SUBMISSION TO THE NATIONAL ADVISORY COUNCIL (NAC) MEETING - SCHEDULED FOR 14 AUGUST 2004

Submitted By The Commonwealth Human Rights Initiative

This supplementary paper from CHRI responds specifically to the draft recommendations circulated by the NAC following its last meeting on 31 July 2004. CHRI urges the NAC to reconsider certain key recommendations to ensure that the final document submitted to the Government supports a legal right to information, which accords with international best practice

We also draw the NAC's attention to the detailed analysis of the Central *Freedom of Information Act 2002* (FOI Act) submitted by CHRI to all NAC members prior to the first meeting of the NAC in July 2004. That submission provides a comprehensive set of recommendations for amending the FOI Act.

Exemptions Clauses & The Need For A "Public Interest Override"

It is, of course, widely accepted that certain sensitive information legitimately needs to be protected against disclosure. Nevertheless, we urge that they be reexamined by the NAC to ensure that they do not inadvertently and unjustifiably narrow the scope of government's obligation to function in a transparent manner. Best practice requires that exemptions are determined with reference to specific content on a case-by-case basis. Exemptions clauses need to be narrowly defined to ensure that they do not provide blanket protections to whole classes/categories of information in all cases.

Any exemption can only be justified on the ground that non-disclosure is itself in the overall public interest as distinct from the interest of the ruling party or the bureaucracy. In practice, this requires that an exemption clause require the consideration of three issues:

(i) Is the requested information covered by a legitimate exemption (Type of Exemption)?
(ii) Will disclosure cause substantial harm or serious prejudice (Harm Threshold)?
(iii) Is the likely harm greater than the public interest in disclosure (Public Interest Override)?

Only when all three questions are answered in the affirmative, should an exemption be allowed.

The current exemptions regime does not adequately deal with any of these three issues:

(i) Type of Exemption: Best practice argues against the inclusion of exemptions for entire agencies (eg intelligence/security agencies) or classes of documents (eg. Cabinet papers). Exemptions should be ***subject specific and narrowly drawn***, to ensure maximum disclosure. We therefore recommend:

- The exemption in s.16 should be deleted. Sensitive information held by national intelligence/security organisations will be protected under ss.8(1)(a), (g) and (h), such that an additional broad exemption for entire intelligence or security agencies cannot be justified. There is serious potential for abuse of this provision, particularly as additional organisations can be exempted simply by a notification in the Official Gazette, which must be laid before Parliament. Already, such an innocuous body as the "Directorate of Vigilance including Anti Corruption Branch, National Capital Territory of Delhi" has been exempted under this section. CHRI strongly recommends that, if this exemption is retained, stringent criteria are included which specify when additional agencies can be added to the list, and clarify that no additions are permissible unless the criteria are demonstrably fulfilled. Nevertheless, this is a compromise position and is only suggested on the assumption that judicial review will always be possible.

- CHRI reiterates that there is no justification for the exemption of whole classes of documents as well. Section 8(1)(i), relates to disclosure of Cabinet papers during the decision-making process. This is too broadly and confusingly drafted. There is no justification for exempting a whole class of documents such as Cabinet papers. Of course, some may be sensitive, but others may contain only factual and/or uncontroversial information, and therefore cannot be justifiably withheld from disclosure. In any case, this provision is poorly drafted - what "decision" is being referred to? In relation to what topics? When will a matter be deemed to be "complete or over"?

If the objective of the provision is to protect the decision-making process to ensure that policies are not undermined by premature disclosure to the public, this should be explicitly stated:

Information the disclosure of which would or would be reasonably likely to seriously frustrate the success of a policy or project, by premature disclosure of that policy, provided that such information will be disclosed;

- Similarly, it is not clear why the NAC supports the exemption at s.8(1)(c) related to parliamentary privileges. What information is intended to be withheld from disclosure under this clause? What legitimate interest is being protected?
- Section 8(1)(j), relating to personal information, should make it absolutely explicit that information relating to the service records and activities of individual public officials will not be covered. Although the exemption currently covers only personal information "which has no relationship to any public activity or interest", it should still be made clear that the exemption will not preclude disclosure of information such as the "*classification, salary scale or remuneration and responsibilities of the position held or services performed by a public official*". Likewise, information relating to decisions to transfer officials, which have been subject to numerous requests under the Maharashta Right to Information Act, should not be exempt under this provision.

(ii) Harm Threshold: Information can be withheld if it harms the overall public good. However, CHRI cautions that a sufficiently ***high threshold of harm*** should be required to justify non-disclosure. The subjective element in decision-making by bureaucrats needs to be minimised or eliminated to the extent that this is possible. Specifically, information should not be withheld merely because it "relates" to a sensitive issue or would "prejudicially affect" a protected interest. For example, not all information relating to national security is sufficiently sensitive to justify non-disclosure. While it may be valid to exempt information about the number of soldiers deployed on the border, there is no justification for exempting disclosure of the amount of money spent on purchasing weapons or the process by which they were procured.

In keeping with international best practice, information should only be withheld only where ***disclosure "would or is reasonably likely to cause serious prejudice or substantial harm".*** This higher test of harm will ensure that only genuinely sensitive information is legitimately kept from the public.

All of the exemptions in s.8(1) should be reviewed to ensure a proper harm test is adopted:

- Section 8(1)(a) should adopt a test of "serious prejudice".
- Section 8(1)(d) should adopt a test of "serious harm".
- Section 8(1)(f) should be deleted on the basis that: (a) no harm test has been included at all; and (b) such information will anyway be protected under the exemption in s.8(1)(a) for "*relations with a foreign State*". Currently, the provision gives too much power to another State to determine what is and is not confidential. Consider in practice: what if the information was given in confidence to a State Government by Saddam Hussein's Government 5 years ago in relation to a corrupt oil deal? Even if someone requested the information now, no harm would be caused to international relations by the disclosure and disclosure was in the public interest, this exemption would still operate to exempt it.
- CHRI is particularly concerned by the inclusion of harm tests which have no legal parameters. Such tests expand the scope of what can be hidden. For example, s.8(1)(h) requires only that disclosure would "impede" an investigation/ prosecution. This is a broad, colloquial term and could easily be misapplied by corrupt police officials. How will one decide when disclosure would "impede" an investigation? The section should be redrafted to require that disclosure would cause "serious harm" to an investigation, etc. This is a more technical legal phrase which courts have experience interpreting.

(iii) Public Interest Override: Best practice requires that ***ALL exemptions should be subject to a "public interest override"*** on the basis that the public interest should always be the final determining factor when deciding whether or not to release information. This principle holds true no matter what exemption is at issue. Thus for example, even where information relates to national security, if the public interest in disclosure can be shown in the *specific* case to outweigh ordinary national security interests, then the information should be disclosed. Topically, this is what has been witnessed recently in the United States, where considerable amounts of ordinarily secret information – including high confidential Presidential Briefing Notes - has been released to the public by the September 11 Senate Commission because the unique circumstances warranted disclosure. The Government and the public can rest assured however, that the public interest override will not be misused because its use will be overseen by the independent appeals body established under the Act (eg. the Information Commissioner) and the courts.

Currently, the NAC has recommended that only the exemptions relating to competitive commercial information (s.8(1)(d) and 11(1)), information available because of a fiduciary relationship (s.8(1)(e)) and personal information be made subject to a public interest override. It is recommended that the following clause be inserted as s.8(1A) to extend the public interest override to ALL exemptions:

> *Notwithstanding anything in the Official Secrets Act 1923 nor any of the exemptions permissible in accordance with section 8(1), a public authority may not refuse to allow access to information, unless the harm to the protected interest outweighs the public interest in disclosure.*

One final issue relates to the first exemption in s.8(1)(a), which protects again disclosures which would prejudicially affect national sovereignty, security, strategic, scientific and economic interests, relations with foreign States or lead to incitement of an offence. This exemption copies an exemption in the *Maharashtra Right to Information Act 2002* (see sections 7(a) and 2(2)). However, under the Maharashtra Act, that particular exemption is special – rather than being considered by PIOs, applications which relate to the exemption must be considered by a special Committee headed by the Additional Chief Secretary (Home) and formed specifically for that purpose. Consideration could be given to replicating such an approach in the Central Act, perhaps by requiring the Competent Authority, rather than the PIO, to make decisions in relation to the exemption. In practice, this avoids a situation whereby low-level functionaries must make decisions in relation to extremely sensitive information.

Proactive Disclosure of Government Contracts

It is positive that the current draft extends the current FOI Act's *suo moto* disclosure provisions. However, consideration should be given to including an additional clause requiring ***routine disclosure of Government contracts***. Such information is extremely useful in enabling ordinary people to be more aware of the Government activities being undertaken in their local area and to hold contractors and public authorities accountable for the timely and competent completion of such activities. The following clause could be inserted after section 4(e):

Upon signing, publish all contracts entered into, detailing at a minimum for each contract:

- *(i) The public works, goods acquired or rented, and the contracted service, including any sketches, scopes of service and/or terms of reference;*
- *(ii) The amount of the contracts, broken down into useful line items;*
- *(iii) The name of the provider/contractor/individual to whom the contract has been granted;*
- *(iv) The periods within which the contract must be completed.*

Appeal to the Courts

Section 15, barring appeals to the courts, should be deleted as it is arguably unconstitutional. The Supreme Court has held on numerous occasions that the right to information is a constitutionally entrenched fundamental right. Decisions made by bureaucrats in relation to a constitutional right must always be amenable to challenge in a court of law. Such appeals fall within the original jurisdiction of the High Court and the Supreme Court under Articles 32, 139 and 226 of the Constitution.

Accessing Information in the Local Language

In a country with such linguistic diversity as India, meaningful access to information requires that requests must be permissible in the local language of choice and information should be able to be accessed in the local language. In Canada, a country where linguistic diversity is also a key feature of the socio-political framework, a provision has been included in the federal *Access to Information Act 1982*, to facilitate access by French and English speakers. Notably, it is not suggested that translations should be provided for every single document upon request. However, where it is in the public interest - for example, because the information is of relevance to a large number of people or because it relates to a key issue of relevance to government accountability or corruption – consideration should be given to providing a translation free of cost. The following clause could be inserted after section 7(3):

> *Where access to a record or a part thereof is to be given under this Act and the person to whom access is to be given requests that access be given in the local language of the State in which the request is made, a copy of the record or part thereof shall be given to the person in that language*
>
> *(a) immediately, if the record or part thereof already exists under the control of the public authority in that language; or*
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> *(b) within a reasonable period of time, if the Competent Authority of the public authority that has control of the record considers it to be in the public interest to prepare a translation.*

Fee Waiver

India's right to information regime should promote direct access by all people, no matter their financial means. It is understood that the NAC has already considered the issue of fee waiver and decided not to recommend that a provision be included to allow for fees for access to be reduced/waived in certain circumstances. CHRI urges the NAC to reconsider this position, on the basis that a tightly drafted fee waiver provision, monitored by an active Information Commission, will guard against abuse by corrupt officials while facilitating greater direct access to information by the poor. Considering that a kilogram of wheat costs only Rs 2 for a ration card holder, to impose even a small charge of Rs 1 per page could still impose sufficient burden on a poor person to act as a disincentive to using the Act. Some have argued that the Act is, in any case, predominantly used by NGOs who can afford such charges on behalf of the poor. However, this is not an ideal situation and should not become entrenched because of the imposition of fees.

A narrow fee waiver provision, which is carefully enforced by Competent Authorities (for example, via rules and/or departmental circulars) and monitored by Chief Information Commissioners, will guard against misuse while promoting maximum accessibility. An additional safeguard could be introduced by requiring the Competent Authority to decide upon all fee waivers, rather than the Public Information Officer. The following clause could be inserted after section 7(3):

(1) Upon receiving a notice under sections [XX], an applicant may request the [CA or PIO] to reduce and/or waive any fee imposed for access to information.

(2) Where an applicant has requested that the fee be reduced or waived, the [CA or PIO] may decide that the charge is to be reduced or not to be imposed if:

(a) payment of the charge, or part of it, would cause financial hardship to the applicant, or to a person on whose behalf the application was made; and

(b) giving of access to the document in question is in the general public interest or in the interest of a substantial section of the public.

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