Interpreting the scope of Section 7(3) of RTI Act- CIC's larger bench to rehear the matter on 23rd September at 4.00pm at ISTM, Old JNU Campus

11th September 2009

Dear friends,

I am writing to alert you once again to an important development involving the interpretation of a crucial section of the RTI Act. A new full bench of the Central Information Commission (CIC) will hold a hearing about the ambit and scope of section 7(3) of the Right to Information Act (RTI Act) on 23rd September 2009 at 4.00pm.

You may recollect that the CIC had issued a public notice in November 2008 inviting submissions from people on the scope and ambit of section 7(3) of the RTI Act. That notice may be accessed at: http://cic.gov.in/PublicNotices/NoticeForHearing-27102008-A.pdf.

CHRI and a few other parties had submitted their views on how this important section relating to additional fees must be interpreted. The matter related to a second appeal pending before the CIC involving appellant Mr. K K Kishore and the respondent, Institute of Company Secretaries (ICS). ICS argued that 7(3) allows the PIO to charge wages of officers, search fees, collation and compilation costs and other similar costs on the applicant. We have always strongly opposed this view. A full bench comprising the Chief Information Commissioner Mr. Wajahat Habibullah, Information Commissioner, Prof. M A Ansari and Information Commissioner Satyananda Mishra heard the case on 24th February, 2009. Two civil society representatives - Shri Sarbajit Roy and Shri Rakesh Gupta were present in addition to CHRI representatives. No public authority except ICS was present at this hearing. CHRI and other civil society representatives argued that there was no scope in 7(3) for forcing the applicant to pay all kinds of fees and charges conceivable under the sun. At the end of the hearing the bench informed us that the decision in this case has been reserved.

In the month of May the CIC decided to rehear the matter on 8th June 2009. A notice inviting submissions on the scope and ambit of sec. 7(3) was sent to all heads of Ministries and PSUs such as Ministry of Personnel, Ministry of Law, Ministry of Company Affairs, Ministry of Public Enterprises, Chairmen or CMD of the following PSUs: BHEL, BPCL, BSNL, FCI, GAIL, General Insurance Corporation Ltd., IOCL, MTNL, MMTC, National Insurance Corpn. Ltd., NTPC, ONGC, State Trading Corpn. and SAIL. The notice was copied to me and Shri Roy who had made submissions earlier. From the cc. list it appeared that Information Commissioner Shailesh Gandhi had replaced Information Commissioner Satyananda Mishra on the bench.

On 15th July I received another notice stating that the matter would be reheard by a larger bench on 17th August. This hearing was subsequently postponed. The latest communication from the CIC states that the hearing will be held on 23rd September in an auditorum at the ISTM premises in Old JNU Campus. People who have not field their submissions have been asked to send their submissions by 10th September. It appears that the bench will comprise of the Chief Information Commissioner, Information Commissioner M A Ansari, Information Commissioner Shailesh Gandhi and Information Commissioner Satyanand Mishra as the communication has been cced to their PPSes.

I urge all friends to circulate this email within their networks. Please ensure that you and your friends/collaborators send submissions on the scope and ambit of sec. 7(3) in large numbers to the CIC. Please advise the CIC that the PIO has no power to charge wages, search, collation, compilation at one's whim and fancy under section 7(3). There is no provision for doing so under the RTI Act. You are welcome to use CHRI's submission for formulating your own arguments. Our submission is copied below. Please send your submissions to the CIC at the address given below along with a covering email/letter. A possible text for such an email is recommended below.

If you will be in Delhi or can make a trip to Delhi on the date of the hearing: 23rd September 2009 at 4. 00 pm at **Radhakrishnan Auditorium of the Institute of Secretariat Training and Management (ISTM), Old JNU Campus**, please do attend the hearing and oppose any move to empower PIOs to charge exorbitant fees for giving information. If you cannot attend please send your written submission to the

CIC. If you are too busy to attend the hearing in person please send by email or post the response suggested below.

In order to access our previous email alerts please click on:

http://www.humanrightsinitiative.org/programs/ai/rti/india/national.htm **You will find the links at the top of this web page. If you do not wish to receive email alerts please send an email to this address indicating your refusal to receive email alerts.**

Thanks

Venkatesh Nayak
Programme Coordinator
Access to Information Programme
Commonwealth Human Rights Initiative
B-117, I Floor, Sarvodaya Enclave
New Delhi - 110 017
tel: 91-11-2686 4678/ 2685 0523
fax: 91-11- 2686 4688
website: www.humanrightsinitiative.org
alternate email: nayak.venkatesh@gmail.com

Suggested Response to be sent by Email/Post:

To,

The Registrar,

Central Information Commission

2nd Floor, 'B' Wing

August Kranti Bhawan

New Delhi - 110 066

Email: pkp.shreyaskar@nic.in

Date:

Dear sir,

We have learnt from our network partners in Delhi that the Central Information Commission is rehearing the matter regards the scope and ambit of section 7(3) of the RTI Act. We believe that this section should not be misused to collect wages, search and compilation or other similar kinds of fees from RTI applicants. The PIO does not have the power to charge such kinds of fees under the RTI Act. We have enclosed our detailed arguments about the scope and ambit of section 7(3) of the RTI Act. We urge you and other Information Commissioners on the bench to take these arguments into consideration while deciding this matter. We urge you not to interpret section 7(3) in a manner that is violative of the letter and spirit of the RTI Act.

with best wishes,

sincerely,

(Signature of the sender)

Ambit and Scope of Section 7(3) of *The Right to Information Act, 2005* Relating to Further Fee

Introduction

The Central Information Commission (CIC) has issued a public notice on 27 October, 2008 seeking people's views on a matter relating to the issue of further fee payable under the Right to Information Act (RTI Act/principal Act). The text of the public notice is reproduced below:

"WHEREAS, in the aforesaid appeal case [Shri K K Kishore v Institute of Company Secretaries of India – (CIC/MA/A/2008/01085)], an important question has arisen as regards the ambit and scope of Section 7(3) of the Right to Information Act, 2005 which deals with charging of further fee to be determined by the CPIO;

2. AND WHEREAS, it has been decided that a Full Bench of the Commission shall hear the aforesaid case involving the above issue.

3. NOTICE is, therefore, given to the general public and to the interested organizations that they may, if they so desire, file written submissions so as to reach the Commission by 2nd December, 2008

4. The Commission is likely to hear the matter in the second week of December, 2008."

The absence of a uniform interpretation of this provision in the decisions of the Central Information Commission has caused confusion in the minds of information requestors about the kind of fees they are legitimately required to pay while using the Act for accessing information. There is no uniformity of interpretation in the decisions of State Information Commissions either. CHRI congratulates the CIC for electing to consult people in order to formulate a common position on such an important matter.

1. The Scheme of Section 7

1.1 Understanding the scheme of the arrangement of sub-sections and clauses under section 7 is crucial to the interpretation of the provision relating to further fee (also popularly known as additional fee in civil society circles). The margin note to section 7 indicates that it contains provisions for 'disposal of the request'. The term 'disposal' in common parlance is understood as a process of making a decision on a matter that is under consideration. It is not merely a single act but a chain of several actions constituting a process, at the end of which, a definite outcome is both required and expected. The step by step procedure to be followed by the public information officer (PIO) for making a decision on an information request, received under the preceding section (6) of the Act, is described in outline in the whole of section 7.

1.2 Sub-section (1) provides a summary recital of the action to be taken for disposing a request and links it to a time limit. The exception to this time limit is provided in the *proviso*.[1] The recital summarises the two courses of action open to the PIO while making a decision on the information request –

a) he/she may provide access to information on payment of such fee as may be prescribed or

b) he/she may reject the request for any of the reasons specified in sections 8 and 9.[2]

Both courses of action must be completed in thirty days unless the circumstance envisaged under the *proviso* requires to be taken into account. This provision is subject to two more conditions both of which have to do with time limits namely, applications forwarded by the Assistant PIO under section 5(2) or transferred by another public authority under section 6(3).

1.3 Sub-section (2) continues on the topic of time limit and explains the consequence of not adhering to the limit stipulated in sub-section (1).

1.4 Subsection (1) therefore may be said to contain a reference to the parameters that must characterise the 'disposal process'. Only the detailing of the parameter of 'time limit' is provided in this sub-section and in sub-section (2). The details of other parameters that characterise the disposal procedure are dealt with in subsequent sub-sections. It is important to take note of the fact that the parameter of 'time limit' – the

first to be mentioned in the recital contained in sub-section (1) – is also the first to be dealt with while providing procedural details. Similarly, the option of providing information on payment of fee precedes the option of rejection in this summary recital. Indeed this is the scheme followed in the subsequent provisions where procedural details are described for both courses of action.

1.5 Sub-section (3) contains the details of procedure to be observed where a decision has been taken to provide access to information on payment of further fee.[3]

1.6 Sub-section (4) deals with the duty of the PIO to provide assistance to requestors who may suffer from sensory disability to enable their access to information. This is also in keeping with the scheme outlined in sub-section (1) as it is a part and parcel of the process of providing access to the requested information. If information cannot be read, seen, heard sensed or understood by a person with disabilities mere handing over of the information to the requestor does not amount to providing 'access' to information or ensuring the enjoyment of the right to information as required under section 3 of the Act.

1.6 Sub-section (5) indicates how access to printed or electronic information may be provided. Fees are required to be prescribed for providing access to such information. This sub-section contains a *proviso* which marks the fee mentioned in the main clause, the application fee [section 6(1)] and the fee mentioned in section 7(1), required to be prescribed under the Act, with the characteristic of reasonableness. Furthermore all such fees are required to be waived for people who are below the poverty line. Additional facets of the second parameter are discussed in this sub-section.

1.7 Sub-section (6) provides a remedy for a requestor who is not given access to information within the stipulated time limit. The remedy is linked to the second parameter namely, fees – the requestor has a right to obtain the information free of cost if the PIO fails to meet the stipulated deadline. There is no further reference to the second parameter in subsequent sub-sections.

1.8 Sub-section (7) pegs a caveat in the disposal process where third party interests may be involved. Again this is part of the first procedure, namely providing access to the request. Section 11(1) clearly states that third party procedure may be invoked only if two conditions are satisfied:

a) the PIO should be intending to disclose the information. In other words none of the grounds for rejection of a request mentioned in sections 8 and 9 can be invoked and

b) the information should relate to or should have been supplied by a third party and that third party should have treated such information as being confidential.

1.9 Sub-section (8) describes the second course of action available to the PIO. If the requested information attracts any of the exemptions mentioned in section 8 or 9 the PIO may reject the request.[4]

1.10 Sub-section (9) relates to the first option, namely, providing access to information. However it does not describe any procedure. It lays down an important principle that is intended to guide the PIO. Ordinarily the requestor has a right to receive information in the form in which he/she has sought, namely, photocopies, CDs and floppies or inspection etc. However two caveats are linked to this principle – i) the resources of the organisation should not be disproportionately diverted or ii) no detriment should be caused to the safety or preservation of the record.

This is the narrative scheme of section 7 as enacted by Parliament.

2. Understanding section 7(3)

2.1 The text of section 7(3) is reproduced in full below:

"(3) Where a decision is taken to provide the information on payment of any further fee representing the cost of providing the information, the Central Public Information Officer or State Public Information Officer, as the case may be, shall send an intimation to the person making the request, giving—

(a) the details of further fees representing the cost of providing the information as determined by him, together with the calculations made to arrive at the amount in accordance with fee prescribed under sub-section (1), requesting him to deposit that fees, and the period intervening between the despatch of the said intimation and payment of fees shall be excluded for the purpose of calculating the period of thirty days referred to in that sub-section;

(b) information concerning his or her right with respect to review the decision as to the amount of fees charged or the form of access provided, including the particulars of the appellate authority, time limit, process and any other forms."

2.2 Meaning of 'further fee': The PIO is required to send a written intimation to the requestor if a decision is taken to provide the information on payment of further fee. As the noun 'fee' is qualified by the adjective 'further', a determination must be made as to what is this fee further to. The obvious reference is to the fee that is required to be collected prior to the initiation of this procedure. The only fee whose procedural details are given in the Act prior to this reference is the application fee. The fee mentioned in section 7(3) is 'further' to the application fee mentioned in section 6(1). The phrase 'payment of such fee as may be prescribed' found in section 7(1) cannot be construed as a category of fee that has an existence independent of the 'further fee' mentioned in section 7(3). They are one and the same.

2.3 How should the 'further fee' be determined?: Section 7(3) lays down an important principle for determining 'further fee'. It should 'represent the cost of providing the information'. The Act does not provide any guidance as to what elements should be included in this cost. This responsibility is vested with the appropriate government; in the instant case – the Government of India, in the context of rule-making powers under section 27 (2).

2.4 Clauses (a) and (b) of section 7(3) explain how information about further fee shall be communicated to the requestor. The fee intimation must contain four parts:

Ø details of further fees representing the cost of providing the information as determined by him/her;

Ø calculations made to arrive at the amount in accordance with fee prescribed under sub-section (1);

Ø request to deposit the fees and

Ø information concerning the right of the requestor to seek review of the PIO's decision regards the amount of fees charged or the form of access provided, the contact details of the appellate authority before whom a request for fee review may be submitted, the time limit, process and any other forms.[5]

2.5 A cursory reading of the first two parts mentioned above may give the impression that these elements represent two different kinds of fees that a PIO may require the requestor to pay. Such a cursory reading may also give the impression that the fees mentioned in the first part must be determined by the PIO (using his/her discretion) while the amount mentioned in the second part is to be calculated in accordance with the fee prescribed under sub-section (1). This is an erroneous interpretation based on a cursory reading of these provisions. An in-depth exploration of the phrasing is necessary to show that this is an untenable position.

2.6 The term 'fee' is mentioned in the singular in sub-section (1) and in the opening portion of clause (a) of sub-section 3. In clause (a) the term 'fees' is mentioned in the plural at three places and in the singular at one place. The use of the singular occurs again with reference to sub-section (1). The use of the plural occurs always in relation to the actions of the PIO. The Act does not restrict itself to the possibility of a requestor seeking from the PIO access to information in one form only. A requestor may seek multiple forms of access such as inspection of some records, photocopies or certified copies of others and certified samples of materials used – all in relation to one subject matter. For example, a citizen may make a request for inspection of all bills and vouchers submitted to a public works department office in relation to the construction of a road, seek a photocopy of the contract awarded to the private agency undertaking the construction work, a certified copy of the work order and certified samples of materials used in the course of the construction. The PIO is required to determine how much fee is required to be paid by the requestor further to the application fee. He is required to provide 'details' of the fee chargeable for providing access in each form requested. Hence the use of the plural for the term 'fee' in the case of the actions of the PIO.

2.7 The reference to 'calculations' in clause (a) is indicative of the arithmetic that a PIO is required to work out for arriving at the details of 'further fee' which the requestor will be informed to pay for obtaining the information. The Act does not intend for this arithmetic to be worked out on the basis of the whim and fancy of the PIO or any officer within the public authority or any other authority under this Act. The arithmetic must be based on the fee prescribed by the appropriate government – the Government of India in the instant case. All that the PIO is required to do is to make a determination of the total amount of fees

payable based on the rules and inform the requestor of its details and the calculations that form the basis for arriving at such a determination.

2.8 The foregoing discussion clearly demonstrates that there is no confusion in the Act in regards to fees intended to be charged for providing access to information. The PIO does not have any discretion to make a determination of fees outside the purview of the rules prescribed by the appropriate government – the Government of India in the instant case.

3. Understanding the rule-making power in relation to fees payable under the Act

3.1 Section 27 of the RTI Act empowers the appropriate government – the Government of India in the instant case to notify rules for giving effect to its provisions. Sub-section (1) provides for a general rule making power to carry out any of the provisions of the Act. Sub-section (2) is more specific. The text of the provision is reproduced below:

"(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:—

(a) the cost of the medium or print cost price of the materials to be disseminated under sub-section (4) of section 4;

(b) the fee payable under sub-section (1) of section 6;

(c) the fee payable under sub-sections (1) and (5) of section 7;

(d) the salaries and allowances payable to and the terms and conditions of service of the officers and other employees under sub-section (6) of section 13 and sub-section (6) of section 16;

(e) the procedure to be adopted by the Central Information Commission or State Information Commission, as the case may be, in deciding the appeals under sub-section (10) of section 19; and

(f) any other matter which is required to be, or may be, prescribed."[6]

3.2 An in-depth reading of the foregoing provision makes it clear that only three categories of fees are contemplated under the RTI Act. The first is the application fee mentioned in section 27(2)(b) which is to read with section 6(1) mentioned earlier in the Act. The second is the fee payable under section 7(1) referred to as 'further fee' subsequently. The third category relates to fees payable for obtaining information in printed and electronic form mentioned in section 7(5). Section 27(2) does not recognise any other fees under the RTI Act. This entire provision is in tune with the scheme of section 7 explained above.

4. Whether wages of officers, search, compilation and other related costs can be realised from the requestor?

4.1 The *Right to Information (Regulation of Fee and Cost Rules), 2005* (RTI-RFCR) were notified by the Government of India on 16th September 2005. According to information available in the public domain, only two amendments were incorporated in the RTI-RFCR pertaining to inspection fees and the inclusion of IPOs as a mode of fee payment. No further amendment appears to have been made till date. The RTI-RFCR also does not contain any reference to a separate category of fees payable under section 7(3) of the principal Act. The fee and cost related provisions are reproduced below:

"4. For providing information under sub-section (1) of section , the fee shall be charged by way of cash against proper receipt or by demand draft or bankers cheque payable to the Accounts Officer of the public authority at the following rates:-

(a) rupees two for each page (in A-4 or A-3 size paper) created or copied;

(b) actual charge or cost price of a copy in larger size paper;

(c) actual cost or price for samples or models; and

(d) for inspection of records, no fee for the first hour; and a fee of rupees five for each fifteen minutes (or fraction thereof) thereafter."[7]

4.2 When access to documents (other than of A-4/A-3 size) or materials is sought, the only costs realisable from the requestor are costs of reproduction of the information or cost of supply of samples of materials. It is clear from the provisions of the RTI-RFCR that it does not contain any empowering provision for the realisation of costs relating to the wages of officers, search compilation and other related activities.

4.3 The contention: "the absence of a specific reference to section 7(3) in the rule making provisions of the Act and consequently in the RTI-RFCR implies that the PIO/public authority or any authority under this Act can charge any cost on the requestor at will, provided calculations are disclosed as justification" is a figment of imagination, having no basis in law. To act on the basis of such a contention is tantamount to arrogating to oneself powers that Parliament never intended to vest in any person or authority in the first place. To impose such an interpretation on any requestor is tantamount to showing utter disregard for his/her right to seek and obtain information which has been given shape by Parliament, the supreme-lawmaking body in India.

5. Whether Rules can be made for charging on the requestor, wages of officers, search, compilation and other such costs related to providing information?

5.1 There is no provision in section 27(2) of the principal Act for making rules that will enable a PIO or any other authority to charge the requestor for wages, search, compilation and other related costs. However it may be contended that general powers exist under section 27(1) of the principal Act for making such rules. This is also not a tenable position because the rule-making power can be used only to 'carry out' the provisions of the Act, not defeat or frustrate the intention behind its provisions. While making rules, the appropriate government – the Government of India in the instant case is required to pay attention to the caveat contained in section 7(5) of the principal Act namely: 'fee prescribed must be reasonable'.

5.2 India is a country in which more than 80% citizens survives on less than US$ 2 per day. Charging a requestor for wages, search and compilation costs will only act as a disincentive for people who would otherwise have used the Act for accessing information. In effect this will also be used by PIOs and other authorities under the Act to discourage people from seeking disclosure of information relating to wrongdoing or instances of corruption. The primary objectives behind the enactment of this law mentioned in its preamble namely: creating an informed citizenry, containing corruption and enabling people to hold government and its instrumentalities accountable for their actions, would be defeated. Therefore the general rule-making power cannot be used to impose unreasonable burden upon or create any disincentives for requestors.

5.3 In the ultimate analysis it must be pointed out that the costs on account of time spent by officers for searching and compiling information are not borne by them from their pockets. The costs will have to be paid from the taxes that citizens contribute to the public exchequer. Charging such costs on the requestor would amount to doubly burdening the taxpayer which is not what Parliament had intended while enacting this seminal legislation.

6. What options are available to reduce the burden on the public authority where excessive time and resources are required to be spent on providing information to the requestor?

6.1 It is commonplace to quote from section 7(9) and section 7(3)(b) as options available for ensuring that the resources of a public authority are not excessively burdened while providing information in the form or to the extent requested by the citizen. However a more practical solution exists in section 4(1)(a) to tackle this problem.

6.2 Section 4(1)(a) requires every public authority to index, catalogue and maintain its records in a form that makes them easily accessible. Additionally this provision requires every public authority to computerise all records within a reasonable time and connect them through a network all over the country. If this provision were to be implemented in a time-bound manner, access to the records and documents in every public authority would be considerably easier. Time and resources spent by officers to deal with information requests would also come down significantly. This provision has not been taken

seriously by many public authorities. This is a major reason why providing access to information is perceived to be an expensive exercise. If a public authority has not created such convenient systems despite the Government's conscious policy of evolving offices from paper-heavy to less-paper or paper-less status it is only indicative of the lack of foresight on the part of the highest decision-making officers within that public authority.

6.3 Rather than look for ways of creating disincentives for citizens who wish to access information, more attention needs to be paid to set the house of public authorities in digital order. Information and communications technology which India takes pride in developing must be harnessed to serve people's right to information. The sole purpose behind the existence of any public authority in India is to serve the public interest, not undermine it.