

A FREEDOM OF INFORMATION LAW FOR FIJI

DISCUSSION PAPER AND DRAFT BILL

CITIZENS' CONSTITUTIONAL FORUM

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FOREWORD

A democratic society is one in which individuals have the opportunity to participate in making the decisions that affect them. This participation may take a variety of forms – such as voting in the election of Members of Parliament, contributing to public debate on new laws or policies proposed by the Government, or even standing for election yourself. In a very obvious way, information is critical to all of these activities. Elections would be a sham, for example, if voters did not know what the candidates were proposing to do once elected; and it would be impossible to contribute to debate on proposed new laws if you did not know what they were.

Likewise, it is our democratic right to scrutinize the actions of our political leaders, public officials and government agencies, and assess their performance. Once again, information is critical to this activity. Accountability and good governance can only be achieved if members of the public have access to information.

For these reasons, freedom of information, or the right to access information held by government agencies, is essential to the proper functioning of a democracy.

As long ago as 1946, in its very first session, the General Assembly of the United Nations passed a resolution which referred to freedom of information as “a fundamental human right and ... the touchstone of all the freedoms to which the UN is consecrated.”¹ Since that time, the right to freedom of information has received formal legal recognition in a number of international conventions (notably the International Covenant on Civil and Political Rights), as well as in the domestic laws of many nations (including for example Australia and New Zealand).

Here in Fiji, the right to freedom of information appears in our Constitution as the “freedom to seek, receive and impart information and ideas” – which is part of the right to freedom of expression guaranteed by section 30.² However, section 174 of the Constitution goes further, and provides:

“As soon as practicable after the commencement of this Constitution, the Parliament should enact a law to give members of the public rights of access to official documents of the Government and its agencies.”

In other words, the Constitution imposes a positive obligation on the Fiji Government to introduce a Freedom of Information Act as soon as possible. It is now 2004 and this has not been done. The FLP Government, it must be acknowledged, did release an exposure draft of a Freedom of Information Bill in early 2000; however, this was overtaken by the coup. The present SDL/CAMV Co-alition Government, on the other hand, has made no move to discharge this obligation, despite having been in office for almost three years now.

¹ UNGA Resolution 59(1), 14 December 1946.

² The “freedom to seek, receive and impart information and ideas”: Constitution (Amendment) Act 1997 s 30(1)(a).

In these circumstances, the Citizens' Constitutional Forum has decided to publish this discussion paper and draft Freedom of Information Bill, in an effort to promote public awareness, stimulate debate, raise support for the principles on which we believe the new law should be based, and bring pressure to bear on the Government to fulfil its Constitutional obligation.

In doing so, the CCF recognises that it is governments (and not civil society organisations) which are generally best placed to develop new laws, and of course new laws cannot be passed by Parliament unless they receive Government support. We also recognise that a new law on freedom of information can only succeed in practice if it is fully understood and properly implemented by government agencies – on which it will impose the most significant obligations and associated resource burden. For this reason, government agencies need to be involved in the development of the new law.

The CCF does not pretend to have all the answers when it comes to implementing the right to freedom of information in Fiji, and we invite you to send us your comments, by post or e-mail to the following addresses:

Post: Citizens' Constitutional Forum
25 Berry Road
PO Box 12584
SUVA

E-mail: ccf@connect.com.fj

We would also encourage you to get involved in this issue in any other ways that you can – for example by discussing it with friends or work colleagues, writing to the newspapers or contacting your local Senator or MP. All of these activities will help to make our political leaders aware of the urgent need to introduce a Freedom of Information Act.

Finally, the CCF wishes to acknowledge the contribution of two international non-government organisations to this project: ARTICLE 19, a London-based organisation whose mandate is to promote respect for freedom of expression; and the Commonwealth Human Rights Initiative (CHRI), which is based in India and works towards the practical realisation of human rights in Commonwealth countries. Our draft Bill draws heavily on "A Model Freedom of Information Law" developed jointly by these two organisations in 2001, together with the Centre for Policy Alternatives (Sri Lanka) and the Human Rights Commission of Pakistan.³ The CCF extends its thanks to ARTICLE 19 and CHRI for providing invaluable background material, contacts, comments and other support.

Rev. Akuila Yabaki
CCF Executive Director

³ The "Model Freedom of Information Law" is published on ARTICLE 19's website, www.article19.org.

INTRODUCTION

The purpose of this discussion paper is to set out the principles on which the Citizens' Constitutional Forum believes a Freedom of Information Act for Fiji should be based, and explain how they are articulated in the draft Bill included in the Appendix. These principles are drawn from international best practice, as expressed by inter-governmental organisations, non-government organisations and national governments through their domestic laws. They may be briefly stated as follows:

1. **Maximum Disclosure.** *Every member of the public has a right to know and government agencies have a corresponding duty to disclose information. All information should be available on request unless there is a legitimate ground for withholding it.*
2. **Obligation to Publish.** *Government agencies should publish and widely disseminate key categories of information relating to their activities and any information which is of significant public interest.*
3. **Promotion of Open Government.** *The Freedom of Information Act should include mechanisms to inform the public of its rights and promote a culture of openness within government.*
4. **Limited Scope of Exceptions.** *The Freedom of Information Act should list the grounds on which a government agency may refuse a request for information. Each ground should relate to a legitimate aim of government which would be harmed if particular information were disclosed. These exceptions to the duty to disclose should only apply where the public interest in disclosure is outweighed by the harm that disclosure would cause.*
5. **Processes to Facilitate Access.** *All public bodies should be required to establish open, accessible internal systems for ensuring the public's right to receive information. The Act should establish strict time limits for the processing of requests, require that any refusal be accompanied by written reasons, and provide for appeals to an independent administrative body and the courts.*
6. **Costs.** *Fees for gaining access to information should not be so high as to deter requests and defeat the purpose of the Act.*
7. **Open Meetings.** *There should be a presumption that all meetings of governing bodies are open to the public.*
8. **Disclosure Takes Precedence.** *The Freedom of Information Act should require that other legislation be interpreted, as far as possible, in a manner consistent with its provisions. The grounds listed in the Act on which an*

agency may refuse a request for information, should be comprehensive and other laws should not be permitted to extend them.

9. **Protection for Whistleblowers.** *Individuals should be protected from any legal, administrative or employment-related sanctions for releasing information about wrongdoing.*

1. MAXIMUM DISCLOSURE

Every member of the public has a right to know and government agencies have a corresponding duty to disclose information. All information should be available on request unless there is a legitimate ground for withholding it.

The principle of maximum disclosure flows from the very concept of freedom of information. It arguably follows, as a matter of law, from the Constitutional guarantee of the “freedom to seek, receive and impart information and ideas” (section 30(1)(a)). What the principle means in practice is that all information held by all public bodies should be presumed to be subject to disclosure on request, unless a public body can show that it has a legitimate ground for withholding particular information in a given case.

The principle of maximum disclosure finds expression in the draft Bill in a number of ways.

First, the critical terms on which the Act’s application will turn are defined broadly. So for example clause 10 of the draft Bill defines “public body” to include any body established by the Constitution or by statute, any body that forms part of the executive, the legislature or the judiciary and any body that performs a public function. Likewise, the term “record”, which is used throughout the draft Bill to identify precisely what information, and in what form, may be subject to disclosure on request, is defined in clause 11 to include “any recorded information, regardless of its form, source, date of creation, or official status, whether or not it was created by the body that holds it and whether or not it is classified.”

Secondly, no public body is exempted from the Act. The duty to disclose information will apply at every level, across all branches of government. It will only be displaced where the particular information requested in a given case falls within one of the listed exceptions. Freedom of information laws in some other countries grant an exemption to certain public bodies, so that they can never be obliged to disclose any information. Examples include intelligence agencies, Members of Parliament and the courts. However, all public bodies hold some

information which there is no legitimate ground for withholding, and such information should be disclosed on request, irrespective of the body that holds it.

Thirdly, the right to make a request for information will not be limited to citizens or permanent residents, but will instead be given to “any person”. This includes companies and trusts, as well as people who are visitors to Fiji.

Fourthly, in order to protect the integrity and availability of records, clause 52 of the draft Bill will make it a criminal offence for any person to wilfully obstruct access to or destroy a record without lawful authority.

Fifthly, the draft Bill includes an innovation recently introduced in South Africa,⁴ in that clause 8(2) will extend the duty to disclose information on request to private bodies in circumstances where the information concerned “is necessary for the exercise or protection of any right”. The equivalent South African provisions have been used, for example, by a client of a commercial bank to obtain reasons for the refusal of his application for a home loan.⁵ The definition of a “private body” in clause 10(3) includes companies, partnerships and individuals who carry on a trade, business or profession, but not individuals in their private capacity.

2. OBLIGATION TO PUBLISH

Government agencies should publish and widely disseminate key categories of information relating to their activities and any information which is of significant public interest.

The obligation on public bodies to publish, even in the absence of a request, key categories of information relating to their activities, is a second central aspect of the right to freedom of information. It may be less well recognised than the right to access information on request, but it is no less important.

This principle is expressed in clause 21(1) of the draft Bill, which will require every public body to publish the following information, at least annually:

- (a) a description of its structure, functions, duties and finances;

⁴ See (South Africa) Promotion of Access to Information Act 2000 Pt 3.

⁵ Pretorius v Nedbank Ltd (High Court of South Africa, Transvaal Provincial Division, 2003). The bank disclosed the records sought by the client after court documents were served on it, before the case went to hearing. Details of the case and the South African freedom of information legislation are available on the website of the Open Democracy Advice Centre (a South African non-government organisation): www.opendemocracy.org.za.

- (b) relevant details concerning any services it provides to members of the public;
- (c) any direct request or complaints mechanisms available to members of the public regarding acts or a failure to act by that body, along with a summary of any requests, complaints or other direct actions by members of the public and that body's response;
- (d) a simple guide containing adequate information about its record-keeping systems, the types and forms of information it holds, the categories of information it publishes and the procedure to be followed in making a request for information;
- (e) a description of the powers and duties of its senior officers, and the procedure it follows in making decisions;
- (f) any regulations, policies, rules, guides or manuals regarding the discharge by that body of its functions;
- (g) the content of all decisions and/or policies it has adopted which affect the public, along with the reasons for them, any authoritative interpretations of them, and any important background material; and
- (h) any mechanisms or procedures by which members of the public may make representations or otherwise influence the formulation of policy or the exercise of powers by that body.

In addition, clause 21(2) will require public bodies to publish information relating to any projects they plan to implement. This is especially aimed at development activities. The purpose of the provision is to ensure that the public, and in particular those people who are likely to be affected, are informed about such activities in advance, so that they have a chance to participate in decision-making.

3. PROMOTION OF OPEN GOVERNMENT

The Freedom of Information Act should include mechanisms to inform the public of its rights and promote a culture of openness within government.

Experience in other countries has shown that a Freedom of Information Act is not enough on its own. In order for the Act to succeed, it must be understood and accepted by the public service, and the general public must be aware of its rights under the Act and how to exercise them.

In part, then, the success of Fiji's Freedom of Information Act will depend on the Government's willingness to devote sufficient resources to promote and implement it. However, as the principle above suggests, the Act itself should also include mechanisms to inform the public of its rights and promote a culture of openness within government.

The draft Bill includes three mechanisms for achieving these objectives. Two of these involve the proposed office of Information Commissioner, which will be established by Part V of the draft Bill, to be the public watchdog of the Freedom of Information Act. The Information Commissioner will have a range of functions under the Act, including dealing with complaints from members of the public who believe their requests for information have been refused unlawfully. This complaint-handling function is discussed in more detail in relation to principle 5, **Processes to Facilitate Access**.

The first mechanism for achieving principle 2 is provided by clause 19 of the draft Bill. In order to raise public awareness of the Freedom of Information Act, clause 19(1) will require the Information Commissioner to compile in English, Fijian and Hindustani, a "clear and simple guide containing practical information to facilitate the effective exercise of rights" under the Act. This guide must then be disseminated widely in an accessible form, and updated when necessary (clause 19(2)).

The second mechanism is provided by clause 24 of the draft Bill. It aims to ensure the Freedom of Information Act is understood and accepted by the public service, by requiring that every public body must provide appropriate training for its officials on the right to information and the effective implementation of the Act.

The third mechanism is more general, in that the Information Commissioner will be tasked, in addition to his or her other functions, to undertake the following "General Activities", described in clause 41:

- (a) monitoring and reporting on public bodies' compliance with their obligations under the Freedom of Information Act;
- (b) making recommendations for reform both of a general nature and directed at specific public bodies;
- (c) co-operating with or undertaking training activities for public officials on the right to information and the effective implementation of the law;
- (d) referring to the appropriate authorities cases which reasonably disclose evidence of criminal offences under the Act; and
- (e) publicising the requirements of the Act and the rights of individuals under it.

4. LIMITED SCOPE OF EXCEPTIONS

The Freedom of Information Act should list the grounds on which a government agency may refuse a request for information. Each ground should relate to a legitimate aim of government which would be harmed if particular information were disclosed. These exceptions to the duty to disclose should only apply where the public interest in disclosure is outweighed by the harm that disclosure would cause.

Despite the fundamental importance of the right to freedom of information, there is clearly some information held by public bodies which it is not in the public interest to disclose. This might include for example precise details of the security arrangements for our Parliament buildings, policy advice prepared by a government agency which has not yet been considered by the relevant Minister, the name of a suspect in a police investigation who has not yet been charged, or medical records of a person who has not consented to their release.

While it is generally accepted that there must be some exceptions to the duty to disclose, the nature and extent of those exceptions is more controversial. This is because determining what grounds for refusing a request for information are legitimate involves a delicate balancing act between competing interests. For example, members of the public may have a genuine interest in knowing that the security arrangements for our Parliament buildings are adequate. However, there may also be certain details concerning those arrangements which, if disclosed, could be used to circumvent security and jeopardise the safety of our Senators, MPs and Parliamentary staff. The public interest in disclosure of those details would clearly be outweighed by the harm that disclosure could cause.

The draft Bill lists the following grounds on which a public or private body will be able to refuse a request for information:

- Clause 29 – **Personal Information.** Disclosure may be refused where it would involve the unreasonable disclosure of personal information about a natural person other than the person making the request, unless the other person has consented to the disclosure, or the requester is his or her guardian, or the other person is deceased and the requester is his or her next of kin, or the executor of his or her will.
- Clause 30 – **Legal Privilege.** Disclosure may be refused where the information is privileged from production in legal proceedings, unless the person entitled to the privilege has waived it.
- Clause 31 – **Commercial and Confidential Information.** Disclosure may be refused where the information was obtained in confidence from a

third party and contains a trade secret, or to communicate it would constitute an actionable breach of confidence or seriously prejudice the third party's commercial interests. Disclosure may also be refused on this ground where the information was obtained in confidence from another State or from an international organisation, and to communicate it would seriously prejudice relations with that State or international organisation.

Clause 32 – **Health and Safety.** Disclosure may be refused where it would endanger the life, health or safety of any individual.

Clause 33 – **Law Enforcement.** Disclosure may be refused where it would cause serious prejudice to the prevention or detection of crime, the apprehension or prosecution of offenders, the administration of justice, the assessment or collection of any tax or duty, the operation of immigration controls, or the assessment by a public body of whether civil or criminal proceedings, or regulatory action under any enactment, would be justified.

Clause 34 – **Defence and Security.** Disclosure may be refused where it would cause serious prejudice to Fiji's defence or national security.

Clause 35 – **Public Economic Interests.** Disclosure may be refused where it would cause serious prejudice to the ability of the government to manage the national economy or cause serious prejudice to the legitimate commercial or financial interests of a public body. However, this ground for refusing a request will not apply if the request relates to the results of product or environmental testing, and the information concerned reveals a serious public safety or environmental risk.

Clause 36 – **Policy Making and Operations of Public Bodies.** Disclosure may be refused where it would cause serious prejudice to the effective formulation or development of government policy, seriously frustrate the success of a policy by premature disclosure, significantly undermine the deliberative process in a public body by inhibiting the free and frank provision of advice or exchange of views, or significantly undermine the effectiveness of a testing or auditing procedure used by a public body.

All of these exceptions to the duty to disclose will be subject to a "**Public Interest Override**", so that they only apply if the harm that would be caused by communicating the information requested outweighs the public interest in disclosure (clause 26).

All the exceptions will also be subject to the provisos that a body may not refuse to communicate information which is already publicly available (clause 27), and that if a record contains both information which falls within an exception and information which does not, then the information which does not fall within the exception must be communicated to the extent that it can reasonably be severed from the rest (clause 28).

Some of the exceptions are also subject to time limits (clause 37). For example, a body will not be able to refuse a request for information relating to defence or national security where the information requested is more than 30 years old.

5. PROCESSES TO FACILITATE ACCESS

All public bodies should be required to establish open, accessible internal systems for ensuring the public's right to receive information. The Act should establish strict time limits for the processing of requests, require that any refusal be accompanied by written reasons, and provide for appeals to an independent administrative body and the courts.

In order for members of the public to exercise the right to freedom of information, public bodies clearly must have in place internal systems for processing requests for information. Records need to be kept in a manner that facilitates searching and retrieval, for example, and officials need to be trained to make decisions on the application of the exceptions to the duty to disclose. Some members of the public may require assistance in making a request, or the communication of information in a particular form.

The draft Bill includes a large number of provisions to facilitate the making of requests for information, to ensure they are processed promptly and fairly, to allow information to be communicated in an appropriate form, and to require reasons to be given for any refusal to disclose.

Information Officers, Record Maintenance and Training of Officials

Clause 20 of the draft Bill will require every public body to appoint an Information Officer, and to make his or her contact details available to members of the public. The Information Officer's general responsibilities will be:

- to promote the best possible practices within the public body in relation to open government, record maintenance, archiving and disposal; and
- to serve as a central contact within the public body for receiving requests for information, for assisting individuals seeking to obtain information and for receiving individual complaints regarding the performance of the public body relating to information disclosure.

Clause 23 will require every public body to maintain its records in a manner which facilitates the right to information, and to ensure that adequate procedures are in place for the correction of personal information. Clause 23(3) will require the Information Commissioner (appointed under Part V of the draft Bill) to develop a Code of Practice relating to the keeping, management and disposal of records, as well as the transfer of records to the National Archives of Fiji.

Clause 24 (already mentioned in relation to principle 3, **Promotion of Open Government**) will require that every public body must provide appropriate training for its officials on the right to information and the effective implementation of the Act.

Clause 25 will require the Information Officer of every public body to furnish an annual report to the Information Commissioner on the public bodies' activities under the Act, including information about the number of request for information received, granted and refused, which exceptions to the duty to disclose were relied upon, fees, appeals, publications, record maintenance and training of officials.

Requests for Information and Responses

Clause 12 of the draft Bill will require public bodies to render reasonable assistance to individuals who are unable to properly formulate a request for information, to accept oral requests from individuals who are unable to write, and to provide a receipt for each request received.

Clause 13 will set a time limit of 20 working days for public or private bodies to respond to requests for information, which may be extended to 40 days in certain circumstances. Urgent requests where the information "reasonably appears to be necessary to safeguard the life or liberty of a person" will be required to be dealt with in 48 hours.

Clause 14 will require that responses to a request for information must be made in writing, and indicate:

- the applicable fee in relation to any part of the request which is granted;
- reasons for refusal in relation to any part of the request which is not granted; and
- in the case of a public body – any available rights of appeal.

Clause 16 will provide that, if a request for information indicates a preference as to the form in which the information is communicated, such as a particular language, the public or private body should where possible communicate the information in accordance with that preference.

Clause 17 will provide for a public body which receives a request for information that it does not hold to assist the person who made the request by transferring the request to another public body which does hold the information, or advising the person as to where the information may be found.

Clause 18 will excuse a public or private body from complying with a request for information which is vexatious, where it has recently complied with a substantially similar request from the same person, or where to do so would unreasonably divert its resources.

Internal Review

In order for the right to freedom of information to be enforceable, decisions made by public bodies relating to requests for information must also be subject to review and appeal. Ideally, this should begin internally, by way of a mechanism for review of decisions by a higher authority within the public body (such as a more senior officer). Internal review can offer significant benefits, especially for larger agencies, where it will assist in educating staff, ensuring consistency in decision-making, streamlining the processing of requests, improving client satisfaction and reducing costs associated with external appeals.

However, internal review may not be appropriate for every public or private body to which the Freedom of Information Act will apply. For this reason, the draft Bill contemplates that Information Officers might receive complaints from members of the public “regarding the performance of the public body relating to information disclosure” (clause 20(2)(b)), but will not specifically require public or private bodies to establish internal processes for the review of decisions relating to requests for information.

The Information Commissioner

Whether or not internal review is available, there must ultimately be a mechanism for external review of decisions relating to requests for information by an independent, impartial body, with powers to compel public bodies to comply with the duty to disclose. This is necessary in order to remove any possible perception of bias in the application of the law, and ensure that justice is not only done, but also seen to be done.

As mentioned in relation to principle 3, **Promotion of Open Government**, Part V of the draft Bill will establish the office of Information Commissioner, to be the public watchdog of the Freedom of Information Act. Some of the Information Commissioner’s functions have already been discussed; however, arguably the two most important functions of that office will be:

- to provide a process for the external review of public and private bodies’ decisions relating to requests for information, by handling complaints from

members of the public who believe their requests for information have been refused unlawfully: and

- to oversee and, if necessary, enforce compliance by public bodies with their obligations under the Act to adopt measures to promote openness.

The Information Commissioner will enjoy “operational and administrative autonomy from any other person or entity, including the government” (clause 39(1)) and immunity from civil or criminal liability for acts done in good faith in the performance of his or her functions (clause 43). The Information Commissioner will have all powers necessary to perform his or her functions (clause 39(2)), and will be able to appoint such staff as are necessary to enable him or her to perform those functions (clause 40).

Clause 44 of the draft Bill will provide for individuals who have made requests for information to a public or private body to complain to the Information Commissioner if they have not received a response to their request within the time limits provided by clause 13, or if they believe the response provided does not comply with any provision of the Act. Clause 45 will require the Information Commissioner, on receipt of a complaint under clause 44, to give both the person making the complaint and the body against which the complaint is made an opportunity to provide their views in writing, and then to decide within 30 days whether the public or private body has in fact failed to comply with the Act.

The Information Commissioner will be able to summarily reject complaints which are frivolous, vexatious or clearly unwarranted, or where the person making the complaint has failed to use “any effective and timely internal appeal mechanism provided by the relevant public or private body” (clause 45(2)(b)).

The Information Commissioner will be able to decide a complaint by:

- rejecting it (clause 45(4)(a));
- requiring the body against which the complaint is made to take steps to bring it into compliance with the Act (clause 45(4)(b));
- requiring the body to compensate the person making the complaint for any loss or other detriment suffered (clause 45(4)(c)); or
- in the case of an egregious or wilful failure to comply with the Act – impose a fine on the body (clause 45(4)(d)).

Clause 46 will enable the Information Commissioner to decide whether a public body has failed to comply with its obligations:

- to appoint an Information Officer;
- to publish key information relating to its activities at least annually;
- to maintain its records in a manner which facilitates the right to information;
- to provide appropriate training for its officials; or
- to furnish the Information Commissioner with an annual report on its activities under the Act.

If the Information Commissioner decides that such a failure has occurred, he or she may require the public body to take steps to bring it into compliance with the Act and, in the case of an egregious or wilful failure, impose a fine on the public body (clause 46(2)).

Clause 47(1) will give the Information Commissioner the power to conduct a full investigation, including by calling witnesses or requiring the production of documents, before coming to a decision under clause 45 or 46. Clause 47(2) will give the Information Commissioner the power, during an investigation, to examine any record to which the Act applies (whether or not it contains information which is claimed to fall within an exception to the duty to disclose).

Appeals to the High Court

Clause 48 will enable a person who has made a complaint to the Information Commissioner, or a public or private body, to appeal to the High Court against a decision of the Information Commissioner under clause 45 or 46, or an order of the Information Commissioner under clause 47(1). Appeals will be required to be lodged within 45 days.

In determining such an appeal, the High Court will be able to consider both matters of fact and questions of law, exercise any power of the Information Commissioner, and grant any remedy or relief that the Information Commissioner could have granted.

Enforcement of the Information Commissioner's Decisions

Once the 45-day appeal period has expired, any failure to comply with a decision or order of the Information Commissioner will be able to be dealt with by the High Court under its rules relating to contempt of court (clause 49).

The Ombudsman as an Alternative to the Information Commissioner

Clearly, the establishment of a new office to promote, oversee and enforce the Freedom of Information Act will be an expensive exercise, and a cheaper option would be to give these functions to an existing office. The obvious candidate is the Ombudsman, who is already empowered by section 158 of the Constitution to deal with complaints from members of the public relating to matters of administration. This was the approach adopted by the FLP's draft Freedom of Information Bill 2000, which would simply have extended the Ombudsman's complaint-handling function to include complaints relating to requests for information.

However, this approach has two major drawbacks. First, the Constitution provides that "proceedings of the Ombudsman may not be called into question in any court of law" (section 158(6)). This means that there is no right of appeal

against the Ombudsman's decisions. It is likely that this would apply to decisions of the Ombudsman under a new Freedom of Information Act, so that his or her decisions would be final, and neither a person who had made a complaint to the Ombudsman, nor a public or private body, could appeal to the courts. This would significantly reduce the role of the courts in interpreting the Act, and provide no mechanism for review of the Ombudsman's decisions.

Secondly, the Constitution does not give the Ombudsman the power to enforce his or her decisions. All that he or she may do, after investigating action taken by a government agency, is report his or her findings and recommendations to the agency concerned, and send copies of the report to the Prime Minister, the Minister responsible for the agency, and the person (if any) who requested the investigation (section 161). If the agency does not act on the report, the Ombudsman may then report the matter to Parliament (section 162).

It is doubtful whether a new Freedom of Information Act could empower the Ombudsman to enforce his or her decisions in a manner not contemplated by the Constitution. Assuming it could not, this would mean that the Ombudsman could only recommend, and not direct, that a public or private body take steps to bring it into compliance with the Act – and, if the body did not comply, then the matter could only be referred to Parliament, and not to the courts. This would significantly weaken the process for enforcing the Act. It would also call for Parliament to assume a judicial role, in deciding whether the Act had really been breached in a given case and, if so, what to do about it. Decisions of this nature are better left to the courts.

For these reasons, the CCF believes it is worth spending the extra money to establish a new office of Information Commissioner, and this view is reflected in our draft Bill.

6. COSTS

Fees for gaining access to information should not be so high as to deter requests and defeat the purpose of the Act.

By now it will be obvious that a Freedom of Information Act will impose a resource burden on government agencies in Fiji. Inevitably, it will be argued that this burden should be passed on to those individuals who wish to exercise the right to freedom of information. However, experience in other countries has shown that fees are not an effective means of offsetting the cost of implementing a Freedom of Information law. While it may be justifiable to charge modest fees to those who can afford to pay, fees for processing requests for information must

not be set so high that people are deterred from exercising the right to freedom of information, since this would effectively negate the right.

Clause 15 of the draft Bill will provide for public and private bodies to introduce reasonable fees for communicating information in response to a request. These fees must not exceed the actual cost of communicating the information. In addition, any fees must be waived for requests in the public interest or requests for personal information relating to the person making the request, a natural third party of whom the requester is the guardian, or a deceased third party of whom the requester is the next of kin or of whose will the requester is the executor (clause 15(2)).

The Minister responsible for the administration of the Act will be given the power to make regulations, after consultation with the Information Commissioner, prescribing a formula for the calculation of fees, providing for the waiver of fees in prescribed cases, or setting a maximum amount for any fee (clause 15(3)).

7. OPEN MEETINGS

There should be a presumption that all meetings of governing bodies are open to the public.

Another corollary of the right to freedom of information, which this discussion paper has so far not addressed, is the right to attend meetings of governing bodies – that is, bodies which make executive, legislative or judicial decisions. This would not include, for example, government committees with only advisory powers, but it does include sittings of Parliament, proceedings before the courts, and meetings of statutory boards and councils and (arguably) Cabinet.

Of course, there will be occasions when the public interest in opening a meeting of a governing body to the public is outweighed by the harm that this would cause, owing to the nature of the matters to be discussed at the meeting. The legitimate grounds for closing a meeting of a governing body are likely to be much the same as those for refusing a request for information, discussed above in relation to principle 4, **Limited Scope of Exceptions**.

The CCF has decided not to include the right to attend meetings of governing bodies in our draft Freedom of Information Bill, because this right already finds some expression in various laws and practices in Fiji, and further research would be required to determine whether any extension would be workable. However, the principle is included in this discussion paper in order to draw attention to the fact that this right is another logical implication of the public's right to know what the government is doing on its behalf.

8. DISCLOSURE TAKES PRECEDENCE

The Freedom of Information Act should require that other legislation be interpreted, as far as possible, in a manner consistent with its provisions. The grounds listed in the Act on which an agency may refuse a request for information, should be comprehensive and other laws should not be permitted to extend them.

The purpose of principle 8 is simply to ensure that the Freedom of Information Act is not undermined by other laws. This would occur, for example, if a secrecy law made it an offence for an official to divulge information which he or she was required to disclose under the Freedom of Information Act. The right to information would also tend to be undermined if other laws were permitted to extend the list of grounds on which a request for information may be refused.

Principle 8 is articulated in clause 9(1) of the draft Bill, which will provide that the Freedom of Information Act “applies to the exclusion of any provision of other legislation that prohibits or restricts the disclosure of a record by a public or private body.”

9. PROTECTION FOR WHISTLEBLOWERS

Individuals should be protected from any legal, administrative or employment-related sanctions for releasing information about wrongdoing.

It is clearly desirable, in any society, that individuals who uncover corruption or maladministration should be encouraged to speak out about it. This can be difficult to achieve, because whistleblowers face the risk of retaliatory action by those they accuse or implicate – including for example loss of promotional opportunities, demotion, dismissal from employment, legal action, or worse. One way in which individuals can be encouraged to speak out is by providing legal protection against retaliation.

Clause 50 of the draft Bill will protect whistleblowers by providing that no-one may be subject to any legal, administrative or employment-related sanction for releasing information relating to the commission of a criminal offence, a breach of a legal obligation, a miscarriage of justice, corruption, dishonesty, serious maladministration of a public body, or a serious threat to health, safety or the environment. This protection will apply even where the whistleblower has breached a legal or employment-related obligation in speaking out, but only if he or she acted in good faith, in the reasonable belief that the information was true.

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APPENDIX – DRAFT FREEDOM OF INFORMATION BILL