

Issues Regarding Freedom of Information Legislation for Small States – Policy Paper*

COMMONWEALTH SECRETARIAT

Introduction

1. An individual's right to request and receive information is crucial in promoting and sustaining transparency and accountability within government. Inefficiency, corruption and abuse of power by governments are continuing imperatives in the growing recognition of the need for freedom of information (FOI) legislation in international law.
2. Research indicates that FOI laws improve how government bodies work. Decisions that are made with awareness that they will eventually be disclosed to the public are more likely to be based on objective and justifiable reasons. FOI will also enhance freedom of the press by enabling journalists to have access to government information. All of the above is beneficial to governments as openness and transparency in the decision-making process is likely to improve public confidence in government actions and thereby enhance democratic processes.
3. The Commonwealth is relying on free markets to hasten economic development. Foreign and local investors depend on the regular availability of timely and accurate information about government policies, the operation of regulatory authorities and financial institutions, and the criteria used to award tenders, provide licenses and give credit. Creating an enabling legal environment for investors to access information will create long-term investor confidence, which will in turn encourage economic growth.
4. A guaranteed right to access to information acts as a practical deterrent to corruption, which remains a significant impediment to economic growth and good governance in many Commonwealth states. It is significant that countries with access to information laws are perceived to be the least corrupt and this correlation is reflected in Transparency International's Annual Corruption Perceptions Index, which in 2003 indicated that no fewer than nine of the 10 least corrupt countries had access to information legislation.
5. At least 80 countries have now adopted constitutional provisions that provide for a right of access. Nearly 70 countries around the world have adopted national laws on FOI, and 13 of those are Commonwealth states. Unfortunately, too few of these are small states.

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International Instruments and Freedom of Information

6. There are, to date, no mandatory international obligations on governments to give effect to an individual's right to access information. However there are several international instruments that recognize both the citizen's right to freedom of expression and FOI. Moreover, these instruments encourage governments to give legislative effect to those rights.

Article 19 of the Universal Declaration of Human Rights

7. The concept of FOI is founded in human rights law and has developed from the basic right to freedom of opinion and expression as enshrined in Art 19 of the Universal Declaration of Human Rights.

8. Article 19 states: 'Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers'.

Article 19 of the International Covenant on Civil and Political Rights

9. Article 19 is reaffirmed and expanded upon in the International Covenant on Civil and Political Rights of 1996, the European Convention on Human Rights, the African Charter on Human and People's Rights, and the inter-American Convention on Human Rights.

10. Since the signing of the Charter of the United Nations, human rights have become part of customary international law. Certain human rights have become 'supra-positive' rights from which no derogation is possible under any circumstances. While freedom of information does not fall within this category, it has assumed greater importance in the modern world with the increasing democratisation of states and the growing recognition that public participation in the democratic process is integral to sustainable development.

11. In 1993, the United Nations Commission on Human Rights appointed a Special Rapporteur on Freedom of Opinion and Expression. The Special Rapporteur unequivocally clarified that freedom of information under Art 19 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'. In 2000, the Special Rapporteur endorsed a set of principles on freedom of information as both an essential part of freedom of speech and as an important human right on its own. These principles were noted by the United Nations Commission.

The African Union Declaration of Principles: Part IV

12. The African Charter on Human and Peoples' Rights, signed by all 19 of the Commonwealth's African member states, recognizes the citizen's right to receive information. In 2002, the African Union's African Commission on Human and Peoples' Rights adopted the Declaration of Principles on Freedom of Expression in Africa and reiterated that 'public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information'.

The Council of Europe's Recommendation 2002 (2)

13. The most authoritative international text on accessing official documents held by public bodies is the Council of Europe's Recommendation 2002 (2) on the Right of Access to Official Documents, which sets out clear minimum standards for government transparency.

14. The scope of this recommendation concerns only official documents held by public authorities. It adds, however, that member states should examine, in the light of their domestic law and practice, to what extent the principles of this recommendation could be applied to information held by legislative bodies and judicial authorities.

15. The recommendation declares a 'general principle on access to official documents', which states:

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.

16. The Recommendation goes on to set out the possible limitations to access. These limitations are commonly expressed as exemptions in FOI legislation throughout the world. Examples of such exemptions include: national security, the prevention, investigation and prosecution of crimes and documents pertaining to court proceedings.

The Commonwealth Secretariat – Development of Commonwealth Freedom of Information Principles

17. The Harare Declaration of 1991 formed the basis for the development of the Commonwealth Principles and Guidelines on the Right to Know. The principles laid down in this Declaration include the promotion of democracy, the rule of law, just and honest government and fundamental rights, including the right to information.

18. At their meeting in 1998, Senior Officials of Commonwealth Law Ministries gave further recognition to the importance of freedom of information legislation in promoting good governance by endorsing a proposal for a Commonwealth-wide process to develop common standards of law and practice relating to a citizen's right to know. It was envisaged that this process would involve a Commonwealth-wide consultation to share model legislation and experiences.

19. It was on this basis that an Expert Working Group on the Right to Know and the Promotion of Democracy and Development was convened in 1999. The Group's mandate was to establish good practice guidelines and recommendations regarding relevant legislation and methods of implementation based on experience within and outside the Commonwealth.

20. The Group developed and published the Commonwealth Principles and Guidelines on the Right to Know. It submitted these Principles and Guidelines to the Law Ministers Meeting in Trinidad in 1999, and submitted to Law Ministers that they be forwarded to Commonwealth Heads of Government for consideration at their summit in South Africa in November 1999.

21. On the basis of the Expert Working Group's recommendations, Commonwealth Law Ministers adopted the Commonwealth Freedom of Information Principles, which were

less comprehensive than the principles and guidelines submitted by the Expert Group. The Guidelines recommended by the Expert Group focused on ensuring that appropriate administrative provisions were put in place in order to facilitate effective implementation.

Commonwealth Freedom of Information Principles (1999)

- Member countries should be encouraged to regard FOI as a legal and enforceable right.
- There should be a presumption in favour of maximum disclosure and governments should promote a culture of openness.
- The right of access to information may be subject to limited exemptions, but these shall be drawn narrowly.
- Governments should maintain and preserve records.
- In principle, decisions to refuse access to records and information should be subject to independent review.

22. These Principles were noted by the Commonwealth Heads of Government Meeting in 1999, where Heads of Government 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.

23. It was on the basis of the Commonwealth Freedom of Information Principles that the Commonwealth Secretariat developed model laws on Freedom of Information and Privacy and Protection of Personal Information. The Secretariat undertook the preparatory research and wrote the drafting instructions for the model laws. The primary resources used were: South Africa's Promotion of Access to Information Act, the Freedom of Information Act of Trinidad and Tobago, the Belize Freedom of Information Act, the Australia Freedom of Information Act, the Canada Access to Information Act and the Ireland Freedom of Information Act. Significantly, the Bill does not establish an office of Information Commissioner, as the prevailing view was that such an office would be unsustainable in small island states or developing countries where human resources were often limited.

Freedom of Information Implementation in Commonwealth States

24. Thirteen Commonwealth states have passed FOI legislation, and Bills are pending in more than 20 others. A number of countries enshrine the right of access to government-held information in their constitutions. Seychelles, New Zealand and South Africa are examples of Commonwealth states whose constitutions explicitly guarantee the right to access and receive information.

25. The vast majority of constitutions guarantee the right of freedom of expression and thought. In Sri Lanka, this freedom has been extended to FOI although no subsidiary legislation on it has been enacted. The Constitutions of Fiji and Papua New Guinea provide for FOI but no legislation establishing procedures by which a citizen can access official information exists.

26. There are other constitutions that only enshrine guarantees of freedom of expression without expressly articulating the guarantee of freedom of expression. However, many national courts are increasingly interpreting this guarantee as including the right to freedom of information. Freedom of expression pre-supposes the availability of adequate information to inform opinions. Therefore there is a close relationship between this right and the right to access information. However, despite the nexus, there is a conceptual distinction and it is clearly preferable to have a specific constitutional right guaranteeing freedom of expression.

27. The 1996 Constitution of South Africa has broken new ground by guaranteeing a right of access to information held not only by the government but also by private bodies, and it imposes both positive (to guarantee access) and negative (not to arbitrarily interfere with access) obligations on the state.

28. South Africa's Promotion of Access to Information Act 2000 reflects this specific constitutional right. Further, it has some of the most progressive features of any law in the world in that it allows for access to records held by private bodies if they affect an individual's rights. However, implementation has in some respects, been impeded by lack of funding and poor administration.

29. Freedom of Information Acts in Australia, New Zealand and Canada have been operating for a considerable period of time. Therefore, these countries are now able to evaluate the strengths and weaknesses of their respective regimes. They have also acted and continue to act as useful precedents for other jurisdictions, including small states, intending to implement similar legislation.

30. The Commonwealth Secretariat is currently collaborating with the Government of Swaziland on the drafting and implementation of a freedom of information law.

Data protection regimes

31. Data protection and FOI are usually seen as complementary rights in modern democracies. If there is to be concurring data protection and FOI legislation in force, a lot will depend on a clear delineation and linkage between the two laws. Given the linkage, it is preferable if the two regimes fall under the responsibility of a single agency with a combined remit. This is the case in the United Kingdom where the Data Protection Act and the Freedom of Information Act are regarded as complementary and therefore combined under the Office of the Information Commissioner.

32. Australia and New Zealand also have privacy and data protection regimes in addition to a Freedom of Information Act regime. Other Commonwealth states have striven to have an all-inclusive Freedom of Information Act regime, such as Trinidad and Tobago's Freedom of Information Act – which includes provisions that permit access to personal data and the right of correction, albeit not in detail.

Commonwealth Secretariat activity in specific states

Asia and Pacific region.

33. In December 2004, the Legal & Constitutional Affairs Division (LCAD) of the Commonwealth Secretariat convened a workshop on access to information for the Asia and Pacific Regions.

34. The workshop was significant in that it provided an opportunity for members of the Commonwealth to collectively review the value and relevance of the Commonwealth Model Laws on Freedom of Information and Data Protection and Privacy from a regional perspective.

35. The workshop considered the essential elements of the model bills and formulated conclusions and recommendations taking into account regional circumstances. Significant recommendations in relation to FOI included the following:

- detailed comparisons of Commonwealth model and other Freedom of Information Acts – ‘best practice’ options and ideas;
- assistance with national workshops/process to aid further consideration;
- where legislation is in place, assistance with capacity building/training;
- assist with awareness-raising among lawmakers.

36. The workshop also made recommendations in relation to information privacy. In 2004, Malaysia, the venue for the workshop, emphasised that its priority was protection of information rather than freedom of information and it was in the process of drafting a Data Protection Bill. In Malaysia, the law governing personal data protection is the Personal Data Protection Bill 1998, which has yet to enter into force.

Swaziland.

37. As mentioned, the Justice Section of LCAD is currently collaborating with the Governance & Institutional Development Division on the drafting and implementation of access to information law in the Kingdom of Swaziland. This project was at the request of the Government of Swaziland and came out of recognition that there was a growing need for greater transparency and accountability in relation to government activities and decision-making processes.

38. The Justice Section’s role is to support this initiative by assisting government and stakeholders alike in both the drafting and implementation of this legislation. The scope of the work includes reviewing existing legislation with a view to drafting media and access to information laws within the context of the new constitutional dispensation. In order to achieve this end, consultations with relevant stakeholders have taken place, and this will continue until the Bill has been finalised in readiness for submission to Parliament. Members of the Justice Section have taken responsibility for facilitating these workshops. However, it is recognised that the people of Swaziland need to take ownership of the Bills. To that end, broad stakeholder representation is encouraged.

39. Swaziland has a new Constitution that codifies the citizen’s right to freedom of expression by virtue of s 24 of that Constitution. The right to access information is encompassed within this provision by way of s 24(2)(a) and (b). Section 24(2) states ‘A person shall not except with the free consent of that person be hindered in the enjoyment of the freedom of expression, which includes the freedom of the press and other media, that is to say –

- (a) freedom to hold opinions without interference;
- (b) freedom to receive ideas and information without interference;
- (c) freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons);’

It is planned that once the draft freedom of information Bill has been endorsed by all relevant stakeholders, it will then be submitted to Parliament.

The Pacific.

40. Common imperatives for enabling public access to information in Pacific Island countries include public concern about the misuse of public office, corruption, government secrecy and outdated legislation that impedes the disclosure of information which could expose such practices. It is also significant that, with the exception of Fiji and Papua New Guinea, Pacific countries do not have bodies to review outdated legislation.

41. While there has been little regional activity on FOI in the Pacific, in September 2005 the Commonwealth Parliamentary Association, in collaboration with the Commonwealth Human Rights Initiative and New Zealand Aid, held a workshop on FOI for parliamentarians, including government Ministers and senior parliamentary officials from seven Commonwealth Pacific Island countries. It was recognised by participants that public access to information would enhance economic and social development in the Pacific region, but that given the different needs and local conditions of each Pacific country, there could be no one single model imposed on the entire region.

42. At the conclusion of the workshop, representatives called on all the relevant Commonwealth bodies and international organizations to provide them with assistance in the drafting and implementation of FOI legislation.

43. It is unfortunate that, as yet, none of the Pacific Island countries have FOI legislation, although a number (Papua New Guinea, Fiji, Kiribati and Solomon Islands) have constitutional provisions for freedom of information. Overall there is a commitment by governments to transparency and accountability, but each has handled the FOI issue in accordance with developments in its own national and political circumstances, priorities and capacity.

44. In spite of the lack of specific activity in relation to the implementation of FOI legislation in the Pacific, there are current regional initiatives on good governance and transparency issues. The most significant of these initiatives is the Pacific Plan.

45. The Pacific Plan is a declaration by Pacific Island Forum leaders that identifies initiatives designed to enhance and stimulate economic growth, sustainable development, good governance and security for Pacific Island countries through regionalism. The Pacific Plan defines good governance as including 'the transparent, accountable and equitable management of all resources'.

46. As a direct response to the needs of Pacific Island countries, as embodied in the Pacific Plan, the Commonwealth Secretariat is currently developing a Commonwealth Pacific Governance Project (CPGP). Given that good governance is one of the pillars of the Pacific Plan, it was decided at a regional consultative meeting in May 2006 that the CPGP would focus on four governance themes, with one of those themes being access to information. The CPGP will be implemented over a five-year period.

47. It is envisaged that the CPGP will supplement and support similar regional initiatives without duplicating them. This will necessarily involve collaborative processes involving the Commonwealth Pacific Project, Pacific member countries, and a range of other development partners already engaged in the development of governance capacities in the Pacific Islands region.

48. The focus of this work will involve the development of a project design document based on a thematic framework agreed by Pacific Island countries. The task will necessarily involve consultations with selected Pacific Island countries, the Pacific Islands Forum Secretariat and donors for the purpose of identifying the specific areas of activities and corresponding modalities in relation to creating an enabling environment for citizens to access information.

49. It is already evident from in-country consultations that all Commonwealth member countries in the Pacific have highlighted one or all of the CPGP's thematic areas within their own development plans. The Commonwealth Secretariat recognises that development of this project involves identifying needs and activities in the context of national development plans as well as taking a more broad-brush regional approach to commonly shared problems.

50. It is recognized that there are common regional problems that potentially impede successful FOI implementation, the most significant being a lack of good information management at all levels of government. Imposing FOI legislation on very small jurisdictions that still face major information management challenges, even presuming it could gain political support, could serve to paralyse Pacific bureaucracies and put the cause of FOI back.

51. Another major impediment to FOI implementation in Pacific Island countries is that of human resources. Government departments are generally small and therefore expecting existing staff to undertake additional work and responsibilities is unrealistic.

52. Accordingly, Pacific governments have agreed in discussions with partners that implementation of access to information needs to be approached incrementally, starting with improving information management and expanding proactive disclosure as first steps towards recognizing Pacific Island countries' readiness for FOI regimes.

53. Such an approach is likely to manifest itself in the following phases:

- initial evaluation of current information systems (both manual and electronic) in member countries;
- providing good practice guidelines and training on records management;
- assisting member governments in the public promotion of access to information;
- obligating proactive disclosure of information amongst those bodies likely to be subject to a future FOI Bill; and
- selecting a limited class of organizations to which the future act applies.

To do otherwise is likely to create an unsustainable administrative and financial burden. Further, applying FOI too broadly may meet with political and official reluctance.

Conclusion and Recommendations

54. Law Ministers are invited to note:

- freedom of information is recognized as a fundamental human right;
- the public is only truly able to participate in the democratic process when it has information about the activities and policies of government;
- whilst there are no mandatory international obligations in relation to access to information, international conventions articulate and encourage governments to give effect to the right to freedom of expression and the right to access information – two distinct, but inextricably linked rights;

- the implementation of freedom of information legislation is a growing trend both universally and among Commonwealth jurisdictions;
- it is significant that few small states have implemented FOI legislation;
- FOI is considered a key tool in anti-corruption measures as reasons for awarding contracts and other financial transactions must be documented and justified; and
- monitoring of FOI implementation indicates that, whilst the effectiveness of these laws varies considerably, many countries now enjoy greater transparency – with the public sector having a greater awareness that their decisions and processes are subject to public scrutiny.

55. Law Ministers are invited to consider the following key issues pertaining to Freedom of Information legislation and implementation.

Adequate funding

56. The experiences of some states in relation to FOI implementation clearly demonstrate that, without adequate funding and the existence of effective and supportive mechanisms, even the best intended legislation can prove ineffectual. While putting the appropriate administrative and institutional mechanisms in place may be costly, it is imperative for effective implementation.

57. Public bodies subject to the act will have positive obligations in relation to proactively disclosing information. Further, FOI Officers (and/or dedicated staff) and employees at all levels of a given institution will require the necessary training in readiness for implementation. Ensuring both that information is published regularly and that staff are trained is likely to be both costly and time consuming.

58. Governments will also need to commit sufficient financial resources to the establishment and maintenance of good information systems as this is integral to effective implementation. This will involve training and awareness raising as well as possibly upgrading office technology.

59. Similarly, the establishment of an appeals and oversight body with the accompanying human and administrative resources required to effectively fulfil its functions will require adequate funding.

60. It is strongly suggested that the costs incurred by effective FOI implementation will be outweighed by the significant political and economic benefits. Country studies to date indicate that the guaranteed right to access information encourages investor confidence, which in turn fosters economic growth.

Proactive disclosure

61. The Council of Europe's Recommendation Rec (2), para XI states:

A public authority should, at its own initiative and where appropriate, take the necessary measures to make public information which it holds available when the provision of such information is in the interest of promoting the transparency of public administration and efficiency within administrations or will encourage informed participation by the public in matters of public interest.

Successful implementation of FOI legislation depends both on complying with information requests and in seeking ways of achieving greater openness through proactive disclosure. The more information that is actively put into the public domain proactively, the less information will be requested by the public.

62. Securing a steady flow of proactive release of information depends on a high level of awareness within a public body. As part of internal FOI training and awareness, officials within a body subject to FOI legislation should be encouraged to identify material for proactive disclosure. Any material of wider public interest that would contribute to public debate should be identified for the purpose of proactive disclosure.

63. Proactive disclosure can manifest itself in several ways including proactive releases, disclosure logs and publication schemes. The United Kingdom uses all three means of disclosing information. There should also be provision in the act to obligate organizations to regularly update the information.

64. It is suggested that FOI legislation should establish a basic minimum list of information that all bodies subject to the act must publish. The kind of information routinely published should ideally include matters such as: budgetary information, a directory of employees (and their income and assets), and information relating to procurement and policy-making.

Records management

65. Establishing good information systems is seen as a crucial preliminary step in the implementation of FOI legislation. Assisting small states in this respect is regarded as a priority. We see part of our role as equipping governments with the skills and resources to improve their information systems. The important relationship between effective records management and effective freedom of information is recognized. Many developing states have difficulty finding information and this seriously undermines the potential for freedom of information to work. There must be a record-keeping system in place that allows for the easy collection, indexing, storage and disposal of information.

66. Information systems to improve the speed, reliability and accountability of public-sector transactions and systems to share information across branches of government are critical for these transparency reforms to be effective and meaningful.

67. A new problem that has emerged in the past 10 years is how to handle electronic records. Governments are still struggling with setting rules on the organization and retention of electronic mail and files. A further problem is how to ensure access to those records in the future. As software evolves and changes, it will be necessary to develop common standards or keep old computer systems and software to ensure that disks and files can be read in the future. Recently, there has been an effort by a growing number of governments to adopt an open standard for documents to ensure that future generations will be able to access electronic files.

68. Access to information laws and implementation regulations should require public bodies to compile, maintain, and make public indexes and catalogues of the information that they hold. Such indexes and catalogues should list the titles of classified documents – that is, documents exempted from disclosure to the public – in order to facilitate public criteria used to classify documents.

Involvement of civil society

69. Civil society has played a significant role in encouraging the public to demand the right to information. It has not only advocated the benefits of FOI to the citizen, but it has also lobbied for a culture change within government and the public sector as a whole. Successful advocacy has often involved civil society concentrating on engaging with lawmakers.

70. The continual and active involvement of civil society in lobbying for and monitoring freedom of information laws and implementation should be encouraged. Civil society has a key role to play in measuring the efficacy and integrity of FOI mechanisms and practices. It can also investigate suspected instances of discrimination and file lawsuits in instances where discrimination is found.

71. Studies indicate that the highest response rates to requests for information are from those countries where civil society movements have been active in promoting the adoption and subsequent implementation of national information laws.

Appeals and oversight

72. There are a variety of mechanisms for appealing FOI decisions. These include administrative reviews, court reviews and enforcement or oversight by independent bodies. The effectiveness of these different methods varies greatly. It is generally held by experts that independent commissions are the most effective system of oversight. Such independent oversight bodies are regarded as a cheaper, more efficient alternative to courts. Clearly, their independent status is likely to inspire more public confidence.

73. The powers and functions of the commissions are varied. In some countries such as Canada and France, the Commission has powers similar to an Ombudsman. In the United Kingdom and Ireland, the Commission can issue binding decisions, subject to limited appeals or overrides by Ministers in special cases.

74. Further, the Information Commissioner often has other duties besides merely handling appeals. These include general oversight of the system, training, proposing changes and public awareness.

75. The final level of review in most countries is an appeal to the national courts. Courts typically can review records and make binding decisions.

76. It is strongly suggested that, where the resources and political will permit, an independent commission is the preferred choice to implement and oversee FOI law and practice. However, it is acknowledged that the limited human and financial resources of most small states will pose difficulties in establishing such a commission. Other options might include establishing a dedicated unit attached to an already existing government department or using the Ombudsman or a Human Rights Commission to act as the appeals and oversight body.

77. Jamaica and Trinidad and Tobago, both small states with FOI regimes, established special units to deal with appeals and oversee implementation. The functions of these units include measuring the levels of compliance, identifying impediments to access, assessing good and bad practices, providing guidelines and training, disseminating judgements, making recommendations for reform and running public education programmes.

Greater coverage of bodies

78. Most FOI laws focus on the executive and administrative bodies that make up the modern bureaucratic state. Ideally, a functional FOI regime should ensure access not only to information held by government bodies but also by those private or semi-private bodies that perform public functions, such as telephone and electricity companies.

79. The Council of Europe Recommendation on Access to Official Documents establishes in Principle I that access to information regimes should cover 'all natural or legal persons insofar as they perform public functions or exercise administrative authority'.

80. The best practice is to provide in the law a broad definition of public bodies to include any body that is exercising government functions. However, it is recognized that such a broad application may not be realistic for small states, and therefore starting with a small class of public bodies may be more appropriate.

Use of exemptions

81. Applying exemptions requires assessment of whether disclosure of the requested information might harm one of the exemptions specified in the access to information law and whether, if it does, there is nevertheless an overriding public interest in disclosure of the information. It is crucial to inculcate within the public psyche, an appreciation that public interest lies at the heart of freedom of information legislation.

82. Exemptions are either mandatory or qualified. The use of mandatory exemptions in legislation should be limited. Qualified exemptions are always subject to the public interest test; that is, is the public interest in maintaining the exemption greater than that in disclosing the information? Making such a determination can be difficult, and it is strongly suggested that those dealing with FOI requests be equipped with appropriate training and comprehensive guidance notes, as is done in the United Kingdom.

83. Exemptions, by their very nature, can have limited openness. This is most likely where there is an excessive number, scope or complexity of exemptions, particularly where these are mandatory and cover extensive classes of records.

84. Exemptions, by their very nature, limit openness. This is most likely where there is an excessive number of exemptions, or where they are complex or wide in scope, particularly where these are mandatory and cover extensive classes of records.

85. Good training and supplementary guidance notes for the FOI Officer along with a defined appeals process within a well-structured FOI regime can help to minimise the misapplication of exemptions.

Public interest override

86. Most freedom of information laws also provide for what is known as 'public interest override' of legitimate exemptions. The harm that information released might cause a protected interest might be outweighed by a public interest in disclosing the information.

87. This allows for information to be released even if harm is shown if the public benefit in knowing the information outweighs the harm that may be caused from disclosure. It thereby ensures that the 'public interest' is always at the core of a right to information regime.

Fees

88. High charges for requested information can also serve to undermine the purpose of the legislation. Applying fees to less well-off applicants can deter them from making requests and is, therefore, arguably discriminatory. Further, fees can also create unnecessary administrative barriers, which reduce requests rather than acting as a cost-recovery mechanism.

89. Some laws provide for fees to be waived or reduced, either at the discretion of the public authority or on specific grounds, such as where payment would cause financial hardship to the requestor or where disclosure of the information requested is in the public interest.

90. In practice, in most jurisdictions that do allow for fees, in the majority of requests, fees are not imposed because the nominal cost in providing the information is less than the administrative cost in collecting and processing the fee

91. It is strongly suggested that given the local conditions of many small states, fees should be either waived or limited to actual costs of providing information.

Delays

92. Typically, FOI laws require that government bodies must respond to a request as soon as possible, on average setting a maximum time of between two and four weeks. Many jurisdictions have problems responding to requests in the allotted time period. There can also be delays at the appeals level, often caused by a lack of resources. In the United Kingdom, a backlog of over 1,000 cases has developed at the Information Commissioners Office and it has been known to take over 12 months for applicants to receive a response.

93. Excessive delays can frustrate the intent of FOI by preventing the information from being available when it is useful to the requestor. It is suggested that the problem of delays only serves to reinforce the importance of having both an adequate number of staff dedicated to dealing with requests and that those staff be given comprehensive training on the law itself and good practice.

94. This can be achieved by training officials, civil servants, and other relevant personnel and by establishing transparent internal systems and procedures for processing requests for information. Such systems and procedures might include assigning responsible officials to manage responses to information requests and introducing a tracking system for such requests.

95. If extensions of time are permitted, such extensions should be for a fixed period of a reasonable duration and granted for specific reasons, as when, for example, the information requested is voluminous or requires collecting.

Importance of providing advice and assistance

96. It is strongly suggested, and is in keeping with best practice, that FOI laws should include a provision obligating those dealing with FOI requests to provide advice and assistance.

97. The provision of advice and assistance can be seen as the means by which a public body engages with an applicant in order to establish what the applicant wants, and, where possible, assist him/her in obtaining this. This is in keeping with the spirit of FOI and the presumption to disclose.

98. Offering advice and assistance can be seen as a continual process and can apply in different circumstances. For example, where an applicant speaks and/or writes in another language, it will be good practice for the FOI Officer to assist in facilitating a translation.

Evidence of discrimination against certain requestors

99. A survey of access to information laws and practices conducted by the Open Society Justice Initiative revealed the results of a study indicating that 'journalists or representatives of NGOs [non-governmental organizations] and who identified themselves as such when making their requests tended to receive responses more often than individuals who identified themselves as members of an excluded or vulnerable group – that is, members of a racial, ethnic, religious or socio-economic group routinely subjected to discrimination'.

100. Further, the same study found that where identical requests were submitted by different requesters, the responses received were inconsistent 57% of the time (i.e. each requestor received a different response). The Justice Initiative posit that the 'high level of inconsistency suggests a lack of training and procedures for handling requests, resulting in requests following different paths inside an institution'.

101. Along with the training and supportive procedures necessary to minimize such inconsistencies, it is suggested that legislative provision should be drafted so as to positively assist minority groups in facilitating a successful request for information. India's Right to Information Act and South Africa's Promotion of Access to Information Act are well crafted in facilitating access for both the poor and illiterate. For example, officials are obliged to render all reasonable assistance to the requestor to formalize their request, and translate it from an oral to a written request where necessary.

Importance of monitoring implementation

102. The importance of monitoring FOI implementation cannot be overstated. Most Commonwealth laws require some form of monitoring and periodic reporting. For example, under the Belize Act, the responsible minister must annually table a report to the National Assembly. In Canada, the Information Commissioner is required to present an annual report to the national legislature, and heads of government departments must also present Parliament with annual reports.

103. As mentioned, civil society also has a crucial role to play in monitoring the efficacy of FOI laws and implementation. Non-governmental organizations, such as Open Society Justice Initiative, have undertaken surveys of FOI laws and practice in both non-Commonwealth and Commonwealth countries.

104. While it is hugely positive that so many countries have now adopted FOI legislation, studies indicate that implementation and good practice have often not always lived up to the letter and spirit of the legislation.

105. Monitoring can assist in measuring correlative trends between the existence of FOI legislation and government transparency. It can assess and review the procedural application of access to information norms and can ascertain the nature and efficacy of mechanisms adapted and adopted by selected governments to guarantee the right of access to information.

106. In the context of the Commonwealth, it can serve as a useful tool in ascertaining regional variations and variations between mature democracies and developing states.

107. Law Ministers are accordingly invited to examine the roles in the proposed strategy of the Secretariat, small jurisdictions and civil society, to:

- encourage more governments to implement freedom of information legislation;
- encourage governments to introduce the legislation incrementally. Small states have particular needs and circumstances, which mean a step-by-step approach is likely to be more realistic and effective. An incremental approach could include the following steps: assessing and improving information management systems; FOI awareness raising within government and the public; the establishment of an appeals/oversight body; the provision and training of dedicated staff on implementation; and starting with a limited class of public bodies to which the act applies;
- encourage governments to consolidate legislation by harmonizing the FOI law with other national laws, overriding inconsistent legislation, and enacting complementary laws if necessary;
- encourage governments to raise public awareness of FOI and its benefits;
- obligate public bodies, by way of legislative provisions, to proactively disclose information regularly;
- encourage governments to establish, where possible, free-standing independent information commissions to oversee implementation and deal with appeals;
- encourage public bodies to establish good information systems in order to facilitate effective access to information;
- encourage governments, where practical, to provide for a broad definition of the bodies to which FOI legislation applies. However, consider the application of the act in the domestic context and narrow the class of bodies to which the act applies if appropriate;
- encourage governments to include a 'public interest override' provision within the FOI legislation;
- inculcate an awareness of the application of exemptions and the importance of considering the public interest test when making determinations regarding disclosure. Such awareness raising should include cautioning against the abuse and/or misapplication of exemptions;
- encourage governments to either waive fees or limit fees to the actual costs of providing information;
- encourage governments to invest adequate human and financial resources into FOI implementation;
- encourage governments to ensure that public officials deal with FOI requests in a timely and efficient manner;
- encourage governments to provide comprehensive training and supplementary guidance notes to those officials dealing with FOI requests and appeals;
- encourage governments to afford whistleblower protection within the FOI regime or a separate statutory regime as is in keeping with international best practice.