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Not Good Enough: India's Freedom of Information Bill Has Great Potential to Overhaul the Ills of Secrecy and Inaccessibility but There Are Inadequacies That Need to be Addressed

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by Richard N. Winfield and Sherrell Evans

AT LONG LAST, INDIA HAS PRODUCED A BILL on Freedom of Information. Many other countries around the world have produced such statutes in their attempts to shed a communist or colonial past. India now joins those ranks, more than 50 years after it gained its official independence from Great Britain in 1947. As India is in the process of discovering, freedom of information is one of the most fundamental of human rights and key to building a stable, efficient democracy.

Our opinion of the bill as written, however, is mixed. It contains many positive provisions – for example, obligating public authorities to open their activities to public display, requiring every public authority to appoint a public information officer, imposing time limits on the excludability of information, and for documents that contain sensitive information, allowing reduction so that as much information as possible may be released. These are great strides. The bill would be a statutory reinforcement of the right to information already expressed in the Constitution of India and in the case law for the Supreme Court of India. It has the potential to be a foundation to overhaul a society long rooted in secrecy, inaccessibility and illiteracy.

But the bill has many gaping holes. For example, it does not include any mechanism outside of government, such as the courts, to which a person who is denied information can file an appeal. It does not include any education, publicity or training programs for the hundreds of government officers and millions of residents who have grown accustomed to a vastly different culture, where much information was not supposed to be widely available. There are no sanctions for noncompliance, and there is no requirement that public agencies publish annual reports of requests for information that explain how many requests were denied and why. In short, there is little oversight. Given India's complex and unique history, this is unacceptable. It is not enough to merely include some of the standards of the Council of Europe. More must be done in order to ensure that the bill does indeed, in more than name only, herald in an era of freedom of information.

As said, the Constitution of India and the Supreme Court of India already have declared a right to information and expressed that it should be freely available. Additionally, previous other statutes, such as the Environment Protection Act, also have made such declarations. Yet, in many important ways, information in India today still flows as it had for generations. There are specific things this bill can and should do to change that. Understanding how and why the bill should be changed requires a look into the history of India.

INFORMATION IN TIME

EVERY DISCUSSION OF FREEDOM OF INFORMATION in India is colored by the Official Secrets Act, enacted in 1923. Its far-reaching prohibitions include the making of notes or sketches that might be useful to enemies of India and possessing information that may affect the sovereignty of India or which was provided in confidence by a government official. Accused persons have the onerous task of proving their innocence. Other acts in India also have been used to impede free expression, including the Indian Evidence Act and the Indian Customs and Excise Duty Act. But the Official Secrets Act remains a primary vehicle of suppression.

It came to life during a time when India was a colony of Great Britain, which at the time also had its own British Official Secrets Act. The Acts gave legal sanction to a culture in which information was held tight amongst the elite, who were separated from the masses of the population. Much of India, historically and today, is poor and half is illiterate. Corruption reportedly is widespread. Two-thirds of the population are dependent on agriculture for their livelihoods, yet rural citizens frequently complain that they are unable to access land records and information on land entitlements. People critically affected by the building of a major dam in the Madhya Pradesh region and by the Union Carbide Corporation gas disaster in that same region in 1984 reportedly still have not been able to get crucial information.

Extreme measures have been used to maintain social distinctions and impede the free flow of information. Scores of journalists have been arrested for their work or on sometimes dubious charges, police and military officers on numerous occasions have clashed violently with journalists protesting conditions, newspaper offices have been raided, journalists beaten, and books banned, especially if they have objectionable religious themes.

This is the India of old, and it is clashing with the India of today, where there are reportedly some "forty thousand publications, a hundred private television channels on cable, and hundreds of FM radio stations." This has contributed to India being "one of the world's leading countries in terms of pluralist press and [it] is a promising market," according to Reporters Without Borders. Journalists were able to ban together recently to pressure the government to withdraw a new anti-terrorism law, the Prevention of Terrorism Ordinance (POTO), that would have required them, at the risk of imprisonment, to reveal their sources and turn over any information they might have on "terrorist activity." And in a victory for advocates of open government, the Supreme Court of India, in D.K. Basu v. State of West Bengal (1997) 1 SCC 216, declared that "transparency of action and accountability perhaps are the two safeguards which this court must insist upon."

Indeed, more so than the European Court of Human Rights or the United States Supreme Court, the Supreme Court of India has given citizens a positive right to access information held by the government. In *S.P. Gupta v. President of India* [1982] AIR SC 149, the Supreme Court of India found that this positive right was reflected in Article 19 of the Indian Constitution: "The concept of an open Government is the direct emanation from the right to know which seems implicit in the right of free speech and expression guaranteed under Article 19 (1)(a). Therefore, disclosures of information in regard to the functioning of Government must be the rule, and secrecy an exception justified only where the strictest requirements of public interest so demands."

Yet the Official Secrets Act is still in effect. The Freedom of Information Bill 2000 does note that the Official Secrets Act, and any other statute, will cease to be operative "to the extent to which they are inconsistent with the provisions of this Act." No other details are given. Presumably, the public information officer that each public authority is

supposed to appoint will have the discretion to decide whether a request for information is consistent with either the Freedom of Information Bill or the Official Secrets Act, and which should triumph.

Numerous international courts have struck provisions that leave such wide discretion in the hands of government officers when the fundamental right of freedom of expression is at stake.

Decisions that cite the potential dangers of allowing speech and expression laws to be vague include *R v. Zundel* [1992] 2 SCR 731 (Supreme Court of Canada), *Herczegfalvy v. Austria,* September 24, 1992 (European Court of Human Rights), *Chavunduka and Choto v. Minister of Home Affairs & Attorney General,* May 22, 2000 (Supreme Court of Zimbabwe), *Walker v. City of Birmingham,* 388 U.S. 307 (1967), *Lewis v. City of New Orleans,* 415 U.S. 130 (1973) and *Street v. New York,* 394 U.S. 576 (1969).

The Supreme Court of India, as well, in *State of UP v. Raj Narain,* AIR 1975 SC 865, declared that, other than in matters of national security, even the Prime Minister of India should not have the discretion to decide what information is of public interest and therefore subject to disclosure. That decision left national security concerns as a loophole. National security has been used as an excuse to withhold information pursuant to the Official Secrets Act.

National Security

The Freedom of Information Bill, likewise, leaves national security concerns as a loophole. Chapter II, Section 8 of the bill, titled "Exemption from disclosure of information," cuts out of the ambit of the proposed statute any information the disclosure of which could possibly "prejudicially affect the sovereignty and integrity of India, security of the State, strategic scientific or economic interest of India or conduct of international relations." This is so overly vague and far reaching that it could potentially include anything. Overbreadth in speech legislation has two impermissible effects: it suppresses speech that should be protected, and it risks creating a chilling environment where people afraid of violating the law avoid making a wide array of speech. As the European Court said in *Ekin Association v. France*, (July 17, 2001):

> The dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the Court. This is especially so as far as the press is concerned, for news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest. This risk exists equally with regard to those publications, other than periodicals, that discuss issues of topical interest.

This is especially pertinent in India, where journalists often have been arrested on charges relating to national security.

If India truly desires to overcome its Official Secrets Act and related history, it will have to more precisely define the types of information that could fall within the excluded categories. These definitions could be provided either in the Freedom of Information Bill itself or in companion legislation that goes into greater specificity. There are many international standards.

The United States

For example, in the United States, the Freedom of Information Act (FOIA) contains nine statutory exemptions for classified information, internal personnel rules and practices, information exempt under other laws, confidential business information (including trade secrets), internal government communications, personal privacy, law enforcement, financial institutions and geological information. Additionally, there are exclusions under the FOIA – all of which involve interferences with law enforcement investigations, foreign intelligence or international terrorism. Two executive orders also govern the classification of information pertaining to national security. According to the American FOIA, information is excluded if it is "specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy and is in fact properly classified pursuant to such order." This is significantly more limiting than the language found in India's Chapter II Section 8. In the U.S., information must be properly classified, in accordance with established procedures, in order to be excluded.

Europe

Europe, like the U.S., has recognized the need to balance freedom of information rights with national security concerns. Article 10 of the European Convention on Human Rights, for example, states that while everyone may have the right to freedom of expression, the exercise of this right "may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

In its case law, the European Court of Human Rights has focused upon whether restrictions, and related hindrances, to freedom of expression are really "necessary" as stated in the Convention. Typically this means that there must be a pressing social need. (*Nilsen and Johnsen v. Norway,* Judgment of November 25, 1999). Governments bear a high burden of proof. Additionally, the European Court has examined whether these restrictions, penalties, etc. are proportionate to any legitimate aim government may pursue. If the restrictions are deemed to be excessive, that is, they are considered too much in order to achieve the government's stated purpose, then the European Court has decided that the true, and forbidden, goal was to repress speech.

Even speech that may "offend, shock or disturb" is protected; such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society," according to the European Court. (Nilsen and Johnsen, supra, *Handyside v. the United Kingdom,* December 7, 1976, *Lingens v. Austria,* July 8, 1986, *Jersild v. Denmark,* September 23, 1994).

Last year, the Committee of Ministers of the Council of Europe published a list of recommendations to its member states on the minimum standards for public access to official documents. It was done in consideration of the "importance in a pluralistic, democratic society of transparency of public administration and of the ready availability of information on issues of public interest." Among the recommendations was that any limitations on access be "set down precisely in law, be necessary in a democratic society and be proportionate to the aim of protecting." Additionally, the report noted that disclosure should be made and access to information granted – despite concerns for national security, public safety, criminal investigations and other serious matters – if there is an "overriding public interest in disclosure."

Johannesburg Principles

There are other international standards that caution against using national security concerns as a vehicle to repress speech and freedom of information. A group of experts in a wide range of pertinent fields, including international law, national security, and human rights, met in 1995 to draft the Johannesburg Principles on National Security, Freedom of Expression and Access to Information. The Johannesburg Principles warn that speech and free information rights should be restricted only

continued on page 30

where they have the "genuine purpose and demonstrable effect of protecting a legitimate national security interest." This "genuine purpose" is specifically defined (in Principle 2) not to include "interests unrelated to national security, including, for example, to protect a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology, or to suppress industrial unrest."

The Johannesburg Principles, like the European Court, also question the necessity of restrictions on speech and expression. Governments imposing such restrictions are subjected to scrutiny. In Principle 1.3, the Johannesburg Principles outline a three part test that governments must meet in order to establish that a restriction on freedom of expression or information is necessary. Namely, a government must demonstrate that:

> (a) the expression or information poses a serious threat to a legitimate national security interest; (b) the restriction imposed is the least restrictive means possible for protecting that interest; and (c) the restriction is compatible with democratic principles.

India

It is doubtful whether India's Freedom of Information Bill 2000 can meet these standards. According to published reports, journalists who have explored alleged corruption or questioned authorities have been frequently beaten and/or arrested on charges that they endangered national security. And government officials have used the Official Secrets Act to both restrict publication of sensitive stories and suppress criticism of government policies. The Freedom of Information Bill is supposed to supplant the Official Secrets Act to the extent that it conflicts with the bill. But the bill itself gives national security concerns too much leeway, making it unclear how the provisions of the bill conflict with the Official Secrets Act and other repressive measures. In addition to exempting a potentially limitless array of information from disclosure, in Chapter III Section 16 the bill specifically exempts intelligence and security organizations from its ambit.

Significant Omissions

IT IS ALSO NOTEWORTHY THAT the Freedom of Information Bill, 2000 does not specifically cite the rights of the press. Although the press should not be given expression rights superior to those of ordinary citizens, the press is nevertheless supposed to serve as a public watchdog. They are the proverbial eyes and ears of the people. This is especially important in a country where access to government has been impeded and the relationship between government forces and the media has been racked with tension. Specific mention of the rights of the press might serve as a reminder of their value for public information officers who review requests for information. The Supreme Court of India already has recognized their value and vital link to freedom of information. In *Bennett Coleman & Co. v. Union of India,* AIR 1973 SC 783, the Supreme Court of India said that "it is indisputable that by freedom of the press [is] meant the right of all citizens to speak, publish and express their views... Freedom of speech and expression includes within its compass the right of all citizens to read and be informed."

The bill requires public agencies to release information about their organization and activities. This is good, but the bill also should require government to educate people about the bill itself and its statutory reinforcement of their right to information – a duty the Committee of Ministers of the Council of Europe included in their recommendations to member states. The bill also should require training for the scores of government officers accustomed to operating in secrecy. It should require each public agency to publish annual reports on how many request for information it received, and how many were denied and why. It should require a stipulation that most meetings of public agencies should be public and adequately announced beforehand – as written, the bill, in Chapter II Section 4 (vi)(c), only requires that public agencies "publish all relevant facts concerning important decisions and policies that affect the public while announcing such decisions and policies."

However, if meetings were open and announced, people could find out information immediately and first hand, as well as participate in the decision making process. That, after all, should be a goal of having freedom of information and a better informed public. As a Special Rapporteur to the United Nations' Commission on Human Rights noted, there is an "important link between the ability of people, both individually and collectively, to participate in the public life of their communities and country, and the rights to freedom of opinion and expression, including freedom to seek and receive information." (E/CN.4/1996/31, para. 64).

India also should consider the merits of having an official ombudsman to oversee how public agencies are complying with requests for information. The ombudsman could serve in an advisory capacity to the newly appointed public information officers in each public agency, answering questions and making sure that they are adhering to the principle of the law. An ombudsman also could serve as an entity to whom persons denied information can file an appeal. The bill should note, as well, that persons denied information can file an appeal through the courts. But making the courts available as an avenue of appeal may not be enough. Previous statutes such as The Factories Act, 1948 have given persons denied information the option of appealing to the courts, but this has been too expensive and gargantuan a task for most people. As a result, The Factories Act, which has no other appeals mechanism, is routinely violated and information not released. In its published recommendations on access to information, the Committee of Ministers of the Council of Europe also suggests that an avenue of appeal be made available, whether through "a court of law or another independent and impartial body established by law."

India should consider imposing sanctions or penalties for noncompliance with the bill. As written, there are no consequences for non-compliance. Indeed, in Chapter III, Section 13, the bill specifically states that "no suit, prosecution or other legal proceeding shall lie against a person for anything which is in good faith done or intended to be done under this Act or any rule made thereunder." And in Chapter III, Section 15 – titled "Bar of jurisdiction of courts" – all courts are specifically barred from hearing any "suit, application or other proceeding" pertaining to the Act and any requests for information. The only appeals mechanism is within the public agencies themselves, and if they refuse to release information persons are given no recourse under the bill.

The Factories Act, as noted, has given recourse to the courts, but to little practical avail. A proper solution, however, is not to entirely remove the courts as an avenue of appeal – especially since the press or other groups with financial backing might be more likely than a factory worker to pursue court action if denied a request for public information.

Businesses, entities and organizations that are quasi-governmental in nature should be subject to the bill as well as public agencies.

The bill should specifically note that persons requesting information should not have to state their reasons for wanting information, and formalities for requests should be kept to a minimum. These are recommendations on access to information included in the directive of the Committee of Ministers of the Council of Europe.

There should be a way in which persons who request information can review that information, free of charge (this is also one of the recommendations of the Committee of Ministers of the Council of Europe).

For example, India could chose to make records available for public inspection within the offices of public agencies. Many offices may already be overcrowded, but free public inspections are necessary in order to make the right to information a reality for many people. As written in Chapter II, Section 7, the bill provides for the provision of information only upon payment of "such fee as may be prescribed or [upon] reject[ion] of the request."

A presumption in favor of releasing information should be clearly stated in the bill.

Chapter II, Section 11 of the bill states that requests for information that involve information supplied by third parties, or requests that might affect third parties, first go through a clearing procedure. Public information officers are required for release of the information. Nothing is said as to what should happen if the third party refuses to give its consent – other than that the information should be released anyway, except for trade or commerce secrets, if "public interest in disclosure outweighs in importance any possible harm or injury to the interests of such third party." But in Gaskin v. United Kingdom (July 7, 1989), the European Court ruled that the responsibility of a state does not end if third parties refuse disclosure or are not available to give their consent. States must, the European Court said, establish an independent entity to decide whether access is to be granted.

General Guidelines

A RECENT CONFERENCE (JULY 2001) was held in Colombo, Sri Lanka, to explore the right to information in South Asia. Participants included Article 19, the Centre for Policy Alternatives, the Commonwealth Human Rights Initiative (CHRI – New Delhi, India), and the Human Rights Commission of Pakistan (HRCP – Lahore, Pakistan). They drafted a list of recommendations for countries in the region to follow in order to ensure the right to information. That list is reproduced verbatim below and is especially pertinent to India.

All countries in South Asia should adopt right to information legislation. This legislation should:

1. establish a presumption in favor of disclosure which is subject only to narrow and clearly drawn exceptions which include a harm test and a public interest override;
2. provide for an independent appeals mechanism for any refusals to disclose information which operates in a timely and low-cost fashion and which has full powers to assess claims, including by viewing records, and to order disclosure;
3. ensure that there is a body with responsibility for monitoring and promoting effective implementation of the law;
4. establish mechanisms for tackling the culture of secrecy, including through training;
5. require public bodies to publish and disseminate widely documents of significant public interest, subject only to reasonable limits based on resources and capacity;
6. impose on private bodies which undertake public functions the same obligations as public bodies;
7. provide for penalties for willful obstruction of access to information;
8. provide protection against legal, administrative or employment-related sanctions for whistleblowers, those who (are) releasing information on wrongdoing or a serious threat to health, safety or the environment, as long as they acted in good faith and in the reasonable belief that the information was substantially true and disclosed evidence of wrongdoing;
9. establish a right to receive information from private bodies where this information is needed to exercise or protect a right;
10. impose an obligation on private bodies to publish information in the general public interest including where those bodies undertake activities posing a risk of harm to public health or safety or the environment or where this is necessary to enable consumers to make informed choices. *HRB*

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