Dr. Manmohan Singh
Hon'ble Prime Minister
Government of India
Room 152, South Block
New Delhi – 110001

2 November 2005

Dear Prime Minister

Re: Possible exemption of file notings from the scope of the Right to Information Act 2005

I write once again on the issue of exempting file notings from the purview of the Right to Information Act. You may recall my previous letter to your office dated 29 September 2005, in which I strongly urged your Government to reject the request, reported in the media, from some sections of the bureaucracy to specifically exempt "file notings" from the purview of the *Right to Information Act 2005* (RTI Act). I have attached a copy of that letter again here for your reference.

We are concerned to hear that there continues to be an inclination in Government to exempt file notings by amending the RTI Act and we again strongly urge against this. Access to file notings are an essential part of the broader good governance objectives the Act – and the UPA Government – is committed to promoting.

In addition, I am given to understand that, by way of compromise, it has been suggested that in certain cases the author of the file noting could simply be kept anonymous. We cannot agree with the point of view that anonymity is the answer "if the PIO judges that disclosure of the identity could result in unwarranted and adverse consequences for the functionary and that no larger public interest justifies the disclosure" and would like to place a number of additional points before you for your consideration.

On principle, it cannot be appropriate for public servants making decisions and giving advice on issues of public concern to be permitted to make notings they are unable to stand by and defend openly. This is not appropriate and should not be permitted. This approach violates the basic principles of transparent and accountable government which the Act seeks to implement.

More importantly, I am deeply concerned at the type of public service values an amendment privileging anonymity would entrench. Public servants work to promote the public interest. As such, they should have nothing to hide from the public but instead should be encouraged to work transparently, unless some specific national interest requires the information they are dealing with to be protected from public disclosure.

The idea that a public servant should personally fear disclosure of their identity in association with records of their own advice and opinions is astonishing. It could in fact encourage scurrilous notings that are adverse, because the author need never fear exposure. It could surely enable both blackmail and bureaucratic cowardliness. Blackmail is only a fear for those who have done something wrong; such public servants do not deserve protection.

It is not clear why a public servant should be reluctant to have their name associated with their own documentation. The public has the right to know what advice and information the Government bases its decisions on and how the Government reaches its conclusions. Advice on file or orally is a crucial record of the decision-making process. It is essential that such information is as public as possible to ensure that the public can verify that decisions were made in accordance with the criteria laid down for arriving at decisions. Arguments for and against a position must be articulated – in writing – to demonstrate that proper norms and logic have dictated the decision and personal preference and extraneous considerations have not tainted the decision.

I understand that some civil servants have expressed the view that the necessary discretion required in their work will be negated if file notings are accessible under the Act but I believe this is not the case at all. The cumulative effect of the Act – in particular via section 4 proactive disclosure of norms and criteria of departmental functioning, when combined with the need to make the rationale for decisions public is already specifically intended to ensure that discretions are used within known limits and are not exercised subjectively or capriciously. To fear transparency raises questions about the soundness of the entire decision-making process. Additionally, I believe that knowledge that the rationale behind the decision is sound will limit the endless litigation that presently delays and obstructs timely policy implementation.

It is also not enough to argue that disclosure would inhibit candid internal discussions. Officials should be able – and be required – to ensure that their advice can withstand public scrutiny, because candour is exercised within professional bounds. Frank and fearless advice-giving is an essential part of the bureaucracy but is not a license to air unsubstantiated personal preferences.

There also appears to be some suggestion that public servants may actually fear victimisation or unfair treatment at the hands of their own superiors if adverse file notings regarding the decisions of their superiors are released. However, such a fear should not be addressed by keeping functionaries' identities secret – what message would this send to lower level functionaries about the accountability obligations of their seniors? Instead, it is important that public service norms and rules are reviewed and processes are reinforced to ensure that public servants who do their jobs properly, within the law and in accordance with departmental rules are supported, even if their advice conflicts with that of someone more senior. Any other approach simply attempts to treat the symptoms rather than the disease that afflicts the public service – a failure of accountability throughout the chain of command.

The argument that public servants require anonymity simply does not ring true. At the practical level, every decision is processed according to the hierarchy governing the rules of business, such that it is quite clear from the progression of a file who is saying what within the bureaucratic chain. In fact, within the bureaucracy it is *important* for all within that chain to know where the advice is coming from so that it is possible to review decisions properly and of course to ensure that no extraneous third parties were involved in giving unsolicited or unmandated advice. In effect, anonymity within the system is already nigh impossible, such that the argument that permitting anonymity from the public but not from superiors because otherwise juniors may be victimised simply does not ring true.

We understand that there is also some concern that bureaucrats are worried that if their file notings are disclosed and decisions compared, they might come under criticism for inconsistencies in decisions. This is in fact, an entirely legitimate - and worthy - end of a properly functioning access regime: to help expose poor decision-making processes and ensure that proper processes are followed to promote consistency and equal treatment in the application of government laws and regulations. As noted earlier, bureaucrats must be able to defend their decisions. The value of the right to information act lies in its ability to curb abuse of discretion and the removal of file notings or the granting of anonymity to public servants would entirely destroy its fabric.

I would point out that it *is* a common practice internationally to insert a clause in national right to information laws to protect the disclosure of advice *prior* to a decision being reached. It is my understanding that s.8(1)(i) of the exemptions was intended to provide this protection However, if more certainty is required, you may wish to consider replacing s.8(1)(i) to provide protection for *"premature disclosure which could frustrate the success of a policy or substantially prejudice the decision-making process".* Of course, relevant information should still eventually be disclosed – it is only premature disclosure that may be protected. This clause could cover things like examination papers.

We understand that the Department of Personnel and Training (DOPT) has given an opinion saying that file notings can be exempted. CHRI does not agree with this interpretation of the Act in its present form. File notings are not a generic category which can be exempted under the present Act. The unequivocal legal position is that file notings fall clearly into the non-exhaustive definition of "information" in s.2 and have not been protected from disclosure under the exemptions under s.8. As such, they cannot currently be said to be outside the purview of the new law.

I would also like to point out with great disappointment that even while the debate about file notings goes on, still the Government's own RTI website insists – and refuses to retract the advice – that file notings are not within the purview of the Act. This is patently wrong misinformation and should not continue to be information provided to the public by the DOPT. We have pointed this out to the concerned officials with little response and wonder if the Government can afford to be seen as disobedient to its own laws.

Lastly, I note that some bureaucrats have voiced concern that disgruntled parties may sue a body covered by the Act for defamation for adverse comments made in file notings. However, we would argue that this fear arises from the practice of making sloppy and unsubstantiated decisions, which are not based on well-known criteria. The new Act in fact has the great benefit of ensuring – through the possibility of scrutiny – that decisions are made with great care and can be supported by proper documentation which can be used to *defend* bureaucrats' decisions.

Experience indicates that the concern that officials may be sued for libel if file notings are disclosed is unfounded and a remote possibility. Nonetheless, the provisions of Sec 21 already protects public officials from such an eventuality. In order to encourage greater openness and to guard more strongly against this possibility, however, you may want to consider substituting a more comprehensive provision into the law to protect officials/bodies acting in good faith to discharge their duties under the law. Section 38 of the *Trinidad and Tobago Freedom of Information Act 1999* provide a useful model provision the Law Ministry may want to consider:

(1) Where access to a document has been given in accordance with the requirements of this Act or in good faith, in the belief that it was required to be given in accordance with this Act, unless malice is proved –

(a) no action for defamation, breach of confidence or infringement of copyright may be brought against the public authority or against the responsible Minister, or an officer or employee of the public authority as a result of the giving of access;

(b) no action for defamation or breach of confidence may be brought, in respect of any publication involved in the giving of access by the public authority, against –

(I) any person who was the author of the document; or

(II) any person as a result of that person having supplied the document or the information contained in it to the public authority;

(c) no person shall be guilty of an offence by reason only of having authorised, or having been involved in the giving of the access.

(2) The giving of access to a document, including an exempt document, in consequence of a request shall not be taken for the purposes of the law relating to defamation, breach of confidence or copyright, to constitute an authorisation or approval of the publication of the document or its contents by the person to whom access is given.

Prime Minister, we are frankly most disturbed at the on-going efforts at all levels to reduce the efficacy of this foundational legislation even before it has got off the ground. Implementation mechanisms across the states have been tardy; the Central Information Commission is only just now being set up; entire ministries and departments are asking to be brought outside the purview of the Act; and the signals from the Presidential office have not been encouraging. Conversely, in all the government trainings programmes and interactions we have been part of, we have found enthusiastic honest efficient officers looking forward to implementing the Act but discouraged by the lack of clear political will to back it strongly. May I urge that the PMO's office please make it plain that this Act is going to be protected and become the matrix on which accountable public administration is going to be built.

We are happy to provide any clarification on this issue or discuss this further with your office and the Government. We would be deeply appreciative of an opportunity to do so.

Respectfully Yours,

Maja Daruwala
Director

Encl: CHRI Letter to Prime Minister on File Notings dated 29 September 2005.
- Key Excerpts from an Article by Mr Madhav Godbole on the Freedom of Information Act 2002.

Cc: Shri Suresh Pachouri, Minister of State for Personnel, Public Grievances, Pensions & Parliamentary Affairs, Ministry of Personnel, Public Grievances and Pensions, Room # 102 North Block, New Delhi – 110001
- Shri H R Bharadwaj, Minister of Law and Justice, Ministry of Law and Justice, Room # 402, A-Wing, Shastri Bhawan, Dr Rajendra Prasad Road, New Delhi – 110001
- Smt Sonia Gandhi, Chairperson, National Advisory Council, 2 Motilal Nehru Place, New Delhi – 110001
- Mr Arun Bhatnagar, Secretary, National Advisory Council, 2 Motilal Nehru Place, New Delhi, 110001. For distribution to members of the National Advisory Council
- Shri T Jacob, Joint Secretary, Department of Personnel and Training, Room # 111, North Block, New Delhi – 110001
- Shri T K Vishwanathan, Secretary for Legislation, Legislative Department, Ministry of Law and Justice, Government of India, Room # 405, A Wing, Shastri Bhawan, Dr Rajendra Prasad Road, New Delhi – 110001
- Shri Wajahat Habibullah, Central Chief Information Commissioner, Central Information Commission, Block IV, 5 Floor, JNU Old Campus, New Delhi – 110067
- All Existing State Information Commissions