# Detailed Analysis of the Swaziland *Freedom of Information and Protection of Privacy Bill 2007* & Recommendations for Amendments

*"The great democratising power of information has given us all the chance to effect change and alleviate poverty in ways we cannot even imagine today. Our task, your task…is to make that change real for those in need, wherever they may be. With information on our side, with knowledge a potential for all, the path to poverty can be reversed."*

*--- Kofi Annan*

**Submitted by the**

**Commonwealth Human Rights Initiative**

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# ANALYSIS OF THE SWAZILAND FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY BILL 2007

The Commonwealth Human Rights Initiative (CHRI) was forwarded a copy of the Government of Swaziland's Freedom of Information and Protection of Privacy Bill 2007 by the Swaziland chapter of the Media Institute of Southern Africa (MISA). CHRI has now analysed the Bill, drawing on international best practice standards, in particular, good legislative models from the Commonwealth. This paper suggests areas which could be reconsidered and reworked, as well as providing examples of legislative provisions which could be incorporated into a revised version of the Bill.

## DETAILED ANALYSIS OF THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY BILL 2007

1. Overall, CHRI's assessment is that the Bill in its current form contains some useful provisions. Nonetheless, this analysis suggests a number of amendments, modelled on best practise right to information legislation. At all times, the recommendations proposed attempt to promote the fundamental principles of: maximum disclosure; minimum exceptions; simple, cheap and user-friendly access procedures; independent appeals; strong penalties; and effective monitoring and promotion of access.
2. At the outset, CHRI would note that it is important that the Government publish and circulate the Bill widely for public comment. Experience has shown that for any right to information legislation to be effective, it needs to be respected and 'owned' by both the government and the public. Participation in the legislative development process requires that policy-makers proactively encourage the involvement of civil society groups and the public broadly. This can be done in a variety of ways, for example, by: convening public meetings to discuss the law; strategically and consistently using the media to raise awareness and keep the public up to date on progress; setting up a committee of stakeholders (including officials and public representatives) to consider and provide recommendations on the development of legislation; and inviting submissions from the public at all stages of legislative drafting.
3. It is positive that Swaziland has recognised the many benefits of the right to information through explicit recognition in the Constitution. Article 25 of the Swaziland Constitution provides for freedom to receive ideas and information without interference as part of the right to freedom of expression. Additionally, Swaziland committed itself to implementing the right to information through its international and regional membership of the United Nations, the Commonwealth[1], and the African Union. All of these bodies have endorsed international and regional FOI standards.
4. These standards, as well as evolving State practice and the general principles of law recognised by the community of nations, have been distilled into key principles that should underpin any effective right to information law. These have been included for the Government's information at Annex 1 and have been used as the benchmark for CHRI's analysis and recommendations of the Bill. To bring the Bill in line with international best practice, it is recommended that it be reworked in accordance with the suggestions below.

[1] The Commonwealth recognised the right to information as early as 1980 and in 1999 through the adoption of the Commonwealth Freedom of Information Principles by the Commonwealth Law Ministers.

## PRELIMINARY COMMENTS

Separate Freedom of Information from the Protection of Privacy

5. CHRI strongly urges the Government of Swaziland to consider disaggregating the issues of freedom of information and the protection of privacy and to address them in two separate bills. There are a number of reasons for this. Firstly, freedom of information legislation should be focused on promoting openness and transparency in government. This principle has been recognised by Swaziland in the title and objects of the Bill where it states that the Bill seeks to 'encourage a culture of openness, transparency and accountability in public bodies...' Although it is also important for the Government to protect the privacy of personal information, this should not be addressed within the ambit of this Bill but should be covered more systematically within separate legislation.

6. The principle has been recognised recently by the Tanzanian Government who made the decision to remove all provisions relating to the protection of privacy from their draft Freedom of Information Bill 2006 and address the issue in separate legislation. Another example of best practice can be found in the legislation of the United Kingdom. The UK has two acts that protect the right to information and the protection of privacy independently - the Freedom of Information Act 2000 and the Data Protection Act 1998.

7. There are also procedural reasons why the two issues should be addressed independently. The Bill should establish a central or 'nodal' agency within Government to maintain overall responsibility for the implementation of access to information. It is also best practice to establish an independent monitoring body such as an Information Commission or Commissioner with the power to monitor and scrutinise the Government's compliance with the new access law and for handling public complaints and appeals. Making such bodies responsible for the implementation of both freedom of information and the protection of privacy would cast confusion over their roles and responsibilities. It is preferable to have two separate laws and two corresponding mechanisms for dealing with implementation and appeals.

8. If the Government is concerned that the provision of access to information under the law may in circumstances infringe upon individuals' personal privacy, such information is already protected under the exemptions section in Part 4 of the Bill. If CHRI's suggested amendments to section 39 which exempts documents affecting personal privacy are incorporated, the Bill should ensure that personal and private information is sufficiently protected from disclosure under the law where this is in the public interest.

Address freedom of information independently of freedom of expression

9. It is also important that the right to information is recognised as a fundamental and free standing human right, rather than being presented only as an element of, and in relation to freedom of expression. In 1946 the United Nations called the right 'a touchstone of all the freedoms to which the United Nations is consecrated' and as such it should be recognised as a right in and of itself, crucial to the realisation of all other human rights. As such, CHRI recommends the Memorandum of Objects and Reasons, long title and current definition of 'information' in the Bill be amended to reflect Swaziland's recognition of the right to information's importance as a fundamental, free-standing right of the people which this Act will protect.

Objects and Long title - Act applies to give access to information to *citizens*

10. The long title and stated objects of the Bill clearly suggest that the right to access information is restricted to "citizens" only. This could have major implications, as many poor and disadvantaged people may not have the necessary documentation to prove their citizenship. This clause could therefore be abused by resistant bureaucrats to refuse to accept applications. Additionally, in a country which has taken in long-term refugees and which has a sizeable population of permanent residents – none of whom have citizenship papers – this requirement will work to deny the right to information to key sections of the community. Bureaucrats may also use this requirement to reject applications from NGOs – a practice which has been witnessed in other jurisdictions.
11. Good international practice supports the extension of the Act to allow *all persons* access to information under the law, whether citizens, residents or non-citizens (such as asylum seekers) and to bodies, rather than only individuals. This approach has been followed in a number of jurisdictions, including the United States and Sweden, the two countries with the oldest access laws.
12. Alternatively, if the Government considers this formulation too broad, consideration could be given to following the example of Canada which allows access to information to citizens *and* "permanent residents" (see section 4(1), *Access to Information Act 1982*) or New Zealand which allows requests to be made by citizens, permanent residents or any "person who is in New Zealand" (see section 12(1)(c) *Official Information Act 1982*). This latter formulation is particularly useful because it removes the need for proof of residence documents from applicants, while still limiting access only to people in Swaziland.

***Recommendations:***

*- Remove the provisions that address the protection of privacy from the scope of this Bill and address them in a separate bill dealing exclusively with privacy issues.*

*- Amend the long title of the Bill to read:*

*"An Act to encourage a culture of openness, transparency and accountability in public and private bodies by providing access to information held by these bodies in order to enable every person to fully exercise and protect their constitutional right to information."*

*- Amend part (a) of the object of the Bill to read:*

*"encourage a culture of openness, transparency and accountability in public and private bodies by providing access to information held by these bodies in order to enable every person to fully exercise and protect their constitutional right to information."*

*- Remove parts (b) and (d) from the object of the Bill.*

*- Remove the references to freedom of expression in the Memorandum of Objects and Reasons, the long title of the Bill and the current definition of 'information' so as to emphasise that the right to information is an important, fundamental and free-standing human right.*

*- Substitute the references to 'every citizen' in the objects (a) and long title of the Bill to refer to 'every person'.*

*- Alternatively, follow the example in the Canadian Access to Information Act 1982 by referring to 'citizens and permanent residents' or the New Zealand Official Information Act 1982 by referring to 'every person who is in Swaziland'.*

## PART 1: INTRODUCTORY PROVISIONS

### Section 1 – Short Title and Commencement

13. As discussed above, the Constitution of Swaziland guarantees the protection of the 'freedom to receive ideas and information without interference' to every person, which necessarily implies a *right* of individuals to freely receive and communicate ideas without interference. In recognition of the status of access to information as a *right,* consideration should be given to renaming the law the "Right to Information Act". Although some may argue that such a focus on terminology is pedantic, the status of access to information as a human right should be reflected in any legislation on the matter to ensure that implementing bodies are clear that access to information is not a discretionary gift granted to the people by a benevolent government. Rather it is a constitutionally mandated *obligation* on the Government.

14. It is recommended that section 1(2) clearly specify a date on which the Act will come into force. Failure to specify a commencement date in the legislation itself can otherwise undermine the use of the law in practice. In India for example, the *Freedom of Information Act 2002* was passed by Parliament and even assented to by the President but it never came into force because no date for commencement was ever notified in the Official Gazette. Although it is understandable that the Government may wish to allow for time to prepare for implementation, best practice has shown that the Act itself should specify a maximum time limit for implementation, to ensure there is no room for the provision to be abused and implementation to be stalled indefinitely. Even if a phased approach is adopted, which may require key Ministries to implement in the first year, and other agencies to implement 12 months later, this should be spelled out in the law itself. (For example, Mexico allowed one year for implementation while India's *Right to Information Act 2005* allowed 120 days.)

***Recommendations:***

- *Amend the name of the Bill to the "Right to Information Act 2007" to reflect the fact that the law implements a fundamental human right.*
- *Amend Section 1(2) to specify a maximum time limit for the Act coming into force, which is no later than twelve months from the date the Act receives Presidential assent or the assent of the King.*

### Section 3 – Interpretation

Definition of 'Information', 'record', 'data' and 'document'

15. The current definition of 'information' is too restrictive and could create confusion when read in conjunction with the definitions of 'document' and 'record'.

16. Firstly the definition only refers to the right to information 'that is necessary for the exercise of a person's right of freedom of expression' the definition suggests that this will be a prerequisite for requesting information under the Act. This formulation is in direct contradiction to the fact that the right to information is a right in and of itself and is not a subset of freedom of expression. It is also inconsistent with the right to access information regardless of the reasons for doing so.

17. Throughout the draft Bill the terms "record" and "information" are used interchangeably. This could cause confusion and consistently referring to access to "information" is

recommended. Permitting access to "records" is actually narrower than accessing information as the current definition of "records" refers only to *recorded* information.

18. In light of this, the definition of "information" should also be broadened to reflect the right to access all kinds of information. This approach has been followed in India and New Zealand which means that applicants will not be restricted to accessing only information which is already collated into a "record" at the time of application. In addition the use of term "record" can exclude access to items such as models or materials. This can be a serious oversight. It has been seen in many countries that the public ability to oversee government activities and hold authorities to account, in particular those bodies which deal with construction or road works, is enhanced by allowing them to access samples of materials. It is recommended that the definition of "information" be broadened and used throughout the law instead of "record". Section 2(f) of India's *Right to Information Act 2005* provides a good model.
19. Finally, the concepts in the definition of "record" – that information is able to be accessed if it in the possession or under the control of any body, whether or not it was created by that body - should be applied to accessing all information.
20. For these reasons it is recommended that the definitions of 'data' and 'document' also be removed from the Bill and substituted with a reference to 'information' as they unnecessary circumscribe the definition of 'information' which should be as broad as possible.

***Recommendations:***

- *Amend the definition of 'information to read:*

  *any material in any form , including records , documents, memos, emails, opinions, advices, press releases, circulars, orders, logbooks, contracts, reports, papers , samples, models, data material held in any electronic form and information relating to any private body which can be accessed by a public authority under any other law for the time being in force whether or not said data has been collated as requested*.
- *Substitute access to 'records' 'documents' or 'data' throughout with access to 'information'*
- *Delete the definitions of 'data' and 'document' as they are unnecessary for the application of freedom of information.*

Definition of 'access to information'

21. The draft Bill defines "access to information". This definition is integral to the law as it defines what the right to access information actually and practically implies for the person seeking the information. If the recommendation to broaden the definition of "information" above is adopted, then the definition of "access to information" should be amended to reflect this breadth. See the comments relating to section 17 below.

Definition of 'exempt document'

22. The phrasing of the definition of "exempt document" is of concern as it gives the strong impression that a whole document may be exempted from disclosure if it includes any

information exempted under the draft Bill. This is contrary to international best practice which provides that exemptions only apply to *information* and where that information can be severed from a document then the remainder of the document will be disclosed. This definition should be amended to define "exempt information" with reference to Part 4 of the draft Bill.

Definition of 'public body'

23. The current definition of "public body" is very narrow and will therefore reduce the usefulness of the law for the public by reducing its scope. The definition should be reworked to make it clear that it covers all arms of government – the executive, legislature and judiciary. It is particularly important to recognise that in any modern democracy, it is not appropriate to the give the executive (i.e. The King and/or Cabinet) broad immunities from disclosure. Such protection is a hangover from the days when the monarch was supreme, but this is no longer an appropriate approach to good governance.

24. It is also important to broaden the coverage of the definition to include those private bodies in which the government has a contractual agreement or which carry out public functions. Although it is extremely positive that the Bill allows for access to information of private bodies where that information affects an individual's human rights, best practise suggests that for the purposes of the law, private bodies which conduct public functions or are financed by government should be treated as if they were 'public bodies' and be subject to the same obligations.

25. Section 5 of the Bill does this to some extent by applying the law to contractors engaged by a public or private body, however this principle could be extended further and adopted by adopting a broader definition of "public body". A number of formulations could be considered to include not only to official government agencies but also those bodies the government owns, controls or substantially finances and those private bodies that carry out a statutory or public function:

    - *South Africa s.50: Information held by or under the control of a private body where access to that information is necessary for the exercise or protection of any right.* [NB: if this formulation is too broad, consideration could be given to limiting the application of the law to private bodies over a certain size, determined according to turnover or employee numbers]
    - *India (FOI Act 2002) s.2(f): Any other body owned, controlled or substantially financed by funds provided directly or indirectly by the appropriate Government.*
    - *Jamaica s.5(3): Bodies which provide services of a public nature which are essential to the welfare of society can be covered by the Act by Order.*
    - *United Kingdom s.5(1): Bodies which appear to exercise functions of a public nature, or are providing any service whose provision is a function of an authority under a contract made with that public authority can be covered, by Order of the Secretary of State*

***Recommendations:***

- *Amend the definition of exempt 'document' to refer to exempt 'information'.*
- *Insert a new definition of 'public body to clarify that the law covers all arms of government and also bodies owned controlled or substantially financed by Government, for example:*

  *'public body' includes the Office of the President, Parliament and its committees, the courts, Cabinet, a Ministry, Department, Executive agency, statutory body, municipal corporation, government corporation, any government commission or any other agency of Government, whether part of the executive, legislature or judiciary and also includes any authority or body established or constituted: (i) by or under the Constitution; (ii) by any other law, bodies which appear to exercise functions of a public nature, or are providing under a contract made with a public authority any service whose provision is a function of that authority, a publicly owned company and any other body owned, controlled or substantially financed by funds provided directly or indirectly by the Government"*

**Section 8 – Non application to records required for criminal or civil proceedings**

26. Section 8 states that the law does not apply to a record if it is requested for criminal or civil proceedings. This provision effectively operates as a broad exemption from the law. However, in line with the key principle of minimum disclosure, exemptions should be information specific, not blanket exclusions from the scope of the law and need to be very tightly drafted to ensure that they only permit non-disclosure of information where it would be likely to cause harm. In this context, it is not appropriate that the section allows blanket exemptions from the coverage of the draft Bill regardless of what certain documents contain in reality. Any exemptions should be carefully considered on the merits of the specific request for information.
27. Therefore section 8 should be amended to ensure that the exemption applies to the type of information it is aimed at. If it is aimed at preventing disclosure of information where to do so would undermine the prevention of crime of the administration of justice then it should be re-worded in this light. In order to be exempt from disclosure, it should be necessary for the disclosure of the requested information to actually cause "serious" or "substantial" prejudice to warrant continued secrecy. A more appropriate wording to replace section 8 could be considered, for example:

    *Where disclosure would be reasonably likely to cause serious prejudice to the lawful investigation or prosecution of a crime or the ability to conduct a fair trial, is forbidden to be published by a court or tribunal or would facilitate an escape from legal custody*.
28. To avoid confusion in the operation of the exemption provisions, section 8 should also be moved to the other exemption provisions.

**Section 9 – Act not applying to certain public bodies of officials**

29. Section 9 should be deleted. This section provides that the law will not apply to the King of Swaziland, committees of the Cabinet, the judicial functions or jurisdiction of a court and members of Parliament. It is not appropriate to exclude whole classes of documents or institutions from the coverage of the law. This approach is not in line with international best practice - as stated in paragraph 23 an access to information law should always apply to all three arms of government – the executive, legislature and judiciary. All organisations and bodies supported by taxpayer funds and all bodies financed by public money or mandated to perform certain functions or actions for the benefit of the public should be covered by the law. Exclusions for bodies, for example the Courts are not in keeping with good international practices - Court documents by nature are public documents and court proceedings must be conducted in public view unless the court orders in camera hearing in certain sensitive cases. These provisions also jeopardise the future implementation of the law, as they encourage bodies who do not wish to be transparent to lobby government for the inclusion of their name on this list, a practice which has been witnessed internationally.

***Recommendation:***

*- Delete section 9 as it is inappropriate to exempt entire public bodies or officials from coverage under an access law.*

**PART 2: ACCESS TO RECORDS OF PUBLIC BODIES**

**Sections 13 and 14 – Public Body's Manual and Voluntary Disclosure**

30. Sections 13 and 14 deal with the disclosure of certain information without any request from the public for the information. Section 13 places a duty on public bodies to publish a manual about the public bodies operation and section 14 provides that a public body shall list what information is voluntarily available without an application.
31. These are positive provisions however, the new generation of access laws go further to recognise that proactive disclosure on a range of issues can be a very efficient way of servicing the community's information needs efficiently, while reducing the burden on individual officials to respond to specific requests. The more information is actively put into the public domain in a systemised way, the less information will be requested by the public. Sections 13 and 14 are quite limited and as such, do not achieve this objective.
32. Ideally section 13 should be extended to establish a basic minimum list of information which all public bodies must publish. Considering the Swaziland bureaucracy's historical reluctance to disclose information, allowing public bodies to set the limits on their own disclosure as section 14 currently does, could substantially reduce their usefulness. There is in fact nothing in the law preventing the public body from only publishing the manual in section 13 and not proactively disclosing any further information under section 14.

33. Therefore it is recommended that section 13 be amended to include a minimum list of types of information that must be published by the public body. Section 4 of the new Indian *Right to Information Act 2005* and Article 7 of the Mexican *Federal Transparency and Access to Public Government Information Law 2002* provide excellent models for consideration. They require the disclosure of information such as the recipients of government subsidies, concessions and licenses, publication of all government contracts and information about proposed development works. Such provisions operate to assist the public to keep better track of what the government is doing as well as ensuring key activities of public bodies are always and automatically kept open to public scrutiny.

34. The provision should also provide that all the proactively disclosed information must be regularly updated. Notably, some of the information which is being collected and published may change very often, such that it could be terribly out of date if it is not updated very regularly. Accordingly, a maximum time limit of six months should be allowed for updating and the rules should prescribe shorter time limits for specific categories of information, as appropriate (for example, new government contracts should be published weekly or monthly).

35. Finally, if the Commission is given the role as an overseer of the law, consideration could be given to requiring the Commission to publish a guide to assist public bodies in publishing information proactively under section 13 of the Bill. Such a guide to be published within no more than six months of the Act coming into force, and thereafter updated regularly, so that early on in the Act's implementation, public bodies have guidance on how best to meet their proactive disclosure obligations.

36. According to best practice information that is disclosed proactively by public or private bodies should be made available to the public free of charge and should be disseminated as widely as possible.

***Recommendation:***

*- Replace the term 'voluntary disclosure' with 'proactive disclosure throughout the Bill.*

*- Include a more comprehensive proactive disclosure provision to facilitate easier implementation by public officials, as follows:*

*"(1) Every office shall*

*(a) publish within 6 months of the commencement of this Act:*

*(i) the powers and duties of its officers and employees;*

*(ii) the procedure followed in the decision making process, including channels of supervision and accountability;*

*(iii) the norms set by it for the discharge of its functions;*

*(iv) the rules, regulations, instructions, manuals and records, held by it or under its control or used by its employees for discharging its functions;*

*(v) a directory of its officers and employees;*

*(vi) the monthly remuneration received by each of its officers and employees, including the system of compensation as provided in its regulations*

*(vii) the budget allocated to each of its agency, indicating the particulars of all plans, proposed expenditures and reports on disbursements made;*

*(viii) the manner of execution of subsidy programmes, including the amounts allocated and the details of beneficiaries of such programmes;*

*(ix) particulars of concessions, permits or authorisations granted by it;*

*(x) details in respect of the information, available to or held by it, reduced in an electronic form;*

*(xi) the names, designations and other particulars of the Public Information Officers, and appeals bodies under the Act;*

*(xii) such other information as may be prescribed;*

*and thereafter update there publications within such intervals in each year as may be prescribed;*

*(b) publish all relevant facts while formulating important policies or announcing the decisions which affect public;*

*(c) provide reasons for its administrative or quasi judicial decisions to affected persons;*

*(d) before initiating any project, or formulating any policy, scheme, programme or law, publish or communicate to the public in general or to the persons likely to be affected thereby 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 interest of natural justice and promotion of democratic principles.*

*(e) Upon signing, public authorities must publish all contracts entered into, detailing at a minimum for each contract:*

*(i) The public works, goods acquired or rented, and the contracted service, including any sketches, scopes of service and/or terms of reference;*

*(ii) The amount;*

*(iii) The name of the provider, contractor or individual to whom the contract has been granted,*

*(iv) The periods within which the contract must be completed.*

*(2) Information shall be updated at least every 6 months, while regulations may specify shorter timeframes for different types of information, taking into account how often the information changes to ensure the information is as current as possible.*

*(3) It shall be a constant endeavour of every office to take steps in accordance with the requirements of clause (b) of sub-section (1) to provide as much information proactively to the public at regular intervals through various means of communications so that the public have minimum resort to the use of this Act to obtain information.*

*(4) All materials shall be disseminated taking into consideration the local language and the most effective method of communication in that local area and the information should be easily accessible, including through notice boards, newspapers, public announcements, media broadcasts, the internet or any other means, including inspection at the offices of a public authority.*

*- Explicitly state that the above information must be made available to the public free of charge.*

**Section 17 – Forms of Access**

37. It is positive that the Bill recognizes that there are numerous forms in which the public should be able to access information from the Government and that a requester has the right to specify which form they would prefer to access the requested information in (section 17(3)) However, the list of access methods provided in section 17(2) is not exhaustive and should be amended to reflect the new, more thorough definition of 'information' provided in the interpretations section. As such, CHRI recommends that Swaziland replace section 17(2) with the following description modelled on India's *Right to Information Act 2005*:

> *"access" to information includes the right to-*
>
> *(i) inspect work, documents, records;*
>
> *(ii) take notes extracts or certified copies of documents or records;*
>
> *(iii) take certified samples of materials*
>
> *(iv) obtain information in the form of diskettes, floppies, tapes, video, cassettes or in any other electronic mode through printouts where such information is stored in a computer or in any other device.*

38. This definition also serves to provide for the inspection of public works and taking of samples of materials used in public works. The law should allow for the taking of samples of any materials that a public authority purchases with the use of tax payer's money. It would also be good to clarify how this operates in conjunction with the definition in section 3 of 'access to information'.

39. Although section 17 very positively imposes an obligation for the public body to give access to information in the form requested, it also provides a number of circumstances in which the public body can refuse to give access in that form. This includes, under section 17(3) that giving access in that form would interfere unreasonably with the effective administration or operation of the public body. It is understandable that there may be cases where a request is genuinely too large to process without unreasonably interfering with a public authority's workload. However, section 17(3) should be amended to make it clear that in such situations, the public or private body should: (a) be required to consult the applicant and assist them to try to narrow their search and (b) should not be allowed to reject the request, but should only be allowed to provide the information in a form which is less burdensome. As the provision is currently worded, it does not make it clear that the body must still supply the information, but simply in a different form. A public or private body should not be able to reject applications simply because of the anticipated time it will take to process them. Proposed wording is suggested below:

> *(1) Where a public body is of the opinion that processing the request would substantially and unreasonably divert the resources of the public body from its other operations, the public body shall assist the applicant to modify his/her request accordingly.*
>
> *(2) Only once an offer of assistance has been made and refused can the public authority reject the application on the ground that processing the request would substantially and unreasonably divert the resources of the public authority from its other operations":*

***Recommendations:***

*- Amend the definition of 'access to information' both in the Interpretations section and in section 17 to include the right to take samples or materials*

*- Replace section 17 with the following description taken from the Indian Right to Information Act 2005: "access" to information includes the right to-*

*(i) inspect work, documents, records;*

*(ii) take notes extracts or certified copies of documents or records;*

*(iii) take certified samples of materials*

*(iv) obtain information in the form of diskettes, floppies, tapes, video, cassettes or in any other electronic mode through printouts where such information is stored in a computer or in any other device.*

**Section 18 – Duty to Assist Requester**

40. CHRI commends the Government of Swaziland for the inclusion of section 18 which places a comprehensive duty on Information Officers to provide assistance to the person making a request. Experience has shown that this approach is beneficial to both the public and the Government as it increases the flow of communication and can be a means of minimising the use of resources in the long term.

**Section 19 – Transfer of Requests**

41. While it is common to permit applications to be transferred, section 19 should be amended to require applications to be transferred more quickly as 14 days is an unnecessarily long time. In line with best practice, 5 working days or 7 standard days should be sufficient to decide upon whether an application needs to be transferred and if so, to transfer it.
42. However, section 19(4) should be amended so that the second office to which the application is transferred must still dispose of the application within the original 30 days time limit in section 24. Otherwise, if the time limits restart at the date of transfer, offices may simply delay release of information by endlessly transferring an application.
43. In addition, while section 18(4) seems to require the applicant to transfer an application themselves, section 19 deals with the duty of public bodies to transfer requests. Many laws around the world have provisions similar to section 19, which requires a public body to transfer an application where it doesn't have access to the information and it is aware another public body does. This is in line with best practice because it recognises that a public body will have a better knowledge of government structures and agencies and will be able to more easily identify which other public body is likely to have the requested information. Conversely, in practice individuals could waste time and potentially money shopping around for a public body which will accept that the application is their responsibility. Ideally, the draft Bill should recognize that most public bodies are part of

the same branch of government and should try to act as a single unified entity as far as the public is concerned.

***Recommendations:***

*- Amend section 19(1) and section 19(2) to require applications to be transferred within 5-7 days.*

*- Amend section 19(4) to make it clear that the 30 day time period referred to in section 24(1) does not restart once a request has been transferred. Therefore the section should read:*

*'If a request for access is transferred, any period referred to in section 24(1) shall be computed from the date the request was received by the initial information officer from whom the request was transferred'.*

**Section 21 – Fees**

44. At present, section 21 allows for two types of fees to be charged for providing information under the access law. Section 21(1) describes the fees that may be charged for *applying* for information and section 21(7) describes additional fees that may be charged for *accessing* the information and includes the costs of reproduction as well as the cost of ministers' time spent searching for and preparing the information. However, best practice requires that no fees should be imposed for applying for information and that any access charges should only cover reproduction costs, never searching or collation/compilation time.

45. No application fee should be imposed because the initial work required to locate information and determine its sensitivity to disclosure is a routine and expected task of government. This is the case in Trinidad and Tobago where section 17(1) of the *Freedom of Information Act 1999* specifically states that no fees shall be imposed for applications.

46. Imposing fees for searching and preparing the information is also contrary to best practice. Such fees could easily result in prohibitive costs, particularly as it gives the power to bureaucrats to take their time when searching and collating information in order to increase fees. At the most, fees should be *"limited only to cost recovery, with no additional margin for profit, and a maximum limit should be imposed".*

47. The Bill should also make it explicit that any fees should be set with a view to ensuring that the costs imposed for access are not so high as to deter potential applicants.

Fee Regulations

48. Sections 21(1) and 21(7) should be amended to make it clear that the Minister *must* (as opposed to the current 'may') make rules in respect of fees so as to make it clear that each public or private body is not permitted to set their own fees. This would undoubtedly lead to inconsistencies, and resistant bodies may use fees as one way of deterring requests or even to make a profit. In accordance with common practice, the relevant fee regulations should set out the amounts payable for copies (depending on the size of the

paper), the costs of floppies or CDs, the cost of inspection time and the cost for taking samples.

Fee Waiver

49. It is positive that section 21(1)(d) allows fees to be waived where the information requested is in the public interest. However, in order to ensure fees do not act as a deterrent to using the law, other circumstances in which fees can be waived should be provided for in the law itself, not just in regulations. The following are circumstances for which a body should be under legal obligation to waiver the access fees, and not left to their own discretion.

50. Firstly, fees should not be levied where it would cause financial hardship to an individual. Including such a provision will go a long way to ensuring that some of the underprivileged sections of society will have equal benefit of the use of the law. Two options are available in terms of who decides on the waiver: (1) the Head of the public body could be given the power to waive fees and could delegate that power as necessary; (2) the Information Officer could be given the power to waive fees and internal guidelines could then be developed to assist the Information Officer to make his/her decision. It is recommended that the latter option be chosen because this will likely be more efficient in terms of promoting timely decisions.

51. Secondly, fees should always be waived where the time limits in section 24 are not complied with. This approach has been adopted in India and Trinidad and Tobago.

52. Finally, where the cost of collecting the fee exceeds the amount of the fee itself then the fee should be waived.

***Recommendations:***

- *Amend section 21 to make it clear that fees can only be imposed for accessing the information, not for an application.*
- *Delete section 21(8)(b) which allows for the cost of ministers' time spent searching for and preparing the information to be included in the access fees.*
- *Insert a new section clarifying that:*

  *"any fees charged for provision of information shall be reasonable, shall in no case exceed the actual cost of providing the information such as making photocopies or taking print outs and shall be set via regulations at a maximum limit taking account of the general principle that fees should not be set so high that they undermine the objectives of the Act in practice and deter applications".*

- *Insert a new section obliging public and private bodies to waiver access fees where imposing a fee would cause financial hardship to an individual or where access is in the public interest.*
- *Add a new section to require that fees are automatically waived where the time limits in section 24 are not complied with.*
- *Amend section 21 to make it explicit that the Minister must prescribe fees under the law, and no public authority may set their own fee schedule.*

**Section 23 – Deferral of access**

53. Although it is understandable that in some cases a public authority may genuinely need to defer access because premature disclosure of the information could cause harm to legitimate interests, the provisions in section 23 are broader than what is necessary:

54. For example, section 23(1)(c) allows deferral if the document is already being prepared for submission to Parliament or any particular person. However, it is not clear what purpose this section serves – other than to allow the Minster to publicise a key piece of news before it is published anywhere else? But this smacks of "spin"; if the information is in the public interest, then it should be released – whether in Parliament or not. In its current formulation, this section could be abused because there is no time limit for presenting the information in Parliament or giving it to the person it was prepared for.

55. Section 23 should be reworked to impose a maximum time limit on any deferral, after which the public authority should be required to reconsider release or some external body should be required to approve continued deferral. Otherwise, publication could be delayed *ad infinitem* with no recourse for the applicant.

**Section 24 – Decision on Request**

56. Many laws recognise that some information is required more urgently than other information and therefore provide for a faster response in certain circumstances. It is recommended that no matter what timeframe is decided on, section 23 should be amended (or a new provision inserted) such as that from the Indian *Right to Information Act 2005* is included:

> *Where a request for information relates to information which reasonably appears to be necessary to safeguard the life or liberty of a person, a response must be provided within 48 hours.*

**Section 25 – Extension of period to deal with request**

57. Although there may be some circumstances where it is genuinely necessary to extend the time limits in Section 25, these should be very limited, narrowly defined exceptional circumstances. Accordingly, Section 25 should be reconsidered because it is currently very broadly drafted. In cases where a request is genuinely too large to process without unreasonably interfering with the public authority's workload, it is preferable that the public authority first be required to consult the applicant and assist them to narrow their search, if possible. Thereafter, if the application still cannot be processed within the 20 day time limit, to minimise the possibility of abuse, any extension of the time limits should be approved by the Commission. At the very least, the Head of the public body should be required to approve any extension of the time limits in writing.

58. Section 25(1)(c) allows an extension of the time limit where consultations are required before a proper response can be made. However, considering that public bodies have 30 days to consider and consult on applications, it is not clear when exactly such an extension will be justified. For example, consultations regarding exemptions are an ordinary part of a public body's obligations under the law and do not justify an extension

of time. At the very least, if this section is retained, to minimise the possibility of abuse, any extension of the time limits should be approved by the Commission.

59. Section 25(1)(e) allows an extension of time for any reason so long as the requester consents. Caution should be taken when including this provision as it may be abused to put undue pressure on the requester to give their consent. The request should be subject to one of the other reasons in section 25(1) before any extension of time is made.

60. In any case, it should be made clear that only one extension of up to 30 days can be permitted; otherwise, the provision may be used to block access in effect, by permitting extensions *ad infinitem*.

***Recommendations:***

*- Delete section 23(c)*

*- Rewrite section 23 to impose a maximum time limit on any deferral*

*- Amend section 25 to clarify that only one extension of up to 30 days can be given and only where an application relates to a very large number of documents.*

**Section 28 – Access to health or other records**

61. Section 28 is concerning as it could potentially be abused by resistant bureaucrats wishing to withhold information from requestors. In accordance with the principle that it is every person's fundamental and constitutionally protected human right to access information, particularly information that affects them directly, it is inappropriate for the Government to withhold information due to a hypothesis that it may affect their mental wellbeing. Further, as it would not be inconceivable for a health practitioner to be susceptible to bribery from a corrupt bureaucrat it is inappropriate to allow practitioners to have the power to prevent individuals from exercising their human right to access information under the law. Consideration should be given to removing section 28 from the Bill. At the least, this provision should be moved to Part 4 which deals with exemptions under the law.

***Recommendations:***

*- Delete section 28 'Access to health or other records' as this is not in accordance with international best practice.*

## PART 4: EXEMPT DOCUMENTS AND GROUNDS FOR REFUSAL OF ACCESS TO DOCUMENTS

### Sections 33 – 43 Exemptions from disclosure

62. The current exemption provisions are extremely broad and threaten to undermine the effectiveness of the law. As discussed below, exemptions need to be very tightly drafted to ensure that they only permit non-disclosure of information where it could or would cause significant harm to a legitimately protected interest. Likewise, it is not appropriate to exempt whole agencies or classes of documents from the coverage of the law.

63. One of the key principles of access to information is minimum exemptions. The logic underlying any exemption should be that it must genuinely protect and promote the public interest. All exemptions should therefore be concerned with whether disclosure would actually cause or be likely to cause harm to the public. Blanket exemptions should not be provided simply because a document is of a certain type – for example, a Cabinet document, or a document belonging to an intelligence agency. For the same reasons entire agencies should never be exempt from an access law. The key issue should be whether disclosure would actually cause serious damage to the public interest.

64. As such, exemptions from disclosure are usually allowed where release of information would cause serious harm to national security, international relations, law enforcement activities or would invade the personal privacy of a person who does not hold public office. However, a right to information law needs to be carefully drafted to avoid broadly defined exemptions applying to whole classes or types of information. In most cases, each document and the context of its release is unique and needs to be judged on its merits. Accordingly, exemptions should be applied on a content-specific case-by case review. Non-disclosure is only justified where, on balance, withholding the information is in the public interest.

65. In accordance with international best practice, every exemption should be considered in 3 parts:

    (i) Is the information covered by a legitimate exemption?

    (ii) Will disclosure cause substantial harm?

    (iii) Is the likely harm greater than the public interest in disclosure?

66. Currently, the exemptions provisions are scattered throughout the Bill, which may well make implementation much more complicated for the officials who will be called on to apply them. To aid interpretation, it is strongly recommended that all of the exemptions are captured in a single part. This will require some of the provisions to then be reconsidered, combined and reworded, because the lack of organisation in the Bill has resulted in some duplication as well as some confusion between provisions.

***Recommendation:***

*- Assure that all exemptions under the Act are addressed together in Part 4 rather than being scattered at various points throughout.*

**Section 33 – Cabinet Documents**

67. Although it has historically been very common to include exemptions for Cabinet documents in right to information laws, in a contemporary context where governments are committing themselves to more openness it is less clear why the status of a document as a Cabinet document should, in and of itself, be enough to warrant non-disclosure. Cabinet documents can be protected under other exemptions clauses as necessary – for example, national security or the protection of the national economy. One of the primary objectives of a right to information law is to open up government so that the public can see how decisions are made and make sure that they are made correctly. The public has the right to know what advice and information the Government bases its decisions on and how the Government reaches its conclusions.

68. In this context, it is recommended that the Cabinet exemption be deleted and Cabinet documents protected under other exemptions clauses as necessary – for example, national security or management of the national economy. At the very least, all of the Cabinet exemptions need to be reviewed to ensure that they are very tightly drafted and cannot be abused. However, it is notable that in some other jurisdictions, this type of provision has been abused because Cabinet members simply take documents into Cabinet and then out again and claim an exemption. While it is positive that the exemption requires that the document must have only come into existence for the purpose of submission to Cabinet, in this day and age of "cut and paste" report writing, it would not be very hard for an official to "create" a new document for Cabinet out of old information that he/she wishes to make exempt.

69. Another option would be to exempt information where premature disclosure, "could frustrate the success of a policy or substantially prejudice the decision-making process". Notably though, relevant information should still eventually be disclosed – it is only premature disclosure that should be protected. In Wales and Israel for example, Cabinet documents are routinely disclosed and in India, such documents are at least required to be disclosed after decisions have been made.

**Section 34 – Formulation of policy and operations of public bodies**

70. Section 34 is inappropriate because it could too easily be abused by officials who believe that all their decision making processes are sensitive and should not be open to the scrutiny of the public. This is a very common reaction within the bureaucracy and needs to be broken down by an access law – not protected. Ironically, information which discloses advice given to the government during the policy and decision-making process is exactly the kind of information that the public *should* be able to access, unless it is particularly sensitive. The public has the right to know what advice and information the government bases its decisions on and how the government reaches its conclusions. It is not enough to argue that disclosure 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. CHRI recommends that this provision be removed from the Bill. An alternative would be similar to that above for Cabinet documents – if any exemption is given it should be drafted with regard to the harm that may be caused by the information's disclosure. For example where disclosure would, or would be likely to:

    - cause serious prejudice to the effective formulation or development of government policy; or

- seriously frustrate the success of a policy, by premature disclosure of that policy; and
- disclosure would be contrary to the public interest.

***Recommendation:***

*- Either amend section 33 to state that Cabinet documents will only be exempt in circumstances where premature disclosure "could frustrate the success of a policy or substantially prejudice the decision-making process" or delete section 33 from the Bill.*

*- Remove section 34 'Formulation of policy and operations of public bodies' as this is against international best practise.*

**Section 35 – Documents affecting national security, defence, and international relations**

71. While it is appropriate to exempt information which might harm key national security and international interests, consideration should be given to amending the heading and wording of section 35 to focus on the need for *harm* not just that information will "affect" such interests. An example of such wording would be that disclosure of the information would be: *Reasonably likely to cause serious harm to national security, defence and international relations.* Likewise, section 35(1)(a), (b) and (c) should be amended to reflect the same emphasis on serious harm to the public interest.
72. Section 35(1)(d) relating to information 'supplied in confidence by or on behalf of another state or an international organisation' should be deleted because the key issue for any exemption should be whether harm would be caused by disclosure not whether the information was confidential at the time it was provided. Just because information was given to the Government of Swaziland in confidence does not mean that it should necessarily remain confidential. At the time it was communicated it may have been sensitive, but at the time it is requested it may be harmless. As long as the more general protection in this section which guards against disclosures that would prejudice international relations is retained, the relevant interests will be protected.
73. Section 35(2)(c) pertaining to the exemption of the military forces should be deleted because it is inconsistent with international best practise to exempt entire agencies, units or persons from the scope of freedom of information - only information itself may be exempt for narrowly defined, legitimate purposes in the public interest. In this regard, much of the information held by the military forces may be withheld by virtue of the remainder of the section – the organisation itself does not require an exemption.

***Recommendations:***

*- Amend the title of section 35 to read: 'Information reasonably likely to cause serious harm to national security, defence, and international relations'*

*- Remove section 35.1(d) concerning information supplied in confidence*

*- Remove section 35.2 (c)*

**Section 38 – Documents to which secrecy or protective provisions apply**

74. Section 38 exempting documents that are afforded protection under other laws should be deleted. Not only is this provision entirely against international best practice but it also directly contradicts section 6 which states that the Bill will apply to the exclusion of any other provision of any other law that '(a) prohibits or restricts the disclosure of a record of any body, and (b), is materially inconsistent with an object, or a specific provision, of this Act'. The very purpose of a right to information law is to challenge the bureaucratic cultures of secrecy within Government including the unnecessary over-codification of documents. If left as it is, this section could serve to severely undermine the rights protected under the Act as it leaves space for the creation of new laws which could exempt certain types of information.

***Recommendation:***

*- Delete section 38 'Documents to which secrecy or protective provisions apply'.*

**Section 39 – Documents affecting personal privacy**

75. It is positive that the Government has recognised the need to private the privacy of individuals in this act; the International Covenant on Civil and Political Rights recognises the right not to be subjected to arbitrary interference with his or her privacy, family, and home as a fundamental human right. However, the current exemption in section 39 is too broad and does not provide a tightly worded definition of personal information. Currently information is exempted if it would be 'unreasonable' to disclose the information. Consideration should be given to including a definition of what personal information is. Section 3(II) of the Mexican *Federal Transparency and Access to Public Government Information Law* provides a good example:

> *The information concerning a physical person, identified or identifiable, including that concerning his ethnic or racial origin, or referring to his physical, moral or emotional characteristics, his sentimental and family life, domicile, telephone number, patrimony, ideology and political opinions, religious or philosophical beliefs or convictions, his physical or mental state of health, his sexual preferences, or any similar information that might affect his privacy.*

**Section 42 – Documents containing material obtained in confidence**

76. Section 42 attempts to exempt from disclosure a wide variety of information that is related to the commercial undertakings of various third parties. Currently, there is no consideration of whether disclosure could actually be in the public interest. This is a key deficiency, because private bodies have a huge impact on public life such that the public increasingly feels the need to exercise their right to know in respect of private business information as well as Government information. International experience has demonstrated that, with more and more private companies providing public services with public money, previously clear distinctions between public and private information may need to be reconsidered for the public good. Thus, a number of countries have accepted that some measure of private confidentiality must be legitimately forgone in order to ensure that corruption, for example, in the tendering and implementation of government contracts, cannot be kept hidden through the use of so-called "commercial-in-confidence" provisions. Prioritising transparency and accountability may *sometimes* require that commercial and/or contractual information, including financial details, must be disclosed.

77. At the very least therefore, the draft Bill should make the so-called 'commercial-in-confidence exemptions' *expressly* subject to a public interest override and provide more detail as to what should be considered in applying the public interest test in this case. For example, section 26(6) of the Canadian *Freedom of Information Act 1982* expressly allows the head of a government institution to disclose a record that contains commercial information (other than a trade secret) "if the disclosure would be in the public interest as it relates to public health, public safety or protection of the environment and, if the public interest in disclosure clearly outweighs in importance any financial loss or gain to, prejudice to the competitive position of or interference with contractual or other negotiations of a third party". Section 9(1) of the New Zealand *Official Information Act 1982* states that *a* good reason for withholding confidential commercial information will be taken to exist "unless, in the circumstances of the particular case, the withholding of that information is outweighed by other considerations which render it desirable, in the public interest, to make that information available".

***Recommendation:***

*- Either delete section 42 'Documents containing material obtained in confidence' as any information that is legitimately sensitive in this respect will already be protected under section 35 concerning international relations or*

*- Explicitly state that this exemption will be subject to a public interest test. Suggested wording for this could be: 'Documents containing material obtained in confidence will be disclosed if the disclosure would be in the public interest as it relates to public health, public safety or protection of the environment and, if the public interest in disclosure clearly outweighs in importance any financial loss or gain to, prejudice to the competitive position of or interference with contractual or other negotiations of a third party'.*

**Section 43 – Contempt of Court or Contempt of Parliament**

78. Section 43 is generally properly focused on disclosure that would constitute contempt of court, but it is not clear what the necessity of section 43(1)(c) is, which protects parliamentary privilege. While parliamentary privilege is a recognised Westminster convention, it is not clear how disclosure of documents to the public which are not otherwise covered by other exemptions in Part 4 could undermine this privilege.

**Sections 44 and 47 – Public Interest Override**

79. CHRI commends the Government of Swaziland for including a public interest override in the Bill at section 47, whereby information which falls within the terms of a *general* exemption provision should still be disclosed if the public interest in the *specific* case requires it. This ensures that every case is considered on its individual merits and public officials do not just assume that certain documents will always be exempt. It ensures that the "public interest" is always at the core of a right to information regime. However, to ensure that the provision is properly applied, and to be consistent with the drafting of the rest of the Bill, it is recommended that section 47 make it explicit that the provision applies to both public and private bodies. The provision should also be moved forward to the beginning of Part 4 to ensure that it is clear the public interest test will override all exemptions that follow it..
80. Section 44 which relates to 'Disclosure of exempt document in the public interest' is confusing and appears to limit the scope of the mandatory public interest disclosure in Section 47.This is against international best practise and as such should be deleted.

***Recommendations:***

*- Delete section 44 which appears to unnecessarily restrict the public interest override provided in section 47*

*- Amend section 47 to make it clear that the mandatory disclosure in the public interest applies to both public and private bodies.*

**Section 46 – Manifestly frivolous or vexatious requests or substantial and unreasonable diversion of resources**

81. Section 46(a) that permits non-compliance with a request on the grounds that the "*manifestly vexatious or frivolous"* should be deleted. This provision could too easily be abused, particularly by resistant bureaucrats, who are used to a culture of secrecy and whom may be of the opinion that any request for information from the public is vexatious. If this clause is retained, at the very least the provision needs to be amended to clarify what constitutes the terms "vexatious" and "frivolous".
82. Section 46(b) which allows applications to be rejected because processing would "*substantially and unreasonably divert the resources of a public body"* should also be deleted. While it is understandable that there may be cases where a request is genuinely

too large to process without unreasonably interfering with the public or private body's workload in such cases the public or private body should be required to consult the applicant and assist them to try to narrow their search. Applications should not be summarily rejected simply because of the anticipated time it will take to process them or would unreasonably divert their resources. In any case, as section 25 allows for an extension of time in such cases, there is no need for this provision.

***Recommendations:***

*- Section 46 (a) should be deleted or at least amended so that where a public or private body is of the opinion that processing the request would substantially and unreasonably divert its resources from its other operations, the public authority shall assist the applicant to modify his/her request accordingly. Only once an offer of assistance has been made and refused can the public or private body reject the application on this ground.*

*- Section 46 (b) should be deleted.*

## PARTS 6, 7, AND 8: PROCESSING OF PERSONAL INFORMATION BY PUBLIC BODIES; PROCESSING OF PERSONAL INFORMATION; ACCESS TO PERSONAL INFORMATION

83. CHRI has not commented on these parts as CHRI does not specialise in privacy rights issues. However, CHRI strongly recommends that the Government of Swaziland consider addressing the protection of personal information in a separate Bill. Access to information is a substantial and important enough an issue to be addressed in its own right and the exemptions clause. The Swaziland Government may wish to consult Privacy International for advice on legislation to protect personal information and privacy.
84. One recommendation CHRI would like to make however, is that the provisions in Part 8 be removed. The procedure for applying for personal information should be the same as the procedures for any other form of information – there is no need to repeat these sections and doing so may actually cause confusion in the application of the provisions.

## PARTS 9 AND 10: INVESTIGATION OF COMPLAINTS AND APPEALS AGAINST DECISIONS

85. Although it is extremely positive that the Bill includes a Part on investigation of complaints under the law and a Part on appeals against decisions, it is unclear how these provisions work together and it is strongly recommended that they be reviewed.
86. At present, Part 9 appears to restrict the complaint-hearing function of the appropriate authority to complaints relating to the retention and disclosure of personal information. This is by virtue of section 83(1) which limits all the complaint-hearing to matters about 'personal information'.
87. On the other hand Part 10 provides for an internal appeal mechanism for circumstances in which a request for information has been refused (see section 96). Part 10 allows further appeal to the courts, but does not provide any appeal to the appropriate authority.

88. While it is positive that Part 10 establishes an internal appeal mechanism from decisions made under the law, best practice international standards require that access regimes include an appeals mechanism which is independent of government, as well as cheap, quick and procedurally simple. Although an internal appeal to the public body is one mechanism of appeal as currently established under Part 10, it does not satisfy the criteria of independence.

89. Oversight of the new freedom of information law via appeals to an umpire independent of government pressure is integral to the effective implementation and administration of the law. It is a safeguard against administrative lethargy, indifference or intransigence, and the fear of independent scrutiny ensures that exemption clauses are interpreted responsibly and citizens' requests are not unnecessarily obstructed.

90. On the other hand, Part 10 allows further appeal to the court after the internal appeal decision is made, and the judiciary does generally satisfy the criteria of independence. However, courts are notoriously slow and can be difficult to access for the common person. As such, in many jurisdictions, special independent oversight bodies have been set up to decide complaints of non-disclosure. They have been found to be a cheaper, more efficient alternative to courts and enjoy public confidence when they are robustly independent, well-funded and procedurally simple.

91. For these reasons it is strongly recommended that the draft Bill be amended to include an appeal to an independent appellate body. One way this could be achieved is to amend Part 9 (and more specifically simply to amend section 83) to allow the appropriate authority to undertake inquiries into *any* non-compliance with the law - either in response to a complaint (not necessarily an appeal from a decision), or on its own motion. The law should explicitly state that the appellate body can hear complaints from any person on *any* matter under the law (not just about decisions etc…, to ensure the people can make complaints about issues such as not nominating an Information Officer) and can undertake its own enquiry into any matter under the law.

92. In order to ensure that the appropriate authority can perform its appeal functions effectively, it is imperative that it is explicitly granted the powers necessary to undertake a complete investigation and ensure enforcement of its orders. Section 90 deals only with limited powers in this regard and is far from comprehensive. The powers granted to the Canadian Information Commissioner under section 36 of the Canadian *Access to Information Act 1982* provide a better model.

93. If this approach is adopted then consideration should be given to whether an internal appeals mechanism such as Part 10 is really necessary. Many, though not all, information laws include an internal appeals mechanism. Usually, internal appeals are useful where it is anticipated that there will be a lot of appeals made, because internal appeals will then reduce the number of complaints sent to the independent appellate body (here, the appropriate authority). Is this likely in Swaziland? If so, nonetheless, the question still needs to be asked whether each different public body will have sufficiently qualified staff available to handle information appeals? If not, perhaps it is preferable to set up a bigger appropriate authority, with more staff who are qualified to handle appeals. Naturally, final appeal to the courts should be available.

***Recommendations:***

*- Amend section 83 to make it clear that the appropriate authority is empowered to hear complaints and undertake inquiries into any non-compliance with any part of the law.*

*- Insert a new provision explicitly stating that the appropriate body can hear complaints from any person on any matter under the law and can undertake its own enquiry into any matter under the law.*

*- Amend section 90 regarding the powers of the appropriate authority. The wording could potentially be taken from section 36 the Canadian Access to Information Act:*

*(1) The [insert the name of the independent appeal body] 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 and compel them to give oral or written evidence on oath and to produce such documents and things as the [insert the name of the independent appeal body] 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 [insert the name of the independent appeal body] 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 [insert the name of the independent appeal body] under this Act as the [insert the name of the independent appeal body] 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 [insert the name of the independent appeal body] 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 [insert the name of the independent appeal body] on any grounds.*

**Insert new section – Burden of Proof**

1. Consideration should also be given to including a provision in the draft Bill which sets out the burden of proof in any appeal under the law. In accordance with best practice, the burden of proof should be placed on the body refusing disclosure and/or otherwise applying the law to justify their decision. This is justified because it will be unfair and extremely difficult for members of the public – who will never have seen the document they are requesting – to be forced to carry the burden of proof. Section 61 of the Australian *Freedom of Information Act 1982* provides a useful model.

***Recommendation:***

*- Insert a new section stating that the burden of proof lies with the body withholding the information. For example:*

> *In proceedings under this [Part], the public authority to which the request was made has the onus of establishing that a decision given in respect of the request was justified or that the Information Commission or High Court should give a decision adverse to the applicant.*

## PART 11: APPROPRIATE AUTHORITY

94. It is extremely positive that the Bill gives powers and responsibilities to the Commission on Human Rights and Public Administration established under Article 164 of the Constitution of Swaziland to monitor implementation of the right to information law. As illustrated in CHRI's comments above, experience has shown that it is essential for an access law to elect or create an independent monitoring body to raise the profile of the right to information and balance against bureaucratic resistance to openness. However, CHRI has a number of observations and recommendations for the Government in order to bring these provisions into line with international best practice. Notably, as stated above the appropriate authority should have the power to process appeals under the Act and to make decisions that are binding upon public and private bodies.
95. The independence of an oversight body is of the utmost important as this ensures freedom from political influence when monitoring the implementation of an access law. Although the Constitutional states that the Commission on Human Rights will be an independent body that 'shall not be subject to the direction or control of any person or authority', CHRI notes that its members shall be appointed by the King rather than by a public consultation process, and this could seriously undermine its independence and the confidence of the public.
96. Further, it is important that the oversight body be provided with sufficient time and resources to carry out its role under the law effectively and thoroughly. As the Commission on Human Rights has been tasked with monitoring compliance with all of the human rights protected under the Constitution and has yet to be established, the Government may like to consider appointing a new and independent Information Commission or Commissioner as the "appropriate body" under the Act as the Information Champion of Swaziland who is responsible for independently monitoring implementation and overseeing the implementation of the law.

### Section 105 - Additional functions of the appropriate authority

97. In addition to the functions described under section 105 of the Bill, it is recommended that the following be added to obligatory functions of the appropriate authority, whether this remains the Commission on Human Rights and Public Administration or if a new Information Commission(er) is established for the purpose:

    - Undertaking inquiries into and hearing appeals on non-compliance with the law - either in response to a complaint (not necessarily an appeal from a decision), or on the motion of the Information Commission(er). In accordance with international best practice, such a function should allow the Information

Commission(er) to take action when they suspect a department is not complying with the law or is performing poorly. This should include the power of the Information Commission(er) to make recommendations for improvement of compliance, undertake training and awareness work, and impose fines and other penalties where appropriate. Ideally the law would also provide that on completion of its inquiry the Information Commission(er) should be required to submit its findings to Parliament and Parliament or a relevant parliamentary committee for consideration. Otherwise, the reports may just end up being tabled and ignored.

- Monitoring and reporting - the Information Commission(er) should be required to monitor the law and report and make recommendations to Parliament on these matters. These functions should include:

    (1) Annual reports.

    (2) Identifying and making recommendations for reform of other Acts, laws and administrative systems that affect the implementation of right to information.

    (3) Identifying and making recommendations for reform of the Act itself, particularly where administrative policies are developing that are not in the spirit of the law.

    (4) Reporting, or compiling a report, on findings made as a result of inquiries.

    These reports should also be submitted to Parliament or a relevant Parliamentary committee for consideration.

98. In order to promote public confidence in the members of an independent oversight body and to ensure that they are carefully selected, the selection process should include some element of public participation. For example, when a list is being drawn up by the bureaucracy of possible candidates for the positions, it should be required that the relevant department also call for nominations from the public. At the very least, any list which is put together by the bureaucracy should also be published at least one month prior to consideration by Parliament and the public should be permitted to make submissions on this list. Notably, the list prepared by the bureaucracy should also include a detailed explanation of the reasons for the candidate being nominated, in accordance with agreed criteria.

99. It is essential to appoint Commissioners who have the integrity and experience to be champions of the move to open government and transparency, lead by example and implement the law effectively. Accordingly, not only should technical requirements for appointment as the Information Commission(er) be specified in the law, but it would be useful to elaborate upon the character requirements of the nominee in order to encourage the selection of Commissioners who are utterly impartial and well-respected by the pubic as upstanding citizens who are pro-transparency and accountability. For example, section 12(5) of India's *Right to Information Act 2005* requires that "*…the Information Commissioners shall be persons of eminence in public life with wide knowledge and experience in law, science and technology, social service, management, journalism, mass media or administration and governance."* Alternatively, consideration could be given to including requirements such as:

*The person to be appointed as the Information Commission shall –*

*(a) be publicly regarded as a person who can make impartial judgments;*
*(b) have a demonstrated commitment to open government*
*(c) have sufficient knowledge of the workings of Government;*
*(d) be otherwise competent and capable of performing the duties of his or her office.*

100. The Independence of the Information Commission(er) should also extend to powers, budgets and staff, all of which are very important to the integrity and role of the Commission(er). The law should also provide for the Information Commission(er) to be properly resourced to fulfil all of its functions under the law. To entrench these and to guarantee them, the law should explicitly state that the office of the Information Commission(er) will be independent and that this includes:

- budget making autonomy;
- that the office is completely independent of the interference of any other person or authority other than the courts;
- able to employ its own staff and define their job descriptions, etc;
- able to open additional offices if necessary to undertake its functions.

and that consequently, the Information Commission(er) will be properly resourced to handle appeals and undertake training and public awareness activities.

***Recommendation:***

*- Consider establishing a new independent monitoring and oversight body under Part 11 of the act such as an Information Commission or Commissioner with the power to handle complaints and appeals and make judgements that are binding upon public and private bodies. This would take the place of the 'appropriate body' under the new law.*

*- Amend section 105 to include a more thorough list of functions of the appropriate authority as per the recommendations in paragraph 97 above.*

*- Revise Part 11 to make it clear that members of the appropriate body will persons of eminence in public life with sufficient knowledge of the workings of Government and that the selection process will be subject to public consultation.*

**Section 113 - Offences**

101. Although section 113 deals with limited circumstances in which a person will be guilty of an offence for non-compliance with the law, these provisions should be extended. The offence provisions should be more comprehensive to apply for egregious criminal acts and negligent disregard for the law. Unless there are effective and comprehensive sanctions available to punish conduct that is contrary to the law, then there is little deterrent to resistant officials who wish to flout the law. This is important in a bureaucracy which is likely to be resistant to openness and may stop short of criminal acts, but may still delay and undermine the law in practice. Additional offences need to be created, for example:

- Penalties where timeframes in the law are not complied with,
- unreasonable refusal to accept an application,
- unreasonable delay, which in India incurs a daily,

- unreasonable withholding of information,
- knowingly providing incorrect information,
- concealment or falsification of records,
- non-compliance with the Information Commissioner's orders, which in the UK is treated as a contempt of court.
- dealing with cases where officials ignore the rulings of the Commission,

102. Once the offences are detailed, sanctions need to be available to punish the commission of offences. Notably, any fines need to be sufficiently large to act as a serious disincentive to bad behaviour. Corruption – the scourge that access laws assist to tackle – can result in huge windfalls for bureaucrats. The threat of fines and imprisonment can be an important deterrent, but must be large enough to balance out the gains from corrupt practices. In this context, the offence and penalty provisions should provide for the imposition of a minimum fine as opposed to (or in addition to) a maximum fine.

103. When developing penalties provisions, lessons learned from Indian are illuminating. In India, penalties can be imposed on individual officers, rather than just their department. In reality, without personalised penalty provisions, many public officials may be content to shirk their duties, safe in the knowledge that it is their employer that will suffer the consequences. The relevant provisions need to be carefully drafted though, to ensure that defaulting officers, at whatever level of seniority, are penalised. It is not appropriate for penalty provisions to assume that penalties will always be imposed on Information Officers. Instead, the official responsible for the non-compliance should be punished.

104. In addition to the possibility of fines and/or imprisonment, the Bill should also require that where a penalty is imposed on any officer under the Bill, *"the officer shall also be liable to appropriate disciplinary action under the service rules applicable to him".* This possibility of imposing additional disciplinary sanctions for persistent violation of the Act is permitted under India's *Right to Information Act 2005*.

105. In order to ensure that public authorities properly implement the law, they too should be liable for sanction for non-compliance. This would ensure that heads of department take a strong lead in bedding down the law and ensuring that staff across their authority undertake their duties properly. An additional provision should be included in the Bill to penalise public authorities for persistent non-compliance with the law. A fine could be imposed for example, where a public authority fails to implement the proactive disclosure provisions in a timely manner, does not appoint Information Officers or appellate body, consistently fails to process applications promptly and/or is found on appeal to consistently misapply the provisions of the law to withhold information. The minimum fine should be sufficiently large to act as a deterrent and should be deducted from the budgetary funds approved for the department.

***Recommendations:***

- *Insert more comprehensive offences provisions for example:*

  *(1) Where any official has, without any reasonable cause, failed to supply the information sought within the period specified under Section12, the Information Commission, or the Courts shall impose a penalty of [XXX], which amount must be increased by regulation at*

*least once every five years, for each day's delay in furnishing the information, after giving such official a reasonable opportunity of being heard.*

*(2) Where it is found in appeal that any official has:*

- *Refused to receive an application for information*
- *Mala fide denied a request for information;*
- *Knowingly given incomplete or misleading information,*
- *Knowingly given wrong information, or*
- *Destroyed information, without lawful authority;*
- *Obstructed access to any record contrary to the Act;*
- *Obstructed the performance of a public body of a duty under the Act;*
- *Interfered with or obstructed the work of an Information Officer, the Information Commissioner or the Courts; or*
- *Failed to comply with the decision of the Information Commissioner or Courts;*

*the official commits an offence and the Information Commissioner or the Courts shall impose a fine of not less than [XXXX] and the Courts can also impose a penalty of imprisonment of up to two years or both.*

*(3) An officer whose assistance has been sought by another official for the performance of his/her duties under this Act shall be liable for penalty as prescribed in sub-Articles (1) and (2) jointly with the official or severally as may be decided by the Information Commission or the Courts. [this provision could also be moved to Section9 of the draft Bill if it is deemed more appropriate to be placed there].*

*(4) Any fines imposed under sub-Articles (1), (2) and (3) shall be recoverable from the salary of the concerned officer.*

*(5) Any other officer on whom a penalty under sub-Articles (1), (2) and (3) is imposed shall also be liable to appropriate disciplinary action under the service rules applicable to him and the Information Commission or Courts will refer the case to the appropriate authority for action accordingly.*

*(6) Where the Information Commission finds a public authority guilty of persistent non-compliance it may impose a fine of not less than [XXX] on the body.*

## PART 12: MISCELLANEOUS

### Section 108 Protection against actions for defamation or breach of confidence

106. It is extremely positive that section 108 of the Bill provides for the protection of "whistleblowers", that is, individuals who disclose information in contravention of the law and/or their employment contracts because they believe that such disclosure is in the pubic interest. Whistleblower protection is based on the premise that individuals should be protected from legal, administrative or employment-related sanctions for releasing information on wrongdoing. The inclusion of strong whistleblower protection is important in order to send a message to the public and officials that the government is serious about opening up to legitimate scrutiny.

**Section 114: Repeal of the Official Secret's Act**

107. CHRI commends the Government of Swaziland on their commitment to repeal the Official Secrets Act 1968. It is also extremely positive that the Bill overrides all other inconsistent legislation.

**Insert new section – Education & Training**

108. It is increasingly common to include provisions in the law itself mandating a body not only to monitor implementation of the Act, but also to actively promote the concept of open governance and the right to information within the bureaucracy and amongst the public. Such provisions often specifically require that the government ensure that programmes are undertaken to educate the public and the officials responsible for administering the law. Sections 83 and 10 of the South African *Promotion of Access to Information Act 2000* together provide a very good model:

South Africa*: 83(2) [Insert name], to the extent that financial and other resources are available--*

*(a) develop and conduct educational programmes to advance the understanding of the public, in particular of disadvantaged communities, of this Act and of how to exercise the rights contemplated in this Act;*

*(b) encourage public and Private Bodies to participate in the development and conduct of programmes referred to in paragraph (a) and to undertake such programmes themselves; and*

*(c) promote timely and effective dissemination of accurate information by public bodies about their activities.*

*(3) [Insert name of body] may--*

*(a) make recommendations for--*

*(i) the development, improvement, modernisation, reform or amendment of this Act or other legislation or common law having a bearing on access to information held by public and Private Bodies, respectively; and*

*(ii) procedures by which public and Private Bodies make information electronically available;*

*(b) monitor the implementation of this Act;*

*(c) if reasonably possible, on request, assist any person wishing to exercise a right [under] this Act;*

*(d) recommend to a public or Private Body that the body make such changes in the manner in which it administers this Act as [insert name of body] considers advisable;*

*(e) train information officers of public bodies;*

*(f) consult with and receive reports from public and Private Bodies on the problems encountered in complying with this Act;*

*10(1) The [Information Commission] must, within 18 months…compile in each official language a guide containing such information, in an easily comprehensible form and manner, as may reasonably be required by a person who wishes to exercise any right contemplated in this Act.*

*(2) The guide must, without limiting the generality of subsection (1), include a description of--*

*(a) the objects of this Act;*

*(b) the postal and street address, phone and fax number and, if available, electronic mail address of the information officer of every Public Authority or Private Body; and*

*(c) the manner and form of a request for…access to a record of a Public Authority…[or] a Private Body…;*

*(d) the assistance available from [and the duties of] the Information Officer of a Public Authority or Private Body in terms of this Act;*

*(e) the assistance available from the [Information Commission] in terms of this Act;*

*(f) all remedies in law available regarding an act or failure to act in respect of a right or duty conferred or imposed by this Act, including the manner of lodging--*

*(i) an internal appeal; and*

*(ii) an application with [the Information Commission and] a court against a decision by the information officer of a Public Authority or Private Body, a decision on internal appeal or a decision of the head of a Private Body;…*

*(g) the provisions…providing for the voluntary disclosure of categories of records…;*

*(h) the notices…regarding fees to be paid in relation to requests for access; and*

*(i) the regulations made in terms of [under the Act].*

*(3) The [Information Commission] must, if necessary, update and publish [see the discussion re the meaning of "publish" at paragraph 20 above] the guide at intervals of not more than two years.*

***Recommendations:***

*Insert a new section:*

- *Placing specific responsibility on the new Information Commission to promote public awareness, including through the publication of a Guide to the Act, provide training to bodies responsible for implementing the Act, and*
- *Requiring resources to be provided by the Government accordingly.*

**Insert new section – Regular Parliamentary Review of the Act**

109. To ensure that the law is being implemented effectively, it is strongly recommended that the law provides for a compulsory parliamentary review after the expiry of a period of two years from the date of the commencement of the Act, plus regular five year reviews after that. Internationally, such reviews of legislation have shown good results because they enable governments, public servants and citizens to identify stumbling blocks in the effective implementation of the law. Identified areas for reform may be legislative in nature or procedural. In either case, a two year review would go a long way in ensuring that the sustainability, efficacy and continued applicability of the law to the changing face of Tanzania . It would enable legislators to take cognizance of some of the good and bad practice in how the law is being used and applied and enable them to better protect the people's right to information.

***Recommendation***

*- Insert a new section to provide for a Parliamentary review of the Act after the expiry of two years from the date of the commencement of the Act and then every five years after that.*

## Annex 1: Best Practice Freedom of Information Principles

- *Maximum Disclosure*: The value of access to information legislation comes from its importance in establishing a framework of open governance. In this context, the law must be premised on a clear commitment to the rule of maximum disclosure. This means that there should be a presumption in favour of access. Those bodies covered by the Act therefore have an *obligation* to disclose information and every member of the public has a corresponding *right* to receive information. Any person at all should be able to access information under the legislation, whether a citizen or not. People should not be required to provide a reason for requesting information.

  To ensure that maximum disclosure occurs in practice, the definition of what is covered by the Act should be drafted broadly. Enshrining a right to access to "information" rather than only "records" or "documents" is therefore preferred. Further, the Act should not limit access only to information held by public bodies, but should also cover private bodies "*that carry out public functions or where their activities affect people's rights*". This recognises the fact that in this age where privatisation and outsourcing is increasingly being undertaken by governments, the private sector has increasing influence and impact on the public and therefore cannot be beyond their scrutiny. Part 3 of the South African *Promotion of Access to Information Act* 2000 provides a very good example to draw on.

  Bodies covered by the Act should not only have a duty to disclose information upon request, but should also be required to proactively publish and disseminate documents of general relevance to the public, for example, on their structure, norms and functioning, the documents they hold, their finances, activities, any opportunities for consultation and the content of decisions/policies affecting the public.

  In order to support maximum information disclosure, the law should also provide protection for "whistleblowers", that is, individuals who disclose information in contravention of the law and/or their employment contracts because they believe that such disclosure is in the pubic interest. Whistleblower protection is based on the premise that Individuals should be protected from legal, administrative or employment-related sanctions for releasing information on wrongdoing. It is important in order to send a message to the public that the government is serious about opening itself up to legitimate scrutiny.

- *Minimum Exceptions:* The key aim of any exceptions should be to protect and promote the public interest. The law should therefore not allow room for a refusal to disclose information to be based on trying to protect government from embarrassment or the exposure of wrongdoing. In line with the commitment to maximum disclosure, exemptions to the rule of maximum disclosure should be kept to an absolutely minimum and should be narrowly drawn. The list of exemptions should be comprehensive and other laws should not be permitted to extend them. Broad categories of exemption should be avoided and blanket exemptions for specific positions (eg. President) or bodies (eg. the Armed Services) should not be permitted; in a modern democracy there is no rational reason why such exemptions should be necessary. The law should require that other legislation be interpreted, as far as possible, in a manner consistent with its provisions.

  Even where exemptions are included in legislation, they should still ALL be subject to a blanket "public interest override", whereby a document which is presumed exempt under the Act should still be disclosed if the public interest in the specific case requires it.

- *Simple Access Procedures*: A key test of an access law's effectiveness is the ease, inexpensiveness and promptness with which people seeking information are able to obtain it. The law should include clear and uncomplicated procedures that ensure quick

responses at affordable fees. Applications should be simple and ensure that the illiterate and/or impecunious are not in practice barred from utilising the law. Any fees which are imposed for gaining access should also not be so high as to deter potential applicants. Best practice requires that fees should be limited only to cost recovery, and that no charges should be imposed for applications nor for search time; the latter, in particular, could easily result in prohibitive costs and defeat the intent of the law. The law should provide strict time limits for processing requests and these should be enforceable.

All public bodies should be required to establish open, accessible internal systems for ensuring the public's right to receive information. Likewise, provisions should be included in the law which require that appropriate record keeping and management systems are in place to ensure the effective implementation of the law.

- *Independent Appeals Mechanisms*: Effective enforcement provisions ensure the success of access legislation. Any body denying access must provide reasons. Powerful independent and impartial bodies must be given the mandate to review refusals to disclose information and compel release. The law should impose penalties and sanctions on those who wilfully obstruct access.

  In practice, this requires that any refusal to disclose information is accompanied by substantive written reasons (so that the applicant has sufficient information upon which to appeal) and includes information regarding the processes for appeals. Any such process should be designed to include a cheap, timely, non-judicial option for mediation with review and enforcement powers. Additionally, final recourse to the courts should be permitted.

  The powers of oversight bodies should include a power to impose penalties. Without an option for sanctions, such as fines for delay or even imprisonment for wilful destruction of documents, there is no incentive for bodies subject to the Act to comply with its terms, as they will be aware that the worst that can happen is simply that they may eventually be required to disclose information.

- *Monitoring and Promotion of Open Governance:* Many laws now include specific provisions empowering a specific body, such as an existing National Human Rights Commission or Ombudsman, or a newly-created Information Commissioner, to monitor and support the implementation of the Act. These bodies are often be empowered to develop Codes of Practice or Guidelines for implementing specific provisions of the Act, such as those relating to records management. They are also usually required to submit annual reports to Parliament and are empowered to make recommendations for consideration by the government on improving implementation of the Act and breaking down cultures of secrecy in practice.

  Although not commonly included in early forms of right to information legislation, it is increasingly common to actually include provisions in the law itself mandating a body to promote the Act and the concept of open governance. Such provisions often specifically require that the government ensure that programmes are undertaken to educate the public and the officials responsible for administering the Act.

## Annex 2: The Value of the Right to Information

- *It strengthens democracy*: The right to access information gives practical meaning to the principles of participatory democracy. The underlying foundation of the democratic tradition rests on the premise of an informed constituency that is able to thoughtfully choose its representatives on the basis of the strength of their record and that is able to hold their government accountable for the policies and decisions it promulgates. The right to information has a crucial role in ensuring that citizens are better informed about the people they are electing and their activities while in government. Democracy is enhanced when people meaningfully engage with their institutions of governance and form their judgments on the basis of facts and evidence, rather than just empty promises and meaningless political slogans.
- *It supports participatory development*: Much of the failure of development strategies to date is attributable to the fact that, for years, they were designed and implemented in a closed environment – with governments making decisions without the involvement of *people*. If governments are obligated to provide information, people can be empowered to more meaningfully determine their own development destinies. They can assess for themselves why policies have gone askew and press for the changes to make it work properly.
- *It is a proven anti-corruption tool*: In 2006, of the ten countries performing the best in Transparency International's annual Corruption Perceptions Index, no fewer than nine had effective legislation enabling the public to see government files. In contrast, of the ten countries perceived to be the worst in terms of corruption, only one had a functioning access to information regime. Swaziland scored extremely poorly in the Corruption Perceptions Index and was perceived to be one of the most corrupt countries in a survey of 163. The right to information increases transparency by opening up public and private decision-making processes to scrutiny.
- *It supports economic development*: The right to information provides crucial support to the market-friendly, good governance principles of transparency and accountability. Markets, like governments, do not function well in secret. Openness encourages a political and economic environment more conducive to the free market tenets of 'perfect information' and 'perfect competition'. In turn, this results in stronger growth, not least because it encourages greater investor confidence. Economic equity is also conditional upon freely accessible information because a *right* to information ensures that information itself does not become just another commodity that is corralled and cornered by the few for their sole benefit.
- *It helps to reduce conflict*: Democracy and national stability are enhanced by policies of openness which engender greater public trust in their representatives. Importantly, enhancing people's trust in their government goes some way to minimising the likelihood of conflict. Openness and information-sharing contribute to national stability by establishing a two-way dialogue between citizens and the state, reducing distance between government and people and thereby combating feelings of alienation. Systems that enable people to be part of, and personally scrutinise, decision-making processes reduce citizens' feelings of powerlessness and weakens perceptions of exclusion from opportunity or unfair advantage of one group over another.