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Policy Brief

Effective Legislation on Right To Information

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**Effective Legislation on
Right To Information**

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Foreword

A strong RTI Law is vital for ensuring transparency and accountability within government. The RTI law has great potential to enhance the overall institutional efficiency of government and its functionaries. Effective implementation of RTI legislation also enables performance assessment of public officials and legislators by the public based on verifiable records of their official actions and decisions, which are otherwise unavailable or difficult to access within a culture of official secrecy.

The law currently in place at the Centre, the Freedom of Information Ordinance 2002, is a weak law in terms of granting access to information to citizens. The inclusion of article 19-A in the Constitution after the 18th Amendment acknowledges the right to information (RTI) as a fundamental constitutional right meaning progressive legislation enabling the exercise of this right, and redressal in case of its denial, is mandatory. The Right to Information Bill 2014 in its present form has however taken five years to take shape and is now awaiting approval from the Federal Cabinet.

As part of its ongoing efforts to enrich the RTI reform agenda in Pakistan, PILDAT has commissioned this Policy Brief on **Effective Legislation On Right To Information** to service a series of Briefing Sessions for Member of Parliament and inform the policy making process. This Brief aims to highlight the strengths and weaknesses of the Right to Information Bill 2014 that is under consideration at the Federal level and gives recommendations regarding for more effective implementation.

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Disclaimer

The views and analyses expressed in this Brief are those of the author and do not necessarily represent the views of PILDAT or of Development Alternatives Inc. (DAI).

Islamabad
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Syed Ali Zafar completed his LLB (Honors) from the London School of Economics in 1984 and was called to the bar at Lincoln's Inn in 1985. He is a partner at the leading law firm Mandviwalla & Zafar, and has appeared in many landmark constitutional cases, as well as in various cases involving administrative, financial and taxation laws. He is a founder member of SAARCLAW, a platform for the legal communities of the SAARC countries to promote an exchange of ideas and co-operation between the countries. He was a lecturer at the University of Punjab and continues to lecture at various law colleges in Pakistan.

Current Legal Framework

In 2010 Article 19-A was inserted into the Constitution of Pakistan, enshrining the fundamental right of all citizens to have access to information that is of public importance. This means that the right to information can no longer be treated as a 'freedom' that may be taken away through legislation, government policies or internal operating procedures of public institutions, and instead, has expressly been established as a fundamental right that the Federal and Provincial Governments must promote, protect, realize in a comprehensive manner and only limit in certain specific circumstances.

Even prior to the insertion of Article 19-A in the Constitution of Pakistan, there already existed laws at the Federal and Provincial level pertaining to access to information held by public bodies. The most significant of these is the Right to Information Ordinance, 2002 (**'the 2002 Ordinance'**), which allowed citizens, for the first time, to ask for and obtain public information and records held by the government.

Contrary to the purpose expressed in its preamble, the 2002 Ordinance falls short of delivering its objectives due to two fundamental shortcomings. Firstly, the scope of information that falls within the purview of the 2002 Ordinance is very limited. Not only does the definition of a 'public body' fail to include corporate bodies and private bodies funded by the government, even though such bodies contribute significantly to the government machinery, but the definition of 'record' also excludes notings on record and minutes of meetings. Furthermore, the Federal Government is also given unfettered powers to declare any record it wants as classified and to exclude any record it deems fit from being made available on the grounds of public interest. The second shortcoming of the 2002 Ordinance is that of implementation, since public officials, including the Federal Tax Ombudsman, are passive actors in the scheme of the Ordinance. They are not required to assist the requesters in making their requests and in identifying the required information; to forward the request to any other public body or to submit any kind of reports or carry out any kind of training and capacity building activities.

The 2002 Ordinance was followed by enactments in Balochistan, namely the Balochistan Freedom of Information Act, 2005, and in Sindh, namely the Sindh Freedom of Information Act, 2006. These enactments remain in force today, and have, so far, not been

updated to bring them into line with Article 19-A, giving effect to the right to information in a comprehensive way, nor have they been modernized to meet the changing needs of an evolving world.

Since the insertion of Article 19-A in the Constitution, the two remaining provinces have also enacted progressive legislation, namely the Khyber Pakhtunkhwa Right to Information Act, 2013 (**'KP Act, 2013'**) and the Punjab Transparency & Right to Information Act, 2013 (**'Punjab Act, 2013'**), discussed in detail below. Both these Acts provide a more robust protection of the right to information. Given that these two provinces now have progressive laws in place, it has become a pressing need for the Federal Government, as well as the Governments of Sindh and Balochistan, to amend and update their right to information legislation.

Analysis of Draft Right to Information Bill (Federal)

The Right to Information Bill (**'Federal Draft Bill, 2014'**) currently being tabled by the Federal Government is a much stronger law and gives effect to the fundamental right to information as set out under Article 19A of the Constitution. An analysis of the strengths and weaknesses of the draft bill, as well as some recommendations for improvement and implementation are set out below.

Strengths

1. The right to information, as set out in Article 19-A of the Constitution, is a fundamental right that is subject to certain reasonable restrictions. What this means is that public bodies, designated government officials, the information commission and any court of law before which a matter concerning the right to information may arise, will have to balance competing policy goals and interests against each other. For such cases the courts have evolved the principle of proportionality as a tool to balance competing rights, interests and policy goals. The manner in which the Federal Draft Bill, 2014 is drafted is conducive to carrying out such a balancing exercise. The Preamble to the Federal Draft Bill, 2014, sets out the purpose of furthering the right to information and recognizes the various ways in which it can have an impact on the functioning of the State, including by making the Federal Government more accountable, increasing participation of people, reducing corruption and

inefficiency of the Federal Government, promoting economic growth, good governance and respect for human rights. Section 3(2) of the Federal Draft Bill, 2014, goes on to state that the Act shall be interpreted so as to advance the purposes set out in the Preamble. This means that when a balancing act is carried out by a designated official, or a principal officer or the information commissioners, they will have to bear in mind the immense benefits of allowing access to information, and weigh these against any benefits that may be derived from withholding the information. In fact section 17 (b) goes on to state that even where information falls within the scope of an exception, the information shall still be provided to the applicant where, on the balance, the overall public interest favours disclosure.

2. The Federal Draft Bill, 2014, takes into account requirements of modernization, including the need to switch over to electronic forms and to making documents available on official websites of public bodies. Various sections of the Act recognize and provide for modern methods of storing and disseminating information. The definition of 'Information' covers material held in any record, regardless of its physical form, and the definition of 'record' includes instruments prepared through electronic processes and technology such as CDs, USB devices, discs, mobile devices, audio records, films, videos and machine readable documents. Section 5 of the Federal Draft Bill, 2014, requires all public bodies to make certain categories of information available and recognizes that this requirement will be fulfilled if the information is made available 'over the Internet'. It further provides that requests for information can be made online or by e-mail and that the information requested may be provided to the applicant in electronic form.
3. The definition of 'public body' includes bodies corporate, NGOs and organizations exercising a public function. This means that a wider net of bodies will fall under the right to information regime, and bodies that could previously escape the obligation to provide information to the public will now be required to do so.
4. The designated official of every public body is required to be a senior officer of at least BPS-19 or equivalent. It was necessary for Federal Draft Bill, 2014 to specify a minimum rank for the designated official in order to ensure that only a

senior officer with a high rank is given the authority to carry out functions under it. Had a minimum rank not been specified, public bodies would have been left free to appoint officers with a low rank and little or no authority and competence to comply with the requirement of dealing with requests for information. Inevitably, this would have had a negative impact on the enforcement of the Federal Draft Bill, 2014.

5. Public bodies and the Information Commission have defined duties of officials responsible for compliance with the Federal Draft Bill, 2014, once it is passed, to actively promote and facilitate the right to information. These duties include the obligation to maintain and index records (including an obligation on information commission to set standards for maintaining and indexing records), publish and make accessible certain categories of information, provide assistance to applicants who are making a request, forward a request to another public body if it is known that the information requested is held by the other public body, carry out promotional measures including maintaining lists of the categories of information that the public body holds, carry out staff trainings and to publish annual reports. In addition, the Information Commission is required to compile user friendly handbooks and to publicize the requirements of this Act and the rights of individuals under it, so that citizens are made aware and able to take advantage of their right to information.
6. The Federal Draft Bill, 2014, provides for a comprehensive complaint and appeal mechanism, and includes penalties for non compliance.

Weaknesses

1. It is unclear whether the Federal Draft Bill, 2014, shall be applicable to the armed forces and to law enforcement bodies.
2. The Bill does not specify any procedure that the Principal Officer must follow for disposing of complaints. For instance it is not specified whether the Principal Officer must carry out an enquiry, nor is it specified what powers the Principal Officer will have when processing a complaint.
3. There is no requirement to stamp or seal or to authenticate the copies of the record that are

provided to a requester in any other way. It may be useful to impose such a requirement to prevent tampering with the copies of the record and to prevent fraudulent activities or the dissemination of false information.

Khyber Pakhtunkhwa Right to Information Act, 2013

Khyber Pakhtunkhwa prides itself in being the pioneer of introducing legislation pertaining to the right of information in Pakistan, introduced with the objective of creating a transparent environment that acts as a fetter for corruption and boosts democracy. Under the KP Act, 2013, responsibility is designated to the Public Information Officers (PIOs) to process the citizen's request for information and serve as a bridge between the public and the respective government institutions.

Two amendments were introduced to the KP Act, 2013 in June 2015, these involved firstly exempting the KP Assembly from the purview of the law and secondly lowering the status of the KP Information Commission by giving the Government the right to appeal against its decisions in the court of a district and sessions judge. However, strong protest from the civil society, media and other groups, resulted in the KP Assembly withdrawing these amendments.

Under section 4 of the KP Act, 2013 all public bodies must ensure that all the records that it holds are properly maintained so as to enable them to comply with the obligations under the said Act. This may be considered an ancillary benefit of the same legislation.

If properly implemented, the KP Act, 2013 is a convenient means through which the public may closely monitor the workings of the provincial government. The same law also seeks to provide protection for whistleblowers acting in good faith.

Punjab Transparency & Right to Information Act, 2013

The Punjab Act, 2013 was enacted by the Punjab Government in December, 2013 post inclusion of Article 19-A in the Constitution of Islamic Republic of Pakistan and the appraisal received by the enactment of the KP Act, 2013.

As evident from a look at the preamble of the Punjab Act, 2013, it is also drafted for the purpose of improving access to information.

Comparison between the KP, Punjab and Federal RTI Act

The Federal Draft Bill, 2014, the KP Act, 2013, and the Punjab Act, 2013, ('the Acts') have been drafted in

pursuance of the common goal of providing citizens with access to information.

However, the generally tailored nature of the KP Act, 2013 as compared to the Punjab Act, 2013 becomes apparent from the outset; the preamble to the former specifically identifies the right to information as a fundamental right enshrined in Article 19-A of the Constitution of Islamic Republic of Pakistan, while the latter simply treats it as a fundamental right without making any reference to Article 19-A.

While this may make it appear as if the former is an Act made in pursuance of this particular provision of the Constitution and the latter simply a policy-oriented attempt at improving access to information, such is not the case. In fact, the manner in which the Punjab Act dwells into detail in areas that are of key significance, is evident from the comprehensive definition of 'information' contained in the Act and also by virtue of the fact the list of exempted information is narrowly and clearly drawn. On the other hand, the KP Act, 2013, as well as the Federal Draft Bill, 2014 define information in a broad manner, subjecting it to the interpretation of officials and contradicting with the popular idea that the two are drafted in a more detailed manner as compared to the Punjab Act, 2013.

Similarly, a comparison of the language used in the key sections of the Acts highlights the difference that may arise in the applicability of the Acts.

Section 3 of each act sets out the need for each citizen to have right to public information. The KP Act, 2013, goes a step further to the Punjab Act, 2013, and states that, "...no requester shall be denied access..." converting what would have otherwise constituted non-compliance into clear violation. Furthermore, it provides in Section 3 (3) (b) that such access shall be provided promptly and at the lowest reasonable cost. This is crucial as it eliminates the possibility of non-compliance via the route of red-tapism and bureaucratic procedure. In stark contrast to this, Section 3 of the Punjab Act, 2013 simply states, "Subject to the provisions of this Act, an applicant may, in the prescribed manner, exercise the right to information." This does not allow, as in the case of KP Act, 2013, to eliminate the hurdles of bureaucratic procedure.

The idea of proactive disclosure in relation to certain documents/types of information (as embedded in Section 4 of the Punjab Act, 2013) appears to be an answer to this short-coming. However, it still does not

match the standard of compliance set under the KP Act, 2013.

As regards the Federal Draft Bill, 2014, it not only encapsulates the provision of KP Act, 2013, that access to information shall not be denied, but also goes a step further and states that seeking information shall be encouraged.

Moreover, the KP Act, 2013, in Section 11 and the Federal Draft Bill, 2014, in Section 13, require a public body to respond to all requests for information within seven working days (extendable to ten days) and ten working days respectively and also lay down a detailed framework of the timeline for dissemination of information in accordance with the nature of the information being sought.

The Punjab Act, 2013, on the contrary, in Section 10 (7), lays this time period to be a generous fourteen days, extendable up to another fourteen days. This shows that the KP Act, 2013 takes precedence over the Acts when it comes to speedy access to information.

The Punjab Act, 2013, on the other hand may not provide speedy access to information but takes precedence over the KP Act, 2013, in that it provides cost-effective access by virtue of not charging a fee for release of information, unlike the KP Act, 2013, that allows fee to be charged for releasing more than the first twenty pages of information, unless the requester is below the poverty line.

The Federal Draft Bill, 2014, strikes the right balance by providing that the lodging of requests for information shall be free but money may be charged to cover the costs for reproducing information, unless only the first twenty pages of a document are required to be reproduced or if the requester can show that he is below the poverty line. Thus, the Federal Draft Bill, 2014, is exemplary in providing speedy yet cost-effective access to information.

Furthermore, while both the Punjab Act, 2013 and KP Act, 2013 incriminate the willful withholding of information, the KP Act, 2013 attaches a penalty of Rs. 250 per each day of the delay which can go up to Rs. 25000, under the Punjab Act, 2013, 2 days of salary can be deducted for each day of the delay or fine up to 50000 can be imposed.

This difference between the laws of the two provinces is quantitative in nature, perhaps reflecting the respective levels of tolerance of tampering with the

right to information held by each province. The Federal Draft Bill, 2014, not only continues this tradition of incrimination of withholding information but also sets out a detailed criteria of according increased punishment in event of continuous defaults, which may go up to the imposition of a fine of Rs. 100,000. This reflects the absence of tolerance on part of this new law for any unnecessary delay/withholding of information.

The KP Act, 2013, the Punjab Act, 2013 and the Federal Draft Bill, 2014, are also comparable in that while each provides for the establishment of an Information Commission, in the provinces of KP, Punjab and on the Federal level respectively, the constitution of the Commission is different for each province and for the Federation. The KP Act, 2013 in, Section 24, and the Federal Draft Bill, 2014, in Section 29 provide for the establishment of a Commission consisting of four Commissioners while the Punjab Act, 2013, despite catering to a larger province as compared to the KP Act, 2013, calls for the establishment of a Commission consisting of three members in Section 5 of the Act. The Punjab Act, 2013, is also less stringent with the eligibility requirements for the post of the Commissioners. Moreover, Section 24(2) of the KP Act, 2013 and Section 29 of the Federal Draft Bill, 2014, expressly declare the KP Information Commission and the Pakistan Information Commission to have the status of independent statutory bodies and ensure the autonomy and independence of each body. On the other hand, the Punjab Act, 2013, does not free the Information Commission established thereunder, of Governmental and external influences; it expressly provides that appointments shall be made by the Government and also envisages a pivotal role of the Government in matters of removal of Commissioners.

In light of this, it is evident that the current Federal Draft Bill, 2014, does not only contain the best features of the KP Act, 2013 and the Punjab Act, 2013, but is also being hailed by experts as one of the best pieces of legislation pertaining to the Right to Information in the World.

Comparison with RTI Legislation in South Asia

Bangladesh

In Bangladesh a Right to Information Act, 2009 (**'Bangladesh Act'**) was passed in April 2009. The Bangladesh Act is based on the freedom of thought, conscience and religion, guaranteed by the constitution of Bangladesh. The right to information is interpreted as being an inalienable part of the freedom of thought, conscience and religion.

The Bangladesh Act is largely similar to the Federal Draft Bill, 2014, in the way it is structured and the rights that it guarantees. Both Acts first set out the meaning and scope of '*information*' and the public bodies to which they apply. The Acts then proceed to setting out the procedure for making requests, time frames for sending the information requested and the information exempted from disclosure. Both Acts also define the duties and responsibilities of the public bodies and the officials designated by the public bodies, the constitution and appointment of Information Commissions and the powers and functions of the Information Commissions. Furthermore, both Acts also provide a mechanism for appeals and prescribe penalties for non-compliance.

The Bangladesh Act differs from the Federal Draft Bill, 2014, in particular, in some fundamental ways.

In terms of scope, whereas minutes of meetings are included within the scope of the Federal Draft Bill, 2014, the Bangladesh Act specifically excludes 'office note sheet'. Moreover the Bangladesh Act specifically excludes all intelligence agencies and units within Bangladesh, whereas Federal Draft Bill, 2014, is silent on this front. Finally, the Bangladesh Act includes all private organizations or institutions run on foreign funding to be included in the definition of bodies that are required to disclose information despite the fact that such an onerous obligation on foreign funded private institutions may be a setback in terms of foreign investment.

With regard to the exceptions to the right to information, the Federal Draft Bill, 2014, generally has higher threshold levels that must be crossed before information can be declared to be exempt. For example, with regard to exemption under the heading '*international relations*', the draft Federal Bill sets the threshold as '*grave and significant damage to the interests of Pakistan*' while the Bangladesh Act sets a much lower threshold of '*harming existing*

relationships'. The Bangladesh Act also exempts from disclosure information that would harm the intellectual property rights of a third party as well as information that would impede the judicial process of a case. Such exemptions are not present in the Federal Draft Bill, 2014.

It is evident that while both Acts are similar in application and objectives, the Federal Draft Bill, 2014, offers a more liberal protection of the right to information.

India

In order to achieve the objective of protecting the right to information of its citizens, India promulgated the Right to Information Act, 2005 (**Indian Act**). The preamble to the Indian Act establishes the '*paramountcy of the democratic ideal*' while at the same time recognizing that there are other competing public interests including efficiency, optimum use of finite fiscal resources and maintaining confidentiality of sensitive information. The Act purports to balance competing interests.

In terms of scope and substantive legal provisions, the Indian Act is not very different from Federal Draft Bill, 2014, although there are a few differences to be noted. These differences are that:

- (i) Unlike the Federal Draft Bill, 2014, the Indian law fails to include corporate bodies and non-governmental organisations in its definition of 'appropriate Government' bodies to which the act is applicable.
- (ii) The Indian Act also excludes papers including records of deliberations of the Council of Ministers, Secretaries and other officers, whereas in the Federal Draft Bill, 2014, minutes of meetings are specifically included.
- (iii) The threshold tests laid out for the exemptions from disclosure are generally lower in the Indian Act than the tests laid out in Federal Draft Bill, 2014.
- (iv) The Indian Act appears to grant a limited discretion to grant exemption on the grounds of privacy of an individual or third party documents (the information that would harm the competitive interests of a third party and information held by a person in his fiduciary relationship is only exempt if the court is satisfied that the public interest does not warrant disclosure). Information of that may

'prejudicially affect' the interests of the State and privileged information pertaining to Parliament or State Legislature is exempt without the need to carry out any kind of balancing act. This is unlike the Federal Draft Bill, 2014, where all exemptions must be balanced against the public benefit derived from disclosure.

- (v) The Indian Act protects intellectual property, which the draft Federal Bill fails to do. However, the Indian Act also contains a blanket exemption for disallowing disclosure on the grounds that the disclosure would be an infringement of copyright, which is a vague and general exception and may be subject to abuse.

As far as implementation of the right to information is concerned, however, the Indian Act seems to have a lengthy and tedious procedure for implementation. The Act stipulates that Central Information Commissions shall be established in the Capital and all States of India. Each government department will designate as many Information Officers as required, in all administrative units or offices under it.

To request information, initially, an application will be made to the Assistant Central or State Information Officer who shall then forward it to the Central or State Information Officer to process the request. Appeals against the decisions of the Central or State Information Officers shall be made to such officer who is 'senior in rank' within 30 days. A second appeal may also be made within a period of 90 days. The Indian Act increases the bureaucratic red tape for processing the requests. No single officer is to be designated by the Department for enforcing the Act making it more difficult to designate responsibility and to hold officers accountable. Nor does the Act specify or designate a person with whom to lodge an appeal, instead it puts the burden on the person filing the appeal to identify an officer of a higher rank. Moreover, jurisdiction of the courts is specifically excluded by the Act.

Recommendations for Improvement and Implementation of the Federal Draft Bill, 2014

Though the Federal Draft Bill, 2014 is being hailed by experts as one of the best pieces of legislation in the world, the following recommendations may be considered by policymakers and the Federal Government for its improvement and implementation:

1. Include armed forces and law enforcement bodies in the definition of 'Public body'.
2. Provide for application of the Federal Draft Bill, 2014, to information of public importance held by political parties. This should apply specifically to budgetary/financial information pertaining to the running of large political parties.
3. Exempt information that would affect the intellectual property rights of a third party.
4. Exempt information that would impede the due process of court proceedings.
5. Define '*privacy*', '*personal information*', '*individual*' and '*third party*'. For instance is the privacy and personal information of corporations and association of persons protected? Is the definition of individual and third party limited to natural persons?
6. Specify a special procedure for information concerning the life and liberty of an individual.
7. Specify a procedure that the Principal Officer must follow upon receiving a complaint.
8. The exceptions set out in sections 18, 19, 21, 22 and 26 may be extended to apply beyond 15 years in exceptional circumstances. It should be specified who can extend these exceptions in what manner.
9. Further the use of online and electronic forms as this reduces overall costs of providing information. An online tracking system, whereby the requester can track the progress of the request, may be a useful tool to ensuring effective implementation.
10. Ensure that photocopy machines/scanners/printers, etc., are present in offices of public bodies.
11. Any judgments of the court on the interpretation of the Federal Draft Bill, 2014, once passed, be made available/circulated amongst the public bodies and the information commission, so that the designated officials, principal officers and information commissioners can moderate their own decisions in accordance with the courts interpretation.

Conclusion

The draft law is comparable to any other right to information legislation currently in force in South Asia, including the legislation enacted by the Khyber Pakhtunkhwa and Punjab governments. In fact the draft law goes a step beyond the existing legislation. For instance in the Punjab Right to Information Act, 2013, the exceptions are broad and generalized, and have a very low threshold requirement. Public officials only need to show '*harm*' to the economy or the national interest, etc., in order to withhold information. The thresholds in the Federal Draft Bill, 2014, are significantly higher and the words used include '*grave and significant damage*' and '*serious prejudice*'. Moreover, many of the exceptions contained in the Federal Draft Bill, 2014, will be removed in 15 years (subject to an extension by the Federal Government).

As far as the problem of implementation of the Act is concerned this can be combated through a combination of strategies, including providing information and guide books to the public, giving adequate and effective training to staff in public bodies, and sending a strong message that any violation of the right to information legislation will not be tolerated.

In conclusion, if the Federal Draft Bill, 2014, is to be passed in its present form it will be a leap forward in terms of ensuring the right to information as contained in Article 19-A, and in terms of promoting accountability, transparency and public participation.



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