RECOMMENDATIONS FROM THE COMMONWEALTH HUMAN RIGHTS INITIATIVE ON THE DRAFT RIGHT TO INFORMATION (AMENDMENT BILL, 2006)

1. The UPA Government has indicated its intention to table the Right to Information (Amendment) Bill 2006. It appears that the Bill will narrow the existing scope of the Right to Information Act 2005 (RTI Act), by limiting the definition of "information" accessible under the RTI Act and broadening the exemptions to access.

2. CHRI urges the UPA Government not to table the amendments except those proposed in s.18(5). The RTI Act has only been fully in force for less than 12 months and should be allowed to be given time to be properly implemented in its existing form – a form which was closely and closely vetted by civil society and parliamentarians before its enactment. The amendments appear to be borne out of, as yet, unfounded concerns of bureaucrats that the RTI Act will somehow unfairly impede their legitimate operations. However, civil society activists and the public strongly concur that the only officials who need to fear the RTI Act in its existing forms are those who have used secrecy to hide their corrupt or improper activities and decisions.

3. Under Article 13 subsection (2) of the Indian Constitution "the state shall not make any law which takes away or abridges the Rights conferred by this Part and any law in contravention of this clause shall to the extent of such inconsistency will be void." Notably, the right to information has been recognised as part of the rights in Articles 19 and 21 of the Constitution. Accordingly, the passage of amendments which abridge the right to information impose an "unreasonable restriction" on a citizen's fundamental rights and are *ultra vires* the Constitution – and therefore invalid. All of the amendments, apart from the proposed new ss.18(5) and (6) fail accordingly and need to be withdrawn.

Amendment of s.2(i) – excluding access to file notings

4. Section 2(f) of the RTI Act defines "information" in an inclusive manner, which clarifies what WILL constitute information, without specifically excluding any forms of information. Section 2(f) includes "records" within the definition of "information", and s.2(i) then defines the meaning of "records". Records are stated to include "(a) any document, manuscript and file". The Amendment Bill seeks to amend the definition of records in s.2(i) to include:
   (a) any document, manuscript and file…
   but does not include, for the purpose of sub-clause (a), file noting except substantial file notings on plans, schemes, programmes of the Central Government or a State Government, as the case may be, that relate to development and social issues.

5. In principle, it is troubling that the Amendment Bill seeks to exclude most file notings from public scrutiny. The Preamble to the RTI Act clearly states that the law is intended to "promote transparency and accountability". But if file notings are excluded, this will substantially undermine that objective, for little or no benefit. It is not clear what HARM will be caused to the legitimate interests of the country if file notings are included. However, excluding access to file notings will restrict the public's ability to scrutinise the decisions of public servants and to ensure that decisions are made on the basis of solid evidence and after considering the public interest. File notings help the public to understand what officials were thinking when they made decisions, and given the public confidence that decision-making processes were impartial, appropriate and well-considered.

6. The Government Manual of Office Procedure, which all civil servants adhere to by law when carrying out their duties, defines files to cover "notes".[1] Under the Public Record Rules 1997, "file" means a collection of papers relating to the public record on a specific subject matter consisting of correspondence, notes and appendices thereto and assigned with a file number.[2] To amend the RTI Act to exclude file notings from the meaning of "file" appears inconsistent with existing public service norms. This is not appropriate.

7. ALL information created by public servants should be accessible unless actual HARM would be caused to that warrant protection. However, if the Government proceeds with the amendment, it is at least positive that the proposed amendment permits access to "substantial file notings" on Government "plans, schemes, programmes…that relate to development and social issues". Nonetheless, the amendment should be improved:

   (i) The amendment does not clarify what will constitute a "substantial" file noting. Without such a definition, access will given at the discretion of the concerned officer, who may arbitrarily decide whether a noting is or is not "substantial" and exclude everything and anything;

   (ii) The amendment does not clarify what constitute "development and social issues". While the public and civil society will likely interpret those terms broadly, without more guidance, officials could arbitrarily reject applications at their own discretion;

   (iii) The amendment fails to allow file notings to other information of special significance, such as information related to alleged or actual human rights violations or environmental, public health or public safety risks.

Amendment of s.8(1)(i) – excluding access to the material on the basis of which key decisions are made

8. Section 8(1)(i) currently protects information prior to consideration by Cabinet and the Council of Ministers, but requires "decisions of Council of Ministers, the reasons thereof, and the material on the basis of which the decisions were taken shall be made public after the decision has been taken, and the matter is complete". The Amendment Bill attempts to exclude access to "the material on the basis of which the decisions were taken". This could have a major narrowing effect on the scope of the RTI Act.

9. There has been concern for some time that s.8(1)(i) could unfairly restrict access to information because officials could simply submit documents to Cabinet and the Council of Ministers and then argue that it is protected as a "cabinet document". However, the proviso allowing access to the material on the basis of which the decisions were taken was intended to prevent this misuse of the provision, by ensuring that all information would *eventually* be disclosed, once Cabinet or the Council of Ministers had made their final decision. If the proposed amendment is approved however, then all that will be accessible is the basic decision and the reasons in support of it, while all supporting materials could still be withheld. This will severely undermine the Act's objectives of promoting transparency and accountability.

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[1] See Definitions, 1.4 (xi) "*File* - file means a collection of papers on a specific subject matter and assigned a classified identification number (File No.), consisting of one or more of-(a) correspondence; (b) notes; (c) appendix to correspondence; and (d) appendix to notes. *Current File* - current file means a file containing a paper or papers on which action has not been finally completed" While "note" in Clause (xvi) means *Notes* - notes means the remarks recorded on a case to facilitate its disposal. It includes a précis of previous papers, a statement or an analysis of questions requiring decision, suggestions regarding the course of action and final orders passed thereon. *Appendix to Notes* - in relation to a file, means lengthy document or statement containing detailed information concerning certain aspects of the question discussed on the file, incorporation of which in the main note is likely to obscure the main point or make the main note unnecessarily lengthy.

[2] See section 2(g), definition of "file".

Proposed new s.8(1)(k) - excluding access to the identity of officials

10. The proposed new section 8(1)(k) attempts to withhold from disclosure the identity of officials who have made "inspection, observations, recommendation, or gave legal advice or opinion or referred to in any minute relating to plans, schemes, programme of the public authority which relate to development and social issues". When read with the proposed amendments to s.2(i), it would appear that this clause would operate so that where files and file notings *were* still released, the identify of the officials who wrote the notes would not be accessible. This is completely unjustifiable and inappropriate in a bureaucracy which is committed to real accountability to the public.

11. Public servants act in the public interest and are answerable not only to their Minister, but to the legislature and to the public. In this context, it is unclear on what basis it is considered appropriate that public servants can administer large sums of money and make serious decisions affecting the lives of millions of people, but can hide behind a veil of secrecy which will protect them from being personally responsible for their actions. This amendment will defeat the very primary objective of the RTI Act spelt out in the preamble namely " to fix accountability of Governments and their instrumentalities to the governed" (please use the exact words.) This amendment would effectively permit public authorities to hide the identity of officials responsible for giving advice or opinion that is not based in law or established norms and procedures. Such a veil of secrecy would only increase impunity for erring officials and encourage more wrongdoing. On the other hand providing the public with access to the identity of officials who make file notings will curb such tendencies and increase responsible decision-making.

Proposed new s.8(1)(l) - excluding access to examinations or assessments as to the suitability of candidates for jobs

12. The proposed new section 8(1)(l) appears to be attempting to promote "objective and fairness" in examinations and selection processes. However, it appears contradictory that the amendment suggests that more secrecy would actually encourage fairness, when anecdotal evidence from throughout the country suggests the opposite. Secrecy in examination and selection processes allows bad decisions, favouritism and even nepotism to go unchecked, because examiners and assessors are never required to publicly justify their decisions. In states such as Karnataka, Kerala, Maharashtra it is already routine government practice for tests and exams to be accessible by the public.

13. It may be appropriate for tests, examination papers or audit requirements to be kept secret because their release could actually undermine the conduct of the test, exam or audit. However, to actually prevent the release of exam results or assessments or evaluations is not justifiable. Where is the harm in a tenderer accessing results of a selection process and seeing what basis they were not selected for a project? Where is the harm in an unsuccessful candidate for a public service job accessing an evaluation of his/her application in order to understand why he/she was not considered suitable for a job? This could actually help them in their next application process by pointing out where they need to develop their skills, and conversely would not harm government interests so long as the process was fairly conducted and defensible/

Proposed new s.8(1)(m) - excluding access to legal advice, opinion, observation or recommendations during the decision-making process

14. The Amendment Bill proposes a new s.8(1)(m) which will exclude from the RTI Act access to "copies of noting, or extracts from, the document, manuscript and file so far as it relates to legal advice, opinion, observation or recommendation made by any officer of a public". This clause is incredibly broad and if passed could completely undermine the utility of the Act.

15. It is common internationally for information protected by legal professional privilege to be excluded from the scope of an information disclosure law. However, proposed s.8(1)(m) is much broader than this. In addition to legal advice, the clause excludes all opinions, observations or recommendations made by public officials. This basically covers almost all information relating to decision-making. Any recommendation – whether about high policy matters or simply where to dig a well – will be inaccessible. Any opinion – no matter whether it relates to choosing a tenderer or assessing the appropriateness of a development project – will be beyond the scope of the public. And observation – whether about the state of a village school or the assessment of how well a road has been laid – will be able to be kept secret. There is no reason why such information should be excluded from the RTI Act.

16. If the Government proceeds with the amendment, it is positive that at least the proposed new s.8(1)(m) appears to attempt to exclude only access "*during* the decision-making process and prior to the executive decision or policy formulation". However, it is unclear how this will occur in practice. Does the amendment mean that legal advice, opinions, observations or recommendations *can* be accessed after decisions after made and policies formulated? If so, the wording of the clause should be clarified to make it absolutely clear to officials that they cannot withhold such information *ad infintem*, but must release it once a matter is complete. Even then, information should only be withheld where premature disclosure would actually harm or be likely to cause harm to the decision-making or policy process.

Proposed new ss.18(5) and (6) – empowering Information Commissions to make recommendations on electronic records management

17. It is positive that the new s.18(5) proposed in the Amendment Bill intends to empower the Central and State Information Commissions to take all necessary measures to promote the use of electronic records to facilitate the purposes of the RTI Act (including conducting workshops, developing tools and guidelines and designing monitoring mechanisms), and to make recommendations to the Government in respect of such measures. While s.26 of the RTI Act makes the Government responsible for some of these activities, it is nonetheless positive that Information Commissions will also be involved in this work, but they must be resourced properly so that they can effectively perform these functions.

18. However, the wording of s.18(6) of the Amendment Bill needs to be reviewed because it is very ambiguously drafted and could cause major implementation problems in its current form. Section 18(6) currently requires the Information Commissions to "submit [their] recommendations under this section to the [relevant] Government….which may accept of such recommendations and decision of such Government on the recommendation shall be final." On a plain reading of the text, it appears that s.18(6) intends to refer to recommendations under (new) sub-section (5) and should have been drafted accordingly. However, by broadly referring to "this section", there is some doubt as to whether s.18(6) refers to the whole of s.18, or only s.18(5). Considering that section 18(1) deals with the Information Commissions' general power to receive and inquire into complaints, it is a major concern that a misreading of s.18(6) by resistant officials could mean that the recommendations of Information Commissions in relation to penalties under s.18(1)(e) for example, could then be subject to a decision by the relevant Government on whether to act and that decision will be final.