do not hold information for themselves but rather on behalf of the public.

Recommendations:

- The Working Paper should provide for a clear, expansive definition of public body along the lines suggested above.
- If private bodies are sought to be included within the scope of the law, careful consideration should be given to deciding which bodies should be covered and what obligations should be placed on them.
- The definition of information should cover all information held by public authorities, rather than just information relating to their functions.

III.2 Access Procedure and Fees

The proposed procedure for accessing information is set out in paragraph 18 of the Working Paper. According to this procedure, citizens desiring access must submit a form purchased from the relevant public authority, detailing the particulars of the information sought and the manner in which access is desired, such as a photocopy, inspection in person and so on. The public authority has 15 days to provide the information or ten days to provide reasons for a refusal to grant access.

This access procedure could be improved in a number of respects. First, the right to information belongs to all people and consequently the ability to access information should not be restricted to citizens of Bangladesh, as suggested by the Working Paper. Furthermore, the law should not be restricted in scope to individuals but should benefit all legal persons. Indeed, some of the most common users in established freedom of information regimes include businesses, political parties, NGOs and so on.

Second, ARTICLE 19 is of the view that requests for information should not be subject to overly stringent formal requirements. When submitting an application, it should be sufficient that the applicant provide his or her contact details and sufficient particulars regarding the information requested so that it can be located. If each public authority is permitted to design its own form – as envisaged by the Working Paper – this may act as an obstacle to the exercise of the right to information. We also consider that it is inappropriate for public authorities to charge a fee for forms, a practice that is not imposed in other countries. Fees may be charged for the release of information, but only to cover the administrative costs of reproducing the information. The Working Paper should also contemplate that requests be submitted by email and also orally where there is no question of an exception applying and the information can be provided forthwith.

Third, 15 days may in some exceptional circumstances be too short a time for public authorities to respond to an information request, particularly if the request pertains to a large number of documents. The law should provide a mechanism whereby public authorities may, under certain limited circumstances and upon notice to the applicant, extend the deadline by a certain number of days. The number of extensions should be limited, however, and failure to provide either the information or a reason for a refusal within the extended time period should be treated by the law as a deemed refusal.

Fourth, refusals should be required to be communicated to the applicant in writing and a failure to respond within the regular time-period should be treated as a deemed refusal.

Recommendations:

- The freedom of information law should apply to all legal persons and not just to "citizens".
- Formalities for submitting information requests should be kept to a minimum – requiring only the applicant's name, contact details, and sufficient details about the information sought to facilitate its location – and fees should not be imposed just to get an application form.
- The Law Commission should consider allowing requests to be made by email, orally or by other appropriate means.
- Public authorities should be permitted to extend, where necessary, the amount of time needed to satisfy an information request, for example by another 15 days. At the same time, failure to provide the information or a refusal within the time period should be treated as a deemed refusal.
- Refusals and the reasons therefore should be required to be communicated to the applicant in writing.

III.3 Regime of Exceptions

It is well established that the right to information requires that all individual requests for information from public bodies must be met unless the public body can demonstrate that the information requested falls within the scope of a limited regime of exceptions. One of the most problematic issues for any freedom of information law is how to balance the need for exceptions and yet prevent those exceptions from undermining the very purpose of the legislation.

Under international law, freedom of information, like freedom of expression, may be subject to restrictions, but only where these restrictions can be justified through strict tests of legitimacy and necessity. International and comparative standards, including the ARTICLE 19 Principles, have established that a public authority may not refuse to disclose information unless it can show that the information meets the following strict three-part test:

- the information must relate to a legitimate aim listed in the law;
- disclosure must threaten to cause substantial harm to that aim; and

- the harm to the aim must be greater than the public interest in having the information.[31]

The first part of this test requires that a complete list of the legitimate aims that may justify non-disclosure should be provided in the access to information law; no other aims may be relied on to deny access. The second part of this test requires that the public authority demonstrate that disclosure would cause substantial harm to the legitimate aim. It is not enough for the information simply to fall within the scope of the legitimate aim, for example, be related to national security. Instead, the public authority must also show that disclosure of the information would harm that aim. Otherwise, there is simply no justification not to disclose information in the absence of a risk of harm.

The third part of the test requires a balancing exercise to assess whether the risk of harm to the legitimate aim from disclosure is greater than the public interest in accessing the information (this is often called the public interest override). If, taking into account all the circumstances, the risk of harm from disclosure is greater than the public interest in accessing the information, then the information may legitimately be withheld. This might not, however, be the case, for example where the information, while representing an invasion of privacy, also reveals serious corruption. It is implicit in the three-part test that exceptions to the right to information always be considered on a case-by-case basis.

Furthermore, exceptions should be subject to strict overall time limits, for example of 5 or 10 years, depending on the nature of the information. This is particularly important for those exceptions which protect general public interests, such as national security and the integrity of public decision-making processes.

Most of the grounds set out in the Working Paper for refusing to disclose information are uncontroversial.[32] Nonetheless, a few are problematic. For instance, preventing the premature dissemination of information related to taxes, duties of customs and excise, currency, exchange or interest rates, or the regulation of financial institutions, serves no additional aim beyond protecting a government's ability to manage the economy – which is already established as a ground for refusal of access.

The harm test for refusing access may be too lax. The first five exceptions to disclosure provided for in paragraph 19 of the Working Paper (section 7 of the proposed law) state that access may be denied if disclosure would "prejudicially affect" or "prejudice" the protected interest. ARTICLE 19 recommends that disclosure be required to pose a serious likelihood of "substantial harm" before a public body may refuse to disclose that information. This is a higher standard than causing prejudice to an interest, since "prejudice" may have a much wider interpretation, contrary to the requirement that exceptions be as narrow as possible.

Furthermore, the law should provide for a public interest override so that disclosure of otherwise restricted information is nonetheless required when this serves the general

[31] Note **Error! Bookmark not defined.**, Principle 4.
[32] Paragraph 19 of the Working Paper.

public interest. In our experience, a public interest override is crucial to the effective functioning of a freedom of information regime. It is simply not possible to envisage in advance all of the circumstances in which information should still be disclosed, even if this might harm a legitimate interest, and to address these through narrowly drafted exceptions or exceptions to exceptions. The relevant provision in the ARTICLE 19 Model Law provides:

> Notwithstanding any provision in this Part, 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.[33]

The question of the relationship between a freedom of information law and existing secrecy laws is an important one. The Working Paper sets out all the legislative provisions currently in force in Bangladesh that prohibit access to information which, according to the Law Commission, "are reasonable restrictions for the sake of security of the state, privacy of the citizen and good governance."[34] The Working Paper also sets out the existing laws that promote access to information, such as the Civil Rules and Orders Volume I, and the Parliamentary Rules of Procedure.

The Working Paper states: "It is necessary and appropriate to bring the subject of right of access to information under a legal regime". It is not, however, clear what relationship is being suggested between the proposed law and the secrecy provisions identified. It would appear that the proposal is for these secrecy laws to remain in force, with superior effect to the freedom of information law. Paragraph 14 of the Working Paper states that "a provision may be incorporated in the proposed Act to the effect that the proposed Act shall be applicable subject to the provisions of the prevalent restrictive laws."

This is contrary to best international practice, which provides that secrecy laws should, to the extent of any inconsistency, give way to the freedom of information law. The rational for this is clear: the freedom of information law is based on an assumption of public openness, whereas most secrecy laws were drafted in a different era, when openness was not a priority. The regime of exceptions in the freedom of information law should be comprehensive, so that every legitimate ground for secrecy is listed, but its extension by secrecy laws should not be permitted. At the minimum, as stated in the ARTICLE 19 Principles, the freedom of information law should:

> …require that other legislation be interpreted, as far as possible, in a manner consistent with its provisions. Where this is not possible, other legislation dealing with publicly-held information should be subject to the principles underlying the freedom of information legislation.[35]

Recommendations:

- Exceptions to disclosure should be subject to overall time limits in accordance with the comments above.

[33] Note 2, section 22.
[34] Page 5, para.8 of the Working Paper.
[35] Principle 8.

- The specific exception in favour of the premature dissemination of information regarding taxes, duties of customs and excise, currency, exchange or interest rates, or the regulation of financial institutions should be removed from the proposed law.
- All of the exceptions recognised should be subject to a showing that disclosure would pose a serious likelihood of substantial harm to the protected interest, rather than just a showing of prejudicial effect.
- All exceptions should be subject to a public interest override, as described above.
- The right to information law should explicitly override any other laws that prohibit access to information to the extent of any inconsistency.

III.4 Appeals to Information Tribunals

The Working Paper calls for the establishment, in each district, of an Information Tribunal that will function as the court of first instance for adjudicating any disputes under the proposed law (paragraph 20(b)). There will be a further and final level of appeal from the first Tribunal to an Information Appellate Tribunal, presided over by one judge. No one may be appointed as a judge of a Tribunal unless he or she has already served as a District Judge. To be appointed to the Appellate Tribunal, a judge must be qualified to be a judge of the Supreme Court. A 15-day period is established for appeals to the Appellate Tribunal.

While ARTICLE 19 welcomes the creation of an administrative body responsible for reviewing refusals to disclose information, we have a number of problems with the proposed system.

First, although judges are generally presumed to be independent, there is no specific guarantee of the independence of either of the Tribunals. Proper implementation of the right to information requires that the body responsible for overseeing the system be independent of government influence.

Second, and consistent with practice in a number of different countries, the process for deciding upon requests for information should be specified at three different levels: "within the public body; appeals to an independent administrative body; and appeals to the courts."[36] Although the proposed law creates the post of Designated Officer – a person within the public authority responsible for handling information requests – there is no provision for an internal appeal.

The 15-day period specified in the proposed law for lodging a final appeal may not provide potential appellants with enough time to assess their legal or financial capacity to undertake such an appeal.

Finally, both levels of tribunal are granted wide investigative powers (proposed sections 15(3) and 19(2)) but there is no mention of the power to actually see the information the disclosure of which is at issue. In order to determine whether the refusal to disclose

[36] *Ibid.*

information can be justified under the regime of exceptions, the presiding judge should have access to the record(s) at issue.

Recommendations:

- The Law Commission should amend the proposals for adjudicating disputes in line with the following:
    - the independence of the tribunals should be explicitly provided for in the proposed law;
    - a first level of internal appeal should be available;
    - potential appellants should be granted more than 15 day to file an appeal with the final Appellate Tribunal; and
    - the Tribunals should have access to the information at issue in the dispute.

III.5 Sanctions

Paragraph 20 of the Working Paper defines offences under the law, as well as the sanctions – fines and/or imprisonment – that may be imposed for committing an offence. The law envisages that either the Designated Officer, or the head of the office or sub-office will be personally responsible for violations. For instance, a failure to publish information may result in the imposition of a Taka 10,000 fine (US$170) on those individuals.

ARTICLE 19 is of the view that, absent a deliberate intent to obstruct access to information, individuals should not be singled out for fines and other penalties, as this can lead to scapegoating within an institution. Rather, the relevant public authority should bear responsibility as an entity. Wrongful intent is a requirement of only two of the five offences listed in the Working Paper.

Recommendation:

- Absent a specific intent to obstruct access to information, individual employees should not be responsible for violations of the law. Instead, responsibility for violations and for paying penalties should lie with the relevant public authority.

III.6 Omissions and Miscellaneous Provisions

There are a number of important elements missing from the Working Paper's proposals, each of which is discussed in turn below.

Whistleblower Protection

The law should provide protection for individuals who release information on official wrongdoing – known as "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 of 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.[37]

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 train relevant employees within public authorities and to promote the idea of freedom of information, both within government and in society-at-large. Possible activities in this regard include:

- training public authority employees 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.

Ideally, these tasks should be undertaken by the public authorities themselves, as well as by an independent oversight body with specific responsibility for ensuring adequate attention and resources are directed towards these important tasks.

Severability

If a document contains a mix of information, some of which is captured by an exception, and some of which is subject to disclosure, the Designated Officer or other responsible individual within the public authority should, to the extent reasonably possible, disclose the non-exempt material.

[37] The Article 19 Principles, Principle 9.

Obligation to Publish

ARTICLE 19 commends the imposition of an obligation to maintain records and an obligation to publish certain key documents on public authorities (paragraphs 16 and 17 of the Working Paper).

We would recommend, however, the addition of two categories of documents which public authorities should have a duty to publish, namely: information on any requests, complaints or other actions taken by the public in relation to the public authority; and guidance on processes by which members of the public may influence policy-making or decision-taking by the public authority.[38]

Recommendations:

- Whistleblowers and those who disclose information pursuant to a request under the law should be protected against sanction, under the conditions described above.
- The law should provide for training programmes for those employees, such as Designated Officers, charged with duties under the law, as well as for public education about the new law. Responsibility for this should be placed on public authorities but also on an independent administrative body specifically designated for this purpose.
- The law should provide for the disclosure of severable information.
- An enhanced obligation to publish should be imposed on public authorities, as described above.

[38] The ARTICLE 19 Principles, Principle 2.