Analysis of the Discussion Paper and draft Fiji Freedom of Information Bill 2004, developed by the Citizen's Constitutional Forum

Submitted by the Commonwealth Human Rights Initiative, April 2004

1. The Citizen's Constitutional Forum (CCF) has forwarded a copy of the draft *Freedom of Information Bill 2004* and related Discussion Paper to the Commonwealth Human Rights Initiative (CHRI) for review and comment. CHRI understands that the Discussion Paper and Bill are due to be submitted to parliament in mid-April. The Bill will be tabled as a Private Member's Bill.

2. CHRI welcomes the opportunity to comment on the Discussion Paper and draft Bill. However, we note the Bill does not appear to have been developed in consultation with civil society. Experience has shown that a participatory law-making process can be a major factor in laying a strong foundation for an effective right to information regime. Implementation is strengthened if right to information laws are 'owned' by both the government and the public. This does not necessarily mean that the law must be written by consensus. But participation – whether directly via submissions from the public, or indirectly via awareness-raising by the media - *during* the law-making process can provide a good foundation on which to build a strong platform for implementation. As one RTI advocate has argued, what needs to be remembered and facilitated are the laws of supply and demand:

   - Supply - Implementation will fail unless the officials responsible for providing information are committed to doing so, and have the know-how and technical and financial resources to facilitate the law;
   - Demand - The success of a right to information law is directly related to its use by the public, such that it is vital that the public are aware of the law, what its purpose is and how they can use it.

ANALYSIS OF DRAFT BILL AND SUGGESTIONS FOR IMPROVEMENT

3. CHRI notes that CCF has advised that they considered the 2003 RTI Report, *Open Sesame: Looking for the Right to Information*, during the development of the Discussion Paper draft Bill. That Report sets out key principles which CHRI believes should underpin any right to information law. CHRI has restricted our current note solely to providing a close analysis of the Discussion Paper and draft Bill.

4. Overall, CHRI's assessment is that the Discussion Paper and draft Bill are very comprehensive. Clearly, a significant amount of research was undertaken before the Bill was drafted. Our comments are therefore largely technical in nature and are aimed at refining the documents, rather than suggesting any substantial amendments.

Part I: Preliminary

5. The introduction to the Bill which sits just prior to Part 1 describes the Act as giving "members of the public rights of access to official documents of the Government and its agencies". However, the remainder of the draft Bill demonstrates that it is actually directed at enabling access to Government "information" as well as to information held by private bodies in certain circumstances. While the wording used in the opening proviso reflects the wording of s.174 of the Constitution of Fiji, CHRI argues that it is should be deleted on the basis that it may cause confusion when the Act is being applied by bureaucrats and/or interpreted by the Courts.

Part II – The Right to Access Information Held By Pubic and Private Bodies

6. Section 7 is correctly aimed at granting all people an explicit right to information. However, consideration should be given to referring only to the "right to information", rather than the "right to freedom of information" as the latter phrase adds nothing, but may, if narrowly

interpreted, restrict the right. Further, it is not clear why the right has been elaborated to specifically include "right to access information held by public bodies". Either the right to information should be simply but broadly stated, or the right should be elaborated to clearly include both public bodies and private bodies in specified circumstances, in accordance with ss.8(1) and (2) respectively.

7. Section 8 is very positive. It is laudable that the draft Bill seeks to provide a "right" to access "information" held by public bodies, as well as going further and covering information held by a private body where this is "necessary for the exercise or protection of any right".

8. Consideration should be given to rewording s.9(1) to specifically state that the Act "overrides" inconsistent legislation.

9. It is understood that s.10, which sets out the coverage of the Act, operates to bring the Executive (President) and the Judiciary within the scope of the Act (via ss.(1)(a)(c) and/or (e)). Considering the reluctance of many Governments to enact access laws with similarly broad coverage, it may be beneficial to include in the Discussion Paper a more explicit explanation for why it is legitimate to include all branches of Government. More emphasis could also be given to the fact that the exemptions regime will still operate to protect legitimately sensitive information held by the Executive and Judiciary.

10. As currently worded, s.10(1)(e) operates to make s.10(2) redundant, such that the latter provision should be deleted.

11. In Section 11(1), the inclusion of the term "records", and the definition the term has been accorded, may undermine the positive effect of focussing the Act on enabling the right to "information". This problem may be compounded by the fact that the Act requires the relevant body to "hold" the record containing the requested information. The interaction of these terms means that it is arguable in practice whether the public would be able to access information in the form of samples or materials used in construction activities and the like. In contrast, the Indian *Freedom of Information Act 2002* defines information as *"any material in any form relating to the administration, operations or decisions of a public authority"*. In the State of Delhi in India, a similar definition has resulted in NGO's being empowered to request samples from works undertaken by public bodies with a view to testing whether the correct materials were used and thereby to uncover sub-standard work and/or corruption. Consideration should be given to reworking the various definitional and coverage provisions of the Act to ensure that the Act is as broad in its scope as possible.

12. Consideration should be given to placing ss.12-18 in a new Part, titled Making and Managing Requests, and moving this Part to sit before current Part IV: Exceptions. This would usefully place the disclosure and non-disclosure provisions together. Current Part III: Measures to Promote Openness would then become a new Part II. In placing these obligations upfront, a clear message would be sent to the Government on the importance of proactive disclosure.

13. It is currently not clear from the procedural provisions (ss.12-18), who in practice will be primarily responsible for dealing with information requests within bodies covered by the Act. Section 20 of the Act requires that an Information Officer be appointed by public bodies. However, while s.12(5) envisages Information Officers handling certain specified aspects of information requests, it is not clear whether these Information Officers are also expected to be the main contact points for managing and responding to information requests in practice. If this is not the case, this may lead to difficulties at the implementation stage; it may not be practicable to expect all staff within a public (or private) body to themselves have sufficient understanding of the Act to deal with information requests. Consideration should be given to clarifying these issues, in the Act and at the very least in the Discussion Paper.

14. Section 12(1) should make it clear whether applications can be submitted electronically.

15. Consideration should be given to clarifying in the Discussion Paper whether s.12(3) operates to allow telephonic requests. This could legitimately be the case, as requesters on outlying

islands may effectively be "unable…[for this reason] to make a written request for information", particularly in the event that the postal service is irregular/unreliable.

16. Section 12(6) should be reworded to make it clear that requests which are *not* made on the prescribed form, must still be accepted by bodies covered by the Act, as long as the request complies with s.12(1).

17. Consideration should be given to including a time limit in s.12(7) for sending a receipt and with setting out what information should be included on the receipt, for example, date of receipt of application, final date for response, officer responsible for handling the request.

18. Consideration should be given to moving s.17 relating to transfers of requests to sit after s.13. This will ensure that all the provisions dealing with the initial stages of handling requests can be read together. This will make it easier for officers applying the Act to determine applicable time limits.

19. Consideration should be given to clarifying a number of aspects of s.14(1):

    - ss.(a) should include details of where and when the documents can be accessed, if appropriate;
    - ss.(b) should be reworded to require bodies to state in relation to a refusal in relation to any part of the request which is not granted, "the fact of such refusal, the exemption(s) on which the refusal is based, the reasons why the exemption applies (if this is not obvious)";
    - ss.(c) should be reworded to require that specific reference be provided to the exemption(s) on which the refusal is based and the reasons why the exemption applies (if this is not obvious);
    - ss.(d) should further require details of the procedure for appealing and any time limits.

20. It is not clear why ss.14(2) does not require that refusals to disclosure information by private bodies be accompanied by details of appeal rights and procedures. Consideration should be given to merging ss.14(1) and (2) and thereby applying the same response requirements to public and private bodies.

21. Consideration should be given to including a maximum time limit in s.14(3).

22. The Discussion Paper could usefully clarify whether s.15 allows for the imposition of fees for applications. Best practice requires that fees should not be imposed for applications. Clarification could also be provided on who is envisaged as having the power to determine when fees can be waived in the public interest.

23. Section 15 could usefully include a requirement that the fees imposed and the fee schedule developed by the Minister, if any, should accord with the principle that any fees imposed should not be undermine the objectives of the Act.

24. It is positive that s.16(4) explicitly accounts for the possibility that information may be requested in a language other than English. Consideration should be given to strengthening this provision by further requiring that where information is requested in a language that it is not held in, a translation will be provided free of charge if the translation is determined to be in the public interest. Such is the case in Canada, for example. This approach should also be adopted where information is requested in disability-friendly media, for example, in Braille or on tape for the hearing impaired.

25. Section 17(2)(b) should be deleted. To ensure certainty for the public and to minimise the risk of public officials shirking their responsibilities, there should be no room for officials to require applicants to redirect their requests. Public officials have access to the internal workings of government and can much more easily ensure effective transfers of requests. Further, if applicants are required themselves to transfer the request, they may also be required to pay a

new fee by the new body receiving the request. This problem could be exacerbated if a request for one piece of information needs to be handled by multiple bodies.

26. Section 17(3) should be deleted or amended to require the time limit for responding to transferred requests to be calculated from the date a request is received, not the date it is transferred. This accords with best practice; most laws CHRI has reviewed adopt this approach. It also ensures that bodies do not use the transfer provisions to deliberately delay their response. On the basis of the current provision, it is possible for a body to wait until the nineteenth day and then transfer a request, at which time the clock starts again, allowing for another 20 days. Such delaying tactics can be particularly useful where the media, which often requires information quickly, makes requests. In any case, the current 20 day time limit for responding to requests is generous. Some access laws require a response in as little as 5 days, or more commonly within 2 weeks. Taking this into account, it is clear that, although bodies dealing with transferred requests have slightly less time than others to respond, in practice this is not likely to cause actual hardship.

27. Consideration should be given to deleting the words "or where it has recently complied with a substantially similar request from the same person" from s.18(1) as it adds no additional value to general allowance for vexatious request to be rejected, but in a worst case scenario could allow for obstruction of legitimate requests. Best practice requires that either a request is vexatious (howsoever defined) and can be denied, or not.

Part III – Measures to Promote Openness

28. See paragraph 12 regarding rearranging the various Parts of the draft Bill.

29. Consideration should be given to including in s.20(2)(a) a requirement that Information Officers also promote best practice regarding "open government" and/or "the importance of the right to information and the role of officials in facilitating the right".

30. Section 21(b) should be amended to remove the word "directly". In this era of outsourcing, it is important that the public is given information regarding all the services provided by the Government, as well as those services which are funded by the government, in whole or in part, but provided by private bodies.

31. Consideration should be given to including an additional requirement in s.21 that information be proactively disclosed in relation to development activities being undertaken by public bodies. It is not easy to craft such provisions in a manner which allows for simple implementation in practice. Some attempt has been made in the Indian *Freedom of Information Act 2002* and the Sri Lankan civil society draft *Freedom of Information Bill 2004* (see below), although both of these provisions have flaws (see CHRI's analysis of the Sri Lankan Bill for more[1]). Despite these difficulties however, CHRI would encourage the inclusion of such a provision as international development practice has repeatedly demonstrated the central importance that an informed constituency has in ensuring effective participatory development, Proactively provided affected development constituencies with information is one strategy for ensuring this end.

    - India – Section 4: *Every public authority shall… publish at such intervals as may be prescribed by the appropriate Government or competent authority… (e) before initiating any project, publish or communicate to the public generally or to the persons affected or likely to be affected by the project in particular, the facts available to it or to which it has reasonable access which in its opinion should be known to them in the best interests of natural justice and promotion of democratic principles.*
    - Sri Lanka – Section 8: *Prior to the commencement of any work or activity relating to the initiation of any project, it shall be the duty of the President or the Minister as the case may*

[1] The Analysis can be found at http://www.humanrightsinitiative.org/programs/ai/rti/international/laws_papers/srilanka/foibill-critique-v2-feb04.pdf. See paragraph 28 for more on the proactive disclosure provisions.

be, to whom the subject pertaining to such project has been assigned to communicate to the public generally and to any persons who are particularly likely to be affected by such project in such manner as specified in guidelines issued for that purpose by the Commission all such information relating to the project that are available as on the date of such communication.

For the purpose of this section, "project" means any project the value of the subject matter of which exceeds :-
(a) in the case of foreign funded projects, one million united states dollars; and
(b) in the case of locally funded projects five million rupees.

32. Consideration should be given to including a time limit in s.22(a) for the publication of the guide, perhaps 6 months from the date of the appointment of the Information Commissioner.

33. Consideration should be given to including a time limit in s.23(3) for the development of the Code of Practice, perhaps 18 months from the date of the appointment of the Information Commissioner.

Part IV – Exceptions

34. It is extremely positive that s.26 operates to ensure that the public interest in disclosure will serve as the final and overarching test of whether information should be released. This is absolutely fundamental to the proper functioning of any right to information law and will ensure that the objectives of the Act are not undermined in practice by the restrictive application of the exemptions regime. Consideration could be given to defining the term "protected interest" in s.26. While it is generally clear what is intended, clarification may aid interpretation.

35. It is also encouraging that the draft Bill contains a relatively short list of exemptions, which are generally worded to require a likelihood of harm. This is preferable to simply exempting whole classes of information without considering the actual implications of disclosure

36. While recognising that s.36(1)(c) is limited by the need for public bodies to show that disclosure "would or would be likely to significantly undermine" the deliberative process, it is still worth noting that the idea that disclosure of information could inhibit the free and frank provision of advice or the exchange of views is worrying. It is vital that the public knows what advice and information the Government bases its decisions on and how the Government reaches its conclusions. It is not enough in this context to argue that disclosure of this kind of information would inhibit internal discussions. Officials should be able – and be required – to ensure that their advice can withstand public scrutiny. To fear such transparency raises questions about the soundness of the entire decision-making process. At the very most, in such cases the relevant information should be disclosed and the names of public officials (possibly only those below a certain administrative level) could be withheld.

37. Consideration should be given to reducing the time limit in s.37(2) from 30 years to ideally 10 years, or at most 20 years.

Part V – The Information Commissioner

38. The establishment of an independent body with responsibility for hearing appeals under the Act as well as monitoring and promoting the law is an excellent initiative. However, it should be noted that there may be resistance within the Government to providing resources for a new public body. Recognising this, consideration should be given to strengthening the arguments in support of the Information Commissioner in the Discussion Paper. Anticipated criticisms regarding the cost of the position could usefully be addressed at this point.

39. Taking into account the recent parliamentary difficulties experienced in Fiji between the Government and the Opposition, it is recommended that the process for appointing the Information Commissioner be reconsidered and a new method devised which is more likely to ensure that the final candidate will have the broad support amongst parliament. Currently, although the Prime Minister has to "consult" with the Opposition and the human rights

committee, he/she does not have to take into account their views when nominating a final candidate. The model adopted in Canadian *Access to Information Act 1982* and in the draft Kenyan *Access to Information Bill 2000* could be considered.

- Canada – *Section 54(1): The Governor in Council shall, by commission under the Great Seal, appoint an Information Commissioner after approval of the appointment by resolution of the Senate and House of Commons.*
- Kenya – *Section 10(1): The President shall nominate a candidate or candidates for the post of Information Commissioner from persons qualified under the provisions of this Act and parliament by a special majority vote, shall confirm the said nomination.*

40. Consideration should be given to fleshing out s.38(2) [sic] and setting out more detailed minimum criteria for candidates for the role of Information Commissioner. The Commissioner will have an important role to play in countering possible resistance within Government towards open government and information disclosure such that it important that the candidate is well-respected as well as highly competent. The draft Kenyan *Access to Information Bill 2000* provides a useful model:

    10(2) The person appointed to the office of Information Commissioner shall -
    - *(a) be a person qualified to be appointed as a judge of the High Court of Kenya;*
    - *(b) be publicly regarded as a person who can make impartial judgements;*
    - *(c) have sufficient knowledge of the workings of Government;*
    - *(d) not have had any criminal conviction and not have been a bankrupt;*
    - *(e) be otherwise competent and capable of performing the duties of his or her office;*
    - *(f) not be the President, Vice President, a Minister or Deputy Minister, a serving public officer or a Member of Parliament; and*
    - *(g) not hold any other public office unless otherwise provided for in this Act.*

41. It is positive that the draft Bill explicitly affirms the independence of the Information Commissioner in s.39(1). However, consideration should be given to strengthening s.39(1) to make it clear that the Commissioner not only has autonomy but "should be completely independent of the interference or direction of any other person or authority, other than the Courts".

42. In addition to the activities listed in s.41, consideration should be given to refining the mandate of the Information Commissioner to include: "making recommendations for the development, improvement, modernisation, reform or amendment of the Act or other legislation or common law having a bearing on access to information held by public and private bodies, respectively" (see. s.41(b)) and "conducting educational programmes to advance the understanding of the public, *in particular of disadvantaged communities*" (see current s.41(e)).

43. Consideration should be given to fleshing out the required content of the Report to be submitted by the Information Commissioner in accordance with s.42(1). The Trinidad & Tobago *Freedom of Information Act 1999* provides a useful model:

    40.(3) A report under this section shall include in respect of the year to which the report relates the following:
    - *(a) the number of requests made to each public authority;*
    - *(b) the number of decisions that an applicant was not entitled to access to a document pursuant to a request, the provisions of this Act under which these decisions were made and the number of times each provision was invoked;*
    - *(c) the number of applications for judicial review of decisions under this Act and the outcome of those applications;*
    - *(d) the number of complaints made to the [Information Commissioner] with respect to the operation of this Act and the nature of those complaints;*
    - *(e) the number of notices served upon each public authority under section 10(1) and the number of decisions by the public authority which were adverse to the person's claim;*
    - *(f) particulars of any disciplinary action taken against any officer in respect of the administration of this Act;*

(g) the amount of charges collected by each public authority under this Act;
(h) particulars of any reading room or other facility provided by each public authority for use by applicants or members of the public, and the publications, documents or other information regularly on display in that reading room or other facility; and
(i) any other facts which indicate an effort by public authorities to administer and implement the spirit and intention of this Act.

Part VI – Enforcement By The Commissioner

44. Although s.44 appears to operate to establish the Information Commissioner as an independent appeal body, consideration should be given to stating this explicitly and making it clear at the same time that the Commission not only has the power to decide whether the Act has not been complied with but also to compel compliance.

45. While it is implied in ss.44(a) that the Information Commissioner will be required to determine whether Part IV exceptions have been properly applied, this could also be usefully made explicit. In this context, it is notable that there may be some in the Government who will argue that the Government and not the Commissioner should be the arbiter of what is in the public interest and when protected interests are likely to be prejudiced. It may be useful to address this argument in the Discussion Paper.

46. Consideration should be given to inserting a provision after s.44 which replicates s.30(3) of the Canadian *Access to Information Act 1982*, which gives the Information Commissioner the power to initiate his/her own investigations. In practice, this will be particularly useful in allowing the Commissioner to investigate delays in providing information, which often will not reach him/her as a complaint if the information is finally handed over, but which may still be worthy of the imposition of a penalty, particularly if the Commissioner uncovers a pattern of non-compliant behaviour.

47. Consideration should be given to including a "deemed decision" provision after s.45(1), similar to that in s.13(4) of the draft Bill, to ensure that if no action is taken by the Information Commissioner the complainant will not be restrained from invoking the remaining appeals processes.

48. It is very positive that s.45(4)(d) gives the Information Commissioner the power to impose penalties for non-compliance. However, the current requirement that non-compliance be willful or egregious fails to take account of the fact that any form of "unreasonable" delay should not be countenanced and should attract penalties on the basis that a fine will operate as an important warning to officials who are poorly implementing the law, not just those who are deliberately obstructing it. In the early years of implementation, this could be particularly important in overcoming bureaucratic resistance. Consideration should be given to lowering the current standard for imposing fines to cover non-compliance which is deemed "unreasonable".

49. Consideration should also be given to amending s.45(4) to allow the imposition of fines on officials personally, not just on their organisations. This suggestion is not as novel as it appears - s.12 of the Maharashtra (India) *Right to Information Act 2002* allows for the imposition of penalties on officials personally. This has been permitted on the basis that many officials will not be concerned if their non-compliance results in their organisation being fined, but will be more likely to comply with the law if they themselves may be liable to pay a sum out of their own pockets for their own non-compliance. In the same vein, corrupt officials will very easily disregard the threat of a fine that they do not have to pay.

50. Notably, s.45(4) does not set a limit on the amount of the fine that the Information Commission has the power to impose. To ensure that the penalty provisions are not weakened via regulation, the draft Bill should include an additional provision which states that there is no upper limit on the fines that the information Commissioner can impose. The rationale for such a provision is grounded in the fact that corruption – which is often the cause of non-compliant non-disclosure of documents – can often involve large sums of money, and needs to be

countered by deterrent or punitive fines which are large enough to act as a disincentive to wrongful practices.

51. Consideration should be given to making it explicit in s.46(1) that the Commissioner may take action under the provision on his/her own motion.

52. The comments in paragraphs 48 and 50 above apply similarly to s.46(2)(f).

53. To ensure that the Information Commissioner's authority is respected by public officials, consideration should be given to more explicitly listing his/her investigative powers under s.47(1) . The Canadian *Access to Information Act 1982* provides a useful model:

Section 36(1) The Information Commissioner has, in relation to the carrying out of the investigation of any complaint under this Act, power:

(a) to summon and enforce the appearance of persons before the Information Commissioner and compel them to give oral or written evidence on oath and to produce such documents and things as the Commissioner deems requisite to the full investigation and consideration of the complaint, in the same manner and to the same extent as a superior court of record;

(b) to administer oaths;

(c) to receive and accept such evidence and other information, whether on oath or by affidavit or otherwise, as the Information Commissioner sees fit, whether or not the evidence or information is or would be admissible in a court of law;

(d) to enter any premises occupied by any government institution on satisfying any security requirements of the institution relating to the premises;

(e) to converse in private with any person in any premises entered pursuant to paragraph (d) and otherwise carry out therein such inquiries within the authority of the Information Commissioner under this Act as the Commissioner sees fit; and

(f) to examine or obtain copies of or extracts from books or other records found in any premises entered pursuant to paragraph (d) containing any matter relevant to the investigation.

(2) Notwithstanding any other Act of Parliament or any privilege under the law of evidence, the Information Commissioner may, during the investigation of any complaint under this Act, examine any record to which this Act applies that is under the control of a government institution, and no such record may be withheld from the Commissioner on any grounds.

Part VII: Whistleblowers

54. Section 50(2) currently appears to operate to restrict the protection provided to whistleblowers under the law to only those people who are blowing the whistle on public bodies. This is an unnecessary and inappropriate limitation, particularly when one considers the recent important cases of corporate whistleblowing by employees at Enron and WorldCom. Consideration should be given to reworking the provision to ensure it covers whistleblowing in both the public and private sectors.

Part VIII: Criminal and Civil Responsibility

55. The comments in paragraph 50 above apply strongly in relation to s.52(2). A fine of $1000 is unjustifiably low and will not act as a deterrent or a reasonable punishment. Consideration should be given to clarifying whether s.52(2) operates to allow for the optional imposition of a fine instead of and/or in addition to imprisonment, or whether the fine and prison term are automatic upon conviction, as appears prima facie to be the case.

For more information or to discuss this paper, please contact:
Ms Charmaine Rodrigues
Right to Information Programme
Commonwealth Human Rights Initiative (New Delhi)
Email: charmaine@humanrightsinitiative.org
Phone: +91-11 2686 4678 / 2685 0523, Fax: +91-11 2686 4688