MEMORANDUM

on

The Federal Government of Pakistan's Freedom of Information Ordinance

by

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Global Campaign for Free Expression

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Introduction

This Memorandum contains an analysis by ARTICLE 19, The Global Campaign for Free Expression, of the Pakistan Freedom of Information Ordinance, No. XCVI of 2002, of 27 October 2002. ARTICLE 19 has been asked to comment on the Ordinance. These comments are based on an unofficial English version of the Ordinance received by ARTICLE 19.

We welcome the Federal Government's introduction of freedom of information legislation. The Ordinance includes a number of positive features, such as the inclusion of an interpretation clause, the right of appeal to either the Mohtasib or Federal Tax Ombudsman, a clear time frame for the release of information, and the inclusion of courts and tribunals in the definition of public office. At the same time, the Ordinance has a number of weaknesses, including an excessively broad regime of exceptions and a restrictive approach to the definition of "public record". In addition, the Ordinance does not include a number of features that would substantially strengthen the public's right to know, such as obligations on public bodies to maintain their records in good condition and to publish key categories of information, a system for promoting freedom information and educating civil servants, the granting of

specific investigative powers to the Mohtasib and Federal Tax Ombudsman and a right of appeal to the courts.

This submission sets out ARTICLE 19's major concerns with the draft Ordinance. It draws upon our key publications in this area, *The Public's Right to Know: Principles on Freedom of Information Legislation* (the ARTICLE 19 Principles),[1] *A Model Freedom of Information Law* (the Model Law)[2] and the July 2001 survey, *Global Trends on the Right to Information: A Survey of South Asia*.[3] *The Public's Right to Know*, which sets out principles based on international and comparative best practice, has been endorsed by, among others, the UN Special Rapporteur on Freedom of Opinion and Expression. The *Global Trends* survey considers significant developments at the international level recognising the right to information, and provides an in-depth analysis of the need for information from the perspective of Pakistan, India and Sri Lanka.

International and Constitutional Standards

International Guarantees of Freedom of Expression

Article 19 of the *Universal Declaration on Human Rights* (UDHR),[4] a United Nations General Assembly resolution, guarantees the 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 and regardless of frontiers.

The UDHR is not directly binding on States but parts of it, including Article 19, are widely regarded as having acquired legal force as customary international law since its adoption in 1948.[5]

The *International Covenant on Civil and Political Rights* (ICCPR),[6] a formally binding legal treaty ratified by over 145 States, guarantees the right to freedom of opinion and expression at Article 19, in terms very similar to the UDHR. Although Pakistan has neither signed nor ratified the ICCPR, it is an authoritative elaboration of the rights set out in the UDHR and hence relevant here.

Freedom of information is an important component of the international guarantee of freedom of expression, which includes the right to seek and receive, as well as to impart, information and ideas. There can be little doubt as to the importance of

[1] (London: June 1999).
[2] (London: July 2001).
[3] (London: July 2001).
[4] UN General Assembly Resolution 217A(III), adopted 10 December 1948.
[5] See, for example, *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980) (US Circuit Court of Appeals, 2nd Circuit).
[6] UN General Assembly Resolution 2200A(XXI) of 16 December 1966, in force 23 March 1976.

freedom of information and numerous authoritative statements have been made by official bodies to this effect.

During its first session in 1946, the United Nations General Assembly adopted Resolution 59(1) which stated:

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

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

> [T]he Special Rapporteur expresses again his view, and emphasizes, that everyone has the right to seek, receive and impart information and that this imposes a positive obligation on States to ensure access to information, particularly with regard to information held by Government in all types of storage and retrieval systems - including film, microfiche, electronic capacities, video and photographs - subject only to such restrictions as referred to in article 19, paragraph 3, of the International Covenant on Civil and Political Rights.

In March 1999, a Commonwealth Expert Group Meeting in London 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.[7]

These principles and guidelines were endorsed by the Commonwealth Law Ministers at their May 1999 Meeting[8] and recognised by the Commonwealth Heads of Government Meeting in November 1999.[9]

Within Europe, the Committee of Ministers of the Council of Europe recently adopted a Recommendation on Access to Official Documents,[10] calling on all Member States to adopt legislation giving effect to this right. The European Union has also recently taken steps to give practical legal effect to the right to information. The European Parliament and the Council adopted a regulation on access to European Parliament, Council and Commission documents in May 2001.[11] The preamble, which provides the rationale for the Regulation, states in part:

> Openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and accountable to the citizen in a democratic system. Openness

[7] Quoted in *Communiqué*, Meeting of Commonwealth Law Ministers, Port of Spain, 10 May 1999.
[8] *Ibid.*, para. 21.
[9] The *Durban Communiqué*, Commonwealth Heads of Government Meeting, Durban, 15 November 1999, para. 57.
[10] R(2000)2, adopted 21 February 2002.
[11] Regulation (EC) No. 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.

> contributes to strengthening the principles of democracy and respect for fundamental rights….

The purpose of the Regulation is "to ensure the widest possible access to documents".[12]

In October 2000, the Inter-American Commission on Human Rights approved the Inter-American Declaration of Principles on Freedom of Expression.[13] The Preamble reaffirms with absolute clarity the aforementioned developments on freedom of information:

> CONVINCED that guaranteeing the right to access to information held by the State will ensure greater transparency and accountability of government activities and the strengthening of democratic institutions; …
>
> REAFFIRMING that the principles of the Declaration of Chapultepec constitute a basic document that contemplates the protection and defense of freedom of expression, freedom and independence of the press and the right to information;

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:

> 4. 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.
> 5. 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.

These international developments find their parallel in the passage or preparation of freedom of information legislation in countries in every region of the world. In the past seven years, in particular, a record number of countries from around the world – including Fiji, India, Israel, Japan, Nigeria, South Africa, South Korea, Sri Lanka, Thailand, Trinidad and Tobago, the United Kingdom, a number of East and Central European States, and of course Pakistan – have taken steps to enact legislation giving effect to this right. In doing so, they join a large number of other countries which enacted such laws some time ago, such as Sweden, the United States, Finland, the Netherlands, Australia, and Canada.

Constitutional Guarantees

Article 19 of the 1973 Constitution of the Islamic Republic of Pakistan states:

> Every citizen shall have the right to freedom of speech and expression, and there shall be freedom of the press, subject to any reasonable restrictions imposed by law in the interest of the glory of Islam or the integrity, security or defence of

[12] *Ibid.*, Article 1(a).
[13] 108th Regular Session, 19 October 2000.

> Pakistan or any part thereof, friendly relations with foreign states, public order, decency or morality, or in relation to contempt of court, commission of or incitement to an offence.

Under the proclamation of emergency, Provisional Constitution Order No. 1 of 1999,[14] the Constitution is held in abeyance but the Order also stipulates that, "notwithstanding the abeyance of the provisions of the constitution [the country] shall, subject to this order and any other orders made by the Chief Executive, be governed, as nearly as may be, in accordance with the constitution." Furthermore, the Order states that, "the fundamental rights conferred by Chapter I of Part II of the Constitution, not in conflict with the Proclamation of Emergency or any order made thereunder from time to time, shall continue to be in force." As a result the guarantee of freedom of expression, like all fundamental rights, is available to citizens but only to the extent that it is not in conflict with the President's orders.[15] To put it another way, the President has effectively equipped himself with the power to abridge the right to freedom of expression. In a judgment in 2000 upholding the military take-over, the Supreme Court ruled that while 15 of the 21 fundamental rights set out in the Constitution would remain in force, the executive could derogate from the other six, including freedom of expression.[16]

In any event, the constitutional guarantee fails adequately to protect the right to freedom of expression. As currently drafted, it subjects the right to freedom of expression and freedom of the press to "any reasonable restrictions imposed by law".[17] This falls below the international guarantee which requires any restriction to be 'necessary' rather than merely 'reasonable'. Furthermore, some of the grounds for restricting freedom of expression under the Constitution, such as friendly relations with other States, are not permitted under international law.

Unlike Article 19 of the ICCPR, the Pakistani Constitution does not refer to the right to "seek and receive" information as elements of freedom of expression. Nonetheless, the Supreme Court of Pakistan ruled that the right to freedom of expression includes the right to receive information. In the 1993 *Nawaz Sharif* case the Court stated: "The right of citizens to receive information can be spelt out from the freedom of expression guarantee in Article 19 [of the Constitution]."[18] The conditions required for the exercise of the right to information are, therefore, the same as those necessary for the exercise of the right to freedom of expression.

Recommendations:

- Provisional Constitutional Order No. 1 of 1999 should be amended so that it does not put the human rights provisions of the Constitution in abeyance and does not allow the president to override these provisions by decree.
- The Constitution should be amended to make it clear that the president does not have the power to abridge it by executive order. Amendments should be possible only after

[14] Issued on 14 October 1999.
[15] This effectively circumvents Article 8 of the Constitution, which provides that any law that abridges constitutional rights shall be considered void.
[16] See also Article 233 of the Constitution.
[17] It is unclear whether the restriction relates to the right to freedom of expression, or the 'freedom of the press' which is mentioned separately. However, international law guarantees 'freedom of the press' as part and parcel of the right to freedom of expression.
[18] *Nawaz Sharif v. President of Pakistan*, PLD 1993 SC 473.

ensure wide consultation and with very broad public support.

- The Constitution should incorporate the full three-part test for restrictions on freedom of expression, in particular by limited the grounds for restrictions to those recognised under international law and by requiring any restriction to be "necessary in a democratic society".

Analysis of the Ordinance

Definitions and Scope

Section 2(h) defines a "public body" relatively broadly, but fails to include bodies that are either owned or controlled by government or bodies which, while not controlled by government, carry out public functions. For the purposes of disclosure of information, the definition of 'public body' should focus on the type of service provided rather than on formal designations. Furthermore, the definition is limited to organs of the Federal Government, Parliament and courts, despite the fact that the Federal Government has the power under Pakistan's Constitution to legislate for the provinces.[19] Given the goal of freedom of information legislation to promote maximum access to information, the Ordinance should also apply to provincial public bodies.

Section 2(i) defines "record" broadly, but the terms suggest a possibility that it is restricted to printed or written documents since these are specifically listed while, electronic records, for example, are not. Far more serious, however, is section 7 of the Ordinance, which defines "*public* records" subject to disclosure. Section 7 lists a number of types of documents that are covered. The list is far from comprehensive and excludes important types of information, such as studies, surveys and reports.

To define the public records covered by the Ordinance in a restrictive fashion undermines the very purpose of the system: to promote the free flow of information to the public. This is clear from the following quotation from Principle 1 of the ARTICLE 19 Principles:

> The principle of maximum disclosure establishes a presumption that all information held by public bodies should be subject to disclosure and that this presumption may be overcome only in very limited circumstances. This principle encapsulates the basic rationale underlying the very concept of freedom of information and ideally it should be provided for in the Constitution to make it clear that access to official information is a basic right. The overriding goal of legislation should be to implement maximum disclosure in practice.

Instead of providing a list of public or official records, the law should define records broadly as any information, regardless of its form, source, date of creation, or official status, whether or not it was created by the body that holds it and

[19] Section 246(2) of the *Constitution of the Republic of Pakistan* states:
"An Act of [Majlis-e-Shoora (Parliament)] may, notwithstanding that it relates to a matter with respect to which a Provincial Assembly has no power to make laws, confer powers and impose duties upon a province or officers and authorities thereof."

whether or not it is classified. Individuals should then be given the right to access all records held by public bodies. The exceptions section can then protect against the disclosure of any information that may legitimately be withheld from the public.

Recommendations

- The definition of "public body" in 2(h) should be expanded to include nationalised industries and public corporations, non-departmental bodies or quangos (quasi non-governmental organizations), and private bodies that carry out public functions.
- The Federal Government should consider extending the scope of the Ordinance to provincial public bodies.
- Section 7 should be deleted, the definition of record in Section 2(i) should be amended in accordance with the above, and individuals should be given the right to access all records held by public bodies.

Relationship with Other Laws

Section 3(1) states that, notwithstanding anything contained in any other law, and subject to the provisions of the Ordinance, requests for information shall not be denied, other than as provided for by the exceptions contained in Section 15. ARTICLE 19 welcomes this provision, which appears to state that the Ordinance applies to the exclusion of any provision of other legislation that restricts the disclosure of information. However, section 23 provides: "The provisions of this Ordinance shall be in addition to, and not in derogation of, anything contained in any other law for the time being in force." It is possible that section 23 is intended to apply only to legal provisions that provide for disclosure of information but this is certainly not clear from its drafting. Otherwise, section 23 effectively undermines section 3(1).

Principle 8 of the ARTICLE 19 Principles states that:

> The law on freedom of information 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.
>
> The regime of exceptions provided for in the freedom of information law should be comprehensive and should not make it illegal for officials to divulge information which they are required to disclose under freedom of information law.

Furthermore, it is unclear why section 3(1) refers only to the exceptions listed in section 15. In the first place, inasmuch as section 15 is a provision of the Ordinance, this additional reference is unnecessary. Secondly, section 3(1) must presumably be subject to the other exceptions in the Ordinance and it is unclear why section 15 has specifically been mentioned here.

Section 3(2) states that the Ordinance is to be interpreted so as to advance the statute's purposes and to facilitate and encourage the disclosure of information. This provision

is welcome but it would be even stronger if the Ordinance contained a clear statement of its purpose.

Recommendations
- Section 3(1) should be amended to remove the reference to sections 15 and 23 and section 23 should be deleted.
- A clear statement of the purposes of the Ordinance should be added.

Obligation to Publish

Section 5 requires that all Acts and subordinate legislation in force in Pakistan be published and available for a reasonable price. This provision is good in principle. However, the scope of the provision is far too limited. Public bodies should be under an obligation to publish a much wider range of key information, subject only to reasonable limits based on resources and capacity. Principle 2 of the ARTICLE 19 Principles states that public bodies should, as a minimum, be under an obligation to publish the following categories of information:

- operational information about how the public body functions, including costs, objectives, audited accounts, standards, achievements and so on, particularly where the body provides direct services to the public;
- information on any requests, complaints or other direct actions which members of the public may take in relation to the public body;
- guidance on processes by which members of the public may provide input into major policy or legislative proposals;
- the types of information which the body holds and the form in which this information is held; and
- the content of any decision or policy affecting the public, along with reasons for the decision and background material of importance in framing the decision.

Furthermore, ARTICLE 19 is of the opinion that the practice of charging a fee for access to vital information – such as a country's laws – should be avoided wherever possible.

Recommendations:
- Section 5 should be amended to require public bodies to publish a much larger variety of information.
- The decision to charge a fee for access to documents with significant public interest should be reconsidered.

Exclusions and Exemptions

The Ordinance contains two different types of restrictions on the right to access information. Section 8 lists a number of types of records to which access is "excluded"; no harm is required for access to these documents to be refused. These including notings on files, minutes of meetings, interim orders, financial information, records relating to national defence, records declared classified by the Federal Government, records relating to the personal privacy of individuals, records provided

to a public body with the expectation that the information would be kept confidential, and any other record that the Federal Government may, in the public interest, except from the purview of the Ordinance. Sections 15 through 18 of the Ordinance contain a number of "exemptions", restrictions on the right to access information which are subject to a harm test. These include international relations, law enforcement, privacy and economic interests of the State or public bodies.

Overall the regime of exclusions and exemptions is excessively broad and risks significantly undermining the whole system of access to information.

International Standards

The exercise of freedom of information requires that all individual requests for information from public bodies be met unless the public body can demonstrate that the information requested falls within the scope of a limited regime of exceptions.

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

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

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 law. This list should include only interests that constitute legitimate grounds for refusing to disclose documents and should be limited to such matters such as law enforcement, the protection of personal information, national security, commercial and other confidentiality, public or individual safety, and the effectiveness and integrity of government decision-making processes.

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

The second part of the test means that the fact that information simply falls within the scope of a legitimate aim listed in the law is not enough to justify its non-disclosure. To except information on that basis would be a class exception and would seriously undermine the free flow of information to the public. It would also be unjustified, since public authorities clearly have no reason to withhold information that would not actually harm a legitimate interest. Therefore, the public body must also show that the disclosure of the information would cause substantial harm to the legitimate aim.

In calculating whether harm is caused, the fact that in some cases disclosure may both benefit and harm the aim should be taken into account. For example, in relation to national security, disclosure may both undermine defence and expose corrupt buying

practices. The latter, however, may lead to rooting out of corruption and the long term strengthening of the forces. To justify non-disclosure, the net effect of releasing the information must be to cause substantial harm to the aim. This test is frequently referred to as a "harm test".

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

Cumulatively, the three parts of the test are designed to ensure that information is only withheld when this is in the overall public interest. If applied properly, this test would rule out all blanket exclusions and class exceptions, as well as any exceptions whose real aim is to protect the government from harassment, to prevent the exposure of wrongdoing, to conceal information from the public, or to entrench a particular ideology.

Analysis of the Exclusions and Exemptions in the Ordinance

The regime of exclusions and exemptions introduced by this Ordinance fails in important respects to meet the standards outlined above. The whole of section 8 lacks a harm test, there is no public interest override, some exclusions and exemptions are over-broad and several of the exclusions and exemptions are overlapping.

Sections 8(a), (b) and (c) refer to internal governmental processes. Maintaining the effectiveness and integrity of government decision-making processes is a legitimate aim but incorporating a harm test into these articles would in no way undermine these legitimate aims. Section 8(c) excludes interim orders from disclosure. Interim orders, like final orders, should be subject to disclosure unless they fall within the scope of another exemption.

Section 8(d) refers to customer accounts of banks and other financial institutions, while section 8(g) refers more generally to records relating to the privacy of any individual. Section 17 refers to the protection of privacy and personal information. These three provisions are overlapping and should be collapsed into one protecting personal information. Information covered by this unified section should also be subject to disclosure if the information is otherwise publicly available or where the concerned party consents to the release.

Section 8(e), excludes the disclosure of records relating to defence forces, defence installations, and national security. The protection of national security and intelligence are legitimate aims. However, without limiting the application of this provision, in particular by requiring a risk of harm to the protected interest, just about anything can be classified as connected or "ancillary to" defence and national security.

Section 8(f) excludes from disclosure any record that has been declared classified by the Federal Government. This provision effectively gives bureaucrats the power to overrule the regime of freedom of information. This exclusion effectively permits the Federal Government to get around the freedom of information regime simply by classifying embarrassing or revealing documents. Section 8(i) similarly grants the Federal Government the further discretion to exclude public records from disclosure where to do so would serve the public interest. The public interest should not be used as a reason to prevent disclosure of information, but rather to allow disclosure even though to do so might harm a legitimate interest.

As worded, these provisions totally undermine the freedom of information regime. This approach is contrary to the whole philosophy behind the Ordinance and is also unnecessary inasmuch as the Ordinance itself should cover all legitimate reasons to refuse to disclose information. ARTICLE 19's Principle 8 states: "The regime of exceptions provided for in the freedom of information law should be comprehensive and other laws should not be permitted to extend it."

Section 15 provides an exemption from disclosure of information "likely to cause grave and significant damage to the interests of Pakistan in the conduct of international relations." Unlike the exclusions contained in section 8, this provision contains a harm test, requiring "grave and significant damage" to Pakistan's interests. This is a welcome addition to the Ordinance. Section 16 provides an exemption for the disclosure of information that is "likely" to harm law enforcement operations. The standard in this provision – likely to harm – is lower than in section 15. Section 19 also applies the standard of "grave and significant" or "significant" harm. Eliminating inconsistencies such as these, in favour of the higher standard as set out in sections 15 and 19, would improve the functioning of the freedom of information regime.

Section 17, as noted above, addresses the need to preserve individual privacy, which is a legitimate aim. It is particularly important in this context that disclosure be restricted only when the harm to the privacy interest overrides the public interest in having the information released.

Section 14 notes that information does not have to be released where it is covered by an exemption. This is clear from the exemption sections themselves, so section 14 is redundant and should be removed.

Recommendations

- Section 8 should be amended so that there are no exclusions and all exemptions are subject to a harm test.
- All exemptions should be subject to a public interest override.
- Overlapping exceptions, such as sections 8(d), 8(g), and 17 regarding personal information, should be eliminated.
- Sections 8(c), (f) and (i) should be repealed altogether.
- Sections 15 to 18 should be amended to incorporate uniform harms standards.
- Section 14 should be repealed.

Maintenance of Records

Section 4 provides that every public body shall ensure that all its records are maintained, subject to the Ordinance and rules that may be prescribed. Legislating the preservation of records is essential to a freedom of information regime. This provision, however, is vague and difficult to implement, thus limiting its utility. ARTICLE 19's *Model Information Law* recommends that a Code of Practice be developed setting out clear standards which public bodies must adhere to for purposes of maintaining records. Additionally, public bodies should be required to allocate sufficient resources and attention to ensuring that public record-keeping is adequate.

Recommendation

- Section 4 should be amended to require the development of a clear, detailed Code of Practice setting out clear standards for maintaining records and to require public bodies to set aside sufficient resources for the maintenance of public records.

Application Procedure

Section 10 provides for the designation by a public body of an officer or employee responsible for handling information requests. Section 11 states that the function of the designated official is to provide applicants with the information they have requested, or to deny applications. While these are an important provisions, the role of the designated official could be improved by elaborating clearly in the law what the official's obligations are. For instance, the official should be charged with promoting within the public body the best possible practices in relation to record maintenance, archiving and disposal. To eliminate ambiguity, the provision should specify that the official is the central contact within the public body for receiving requests, assisting applicants and receiving complaints.

Section 13 sets out the procedure for disposing of applications for information. The designated official is given 21 days from the date of receiving a request to either supply the applicant with the requested information or deny the application. Section 13(2) states the grounds under which the official may refuse to grant access. One of these is if an application is not in the prescribed form. Section 25(2) provides that the Federal Government may make rules regarding the form of applications by notification in the official Gazette.

The presumption in favour of disclosure demands that applications for information be subject to minimal formal requirements so any form should be simple and require the minimum amount of information necessary. Furthermore, the Ordinance will not practically come into effect until the Federal Government does produce the required form. It would be preferable if the form was included in the Ordinance; otherwise, it should be clear that a form must be produced within a short timeframe.

Section 12 states that any citizen of Pakistan may make a request for information. Limiting the right to information to citizens of Pakistan denies large classes of people

– including permanent residents and refugees – the right to freedom of information. The rights granted in this Ordinance should not be limited in this way.

Section 13(2)(e) states that an application for information may be refused on the grounds that the records requested are covered by the exclusions contained in section 8. To minimize ambiguity, this subparagraph should also include a reference to the exemptions contained in sections 15 through 18.

Section 13 states that an applicant shall be notified in writing of a decision to reject a request for information. The refusal should also be accompanied by substantive reasons, including the specific provision of the Ordinance under which the application has been rejected.

Recommendations

- Sections 10 and 11 should be amended to specify the clearly the duties of the designated official.
- The Ordinance should itself prescribe the form for information requests. Alternatively, it should be clear that such form must be produced within a short timeframe.
- Section 12 should be amended so that all persons present in Pakistan benefit from the rights recognised by the Ordinance.
- Section 13(2)(e) should be amended to include a reference to sections 15 through 18.
- Section 13 should be amended to state that notification of a refused application must be accompanied by substantive written reasons, including the specific provision of the Ordinance under which the application has been rejected.

Fees

Section 12 also subjects the provision of information to the payment of such fee as may be prescribed. The manner of prescribing this fee is left to the Federal Government to determine and publish in the official Gazette, as provided in section 25. It is common to charge fees for processing information requests and disclosing information. However, given the primary rationale for promoting open access to information, it would be preferable to include in the Ordinance provisions limiting the cost of access so that it does not become so high as to deter potential applicants from making requests. In some jurisdictions, the fee is waived or significantly reduced for requests for personal information or requests in the public interest. Higher fees may be levied for commercial requests to help subsidise personal or public interest requests.

Recommendation:

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

Recourse to the Mohtasib and Federal Tax Ombudsman

Article 19 of the Ordinance allows individuals whose request for information has been refused to appeal to the Mohtasib or, if the original request dealt with the Revenue Division or its subordinate departments, to the Federal Tax Ombudsman. Before an appeal may be made to either of these two authorities, the applicant must have first re-submitted its request to the head of the public body that originally refused the application.

ARTICLE 19 welcomes this element of Pakistan's freedom of information regime. However, the right of appeal could be improved in a number of ways. First, the Ordinance does not set out clear timeframes for the re-submission of the original application to the public body, before an appeal may be filed with the Mohtasib or Tax Ombudsman. Furthermore, where the head of the public body is also the designated official responsible for managing access requests, as permitted by section 10, this requirement is clearly unnecessary and will simply deal requests considerably.

Section 19 fails to specify the nature of the Mohtasib's or Tax Ombudsman's investigative powers. Section 19(2) states that both the applicant and the designated official will be heard by the Mohtasib or Tax Ombudsman. However, no procedure for a hearing is provided for by the Ordinance, nor are specific investigative powers – such as the ability to compel witnesses or review the requested information – granted by the Ordinance.

In addition, the Ordinance is silent on the matter of appeals to the courts. It should be clear that there is a full right of appeal to the courts. The courts have authority to impose standards on the governing authorities and they are in a good position to ensure that due attention is given to resolving difficult questions and that a consistent approach to freedom of information issues is promoted.

Recommendations

- Section 19 should be amended to remove the requirement that applicants re-submit their request to the head of the public body in question. If this requirement is retained, a clear time limit must be set for the head of the public body to respond to the second request.
- The Ordinance should be amended to provide a procedure for hearing complaints and should spell out the investigative powers of the Mohtasib and Federal Tax Ombudsman.
- The Ordinance should be amended to include a full right of appeal to the courts from any decision by the Mohtasib or Federal Tax Ombudsman.

Frivolous, Vexatious or Malicious Complaints

Section 20 allows the Mohtasib – but not the Federal Tax Ombudsman – to dismiss complaints found to be frivolous, vexatious or malicious. The Mohtasib may also impose a fine on the complainant. With no criteria to elaborate what constitutes a "frivolous, vexatious, or malicious" complaint, ARTICLE 19 is of the view that this provision will act as an unwarranted deterrent to applicants who have been denied

access to information by a public body. Furthermore, the power fo the Mohtasib to fine frivolous complainants is unnecessary and likely to deter individuals who have legitimate appeals.

Recommendation
- Section 20 should be repealed. If the power of the Mohtasib to fine complainants should be removed.

Other Provisions

Destruction of Records

Section 21 of the Ordinance states that any person who destroys a record, which at the time of its destruction was subject to an information request or complaint, with the intention of preventing its disclosure, commits an offence punishable with imprisonment or a fine, or both. This is an important provision, in accord with international freedom of information standards. However, we would recommend that the law go further, and sanction any obstruction to the right to access information under the Ordinance.

Principle 1 of the ARTICLE 19 Principles states that the obstruction of access to, or the wilful destruction of records is a criminal offence, regardless of when it occurs.

Recommendation
- Section 21 should be amended to penalize any obstruction of the right to access information.

Omissions

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

Clear Statement of the Right to Information

Although the main body of the Ordinance is devoted to providing a right to information, it nowhere sets out clearly that individuals do have such a right. A statement of this right at or near the beginning of the substantive provisions of the Ordinance would establish a presumption in favour of access. Both as a matter of form and for reasons of interpretation, it is important that the Ordinance set out clearly that there is a presumption in favour of access that may only be overcome once certain conditions are met.

Promotional and Educational Activities

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

- Training civil servants on the scope and importance of freedom of information, procedures for disclosing information and maintenance of records;
- Providing incentives for public bodies that successfully apply the law;
- Requiring the Mohtasib and Federal Tax Ombudsman, as the official supervisory administrative bodies, to submit annual reports to Parliament on the progress (achievements and problems) in implementing and applying the freedom of information law; and
- Setting up a public education campaign on the right to access information, the scope of information available and the manner in which rights may be exercised under the new law.

Recommendations

- The Ordinance should include a provision setting out the general right of individuals to access information held by public bodies.
- The Ordinance should establish a system of education and promotion regarding freedom of information aimed both at civil servants and the general public.