Supplementary Submission to Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice

on the

Indian Right to Information Bill 2004

"Knowledge will forever govern ignorance, and a people who mean to be their own governors, must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy or perhaps both."

- James Madison, Fourth US President

Submitted by the

Commonwealth Human Rights Initiative

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CLAUSE BY CLAUSE ANALYSIS

Section 2

s.2(c)	"Include 'State Government' within the definition of 'Government"

1. The definition of Government omits the state and local governments unlike the definition provided in the Freedom of Information Act 2002. the present Bill therefore does no apply to public authorities funded or controlled by State governments. This omission had serious implications as it leaves a bulk of information, which citizens have a fundamental right to access, out of the purview of the proposed law. It is recommended that the proposed law be passed under Entry 12 pertaining to 'public records' in List III of Schedule 7 of the Constitution. As a law passed on a subject under the Concurrent List this will automatically apply to all states including those 19 states that do not have their own access to information laws at present.

s.2(c) & s.2(g)	Amend the definition of "Government" to ensure that it is consistent with the definition of "public authority in s.2(g)

2. The definition of Government in s.2(c) appears to inadvertently have incorporated a definition of "public authority" which is slightly different to that in s.2(g). The additional clause in s.2(c) which states that a public authority includes a body "substantially financed by funds provided directly or indirectly or controlled by the Central Government…" should be moved to sit with s.2(g) to avoid confusion.

s.2(d)	Reinsert the term "file notings" from the NAC draft RTI Bill into the definition of "information"

3. The original recommendations of the National Advisory Council included the term "file notings" in the definition of "information" but this term has been excluded from the Bill. This is cause for concern – is there a reason why the bureaucracy felt it necessary to specifically exclude this term? Does this indicate an intention on the part of officials that they do not intend to disclose file notings? If so, this is inappropriate. File notings constitute part of the file – whether the official intended for them to be public or not, they cannot be excised simply because they might be embarrassing or frank. Unless they are covered by an exemption, they must be released.

s.2(k)	Amend the definition of "third parties" to EXCLUDE public authorities

4. Section 2(k) defines a third party to include a public authority. However, this is inappropriate considering that public authorities are currently defined only to cover government bodies. One government body should not be considered a third party in respect of another government body. They both comprise part of the second party to any application – namely "the Government". As such, s.2(k) should be amended to remove the reference to public authorities.

s.2(g), s.2(j), s.3	Broaden the right to information to allow access to information held by private bodies – ideally wherever access is needed "for the exercise or protection of any right", but at least "where the functions of the body are of a public nature; where the body provides services under a contract with a public authority; where the body is owned, controlled or receives aid directly or indirectly from the Government; or where the body's office bearers are appointed by the Government"

5. Section 2(j) and s.3 should be amended to extend the scope of the Bill to cover information held by private bodies, at least where the information is necessary for the exercise or protection of a

right. Depending on the formulation chosen (see paragraph 6 below), this may also require an additional definition for "private bodies" to be inserted in s.2.

6. Private bodies are increasingly exerting significant influence on public policy. Furthermore, as noted above, India has witnessed increasing outsourcing of important government functions and is likely to continue to see further privatisation of important services as part of its economic development strategy. In this context, it is unacceptable that these bodies, which have such a huge effect on the rights of the public, should be exempted from public scrutiny simply because of their private status.
   - *South Africa s.50: Information held by or under the control of a private body where access to that information is necessary for the exercise or protection of any right.* [NB: if this formulation is too broad, consideration could be given to limiting the application of the law to private bodies over a certain size (determine according to turnover or employee numbers]
   - *India (FOI Act 2002) s.2(f) Any other body owned, controlled or substantially financed by funds provided directly or indirectly by the appropriate Government.*
   - *Jamaica s.5(3): Bodies which provide services of a public nature which are essential to the welfare of society can be covered by the Act by Order.*
   - *Maharashra s.2(6): Any body which receives any aid directly or indirectly by the Government and shall include the bodies whose composition and administration are predominantly controlled by the Government or the functions of such body are of public nature or interest or on which office bearers are appointed by the Government.*
   - *United Kingdom s.5(1): Bodies which appear to exercise functions of a public nature, or are providing any service whose provision is a function of an authority under a contract made with that public authority can be covered, by Order of the Secretary of State*

Section 3

s.3	Broaden the right to information beyond "citizens" only – ideally allow access by all people, but at least by permanent residents of India and/or anyone who is currently living in India

7. The RTI Bill currently permits only citizens to utilize the law to access information. This is a flawed approach in practice. This could have major implications as many of the poorest of the poor in India may not have the necessary documentation to PROVE their citizenship. This requirement could easily be abused by resistant bureaucrats to refuse to accept applications. Furthermore, in a country which has such a large population of long-term refugees and permanent residents – none of whom have citizenship papers – this requirement will work to deny the right to information to key sections of the community.

8. Good international practice supports the extension of the Act to allow all persons access to information under the law, whether citizens, residents or non-citizens (such as asylum seekers). This approach has been followed in a number of jurisdictions, including the United States and Sweden, the two countries with the oldest access laws. This change may require the inclusion in s.2 of a definition of "person".

9. Alternatively, if the Government considers this formulation too broad, consideration could be given to following the example of Canada which allows access to information to citizens AND "permanent residents" (s.4(1), *Access to Information Act 1982*) or New Zealand which allows requests to be made by citizens, permanent residents or any "person who is in New Zealand" (s.12(1)(c), *Official Information Act 1982*). This latter formulation is particularly useful because it

removes the need for proof of residence documents from applicants, while still limiting access only to people in India.

Section 4

s.4	Include an additional provision requiring the suo moto publication of all contracts entered into by public authorities

10. It is very positive that s.4 requires suo moto disclosure by the bodies covered by the Act. However, the list of topics which public bodies are required to proactively disclose should be extended to also require the publication of all contracts which public authorities enter into. This would serve immediately to reduce corruption in government tendering while also assisting the public to better stay apprised of what work is being undertaken in their area. The Delhi Government has already started proactively disclosing this kind of information on the internet. Accordingly, a new clause could be inserted as s.4(1)(e):

    Upon signing, public authorities must 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;
    (iii) The name of the provider, contractor or individual to whom the contract has been granted, and
    (iv) The periods within which the contract must be completed.

s.4(1)(b)	Amend ss.(xvi) to require the publication of the names and contact details of all appellate authorities under s.16(1) and the Information Commission

Section 6

s.6(1)	Delete the reference to fees being payable for applications for information

11. Best practice requires that no fees should be imposed for accessing information, particularly government information, as costs should already be covered by public taxes. At the very least, no application fee should be levied because the initial work required to locate information and determine its sensitivity to disclosure is a routine and expected task of government. Section 6(1) should be amended accordingly.

Section 7

s.7(5)	Amend to clarify that any fees which are imposed must be reasonable and shall not exceed the actual cost of copying the information

12. If any fees *are* imposed, the law should specifically require that rates are set with a view to ensuring that the costs imposed for access are not so high as to deter potential applicants. At the most, fees should be limited only to cost recovery, with no additional margin for profit, and a maximum limit should be imposed. Charges should only cover reproduction costs, not search or collation/compilation time. Section 6(2) of the Maharastra *Right to Information Act 2002* includes such a provision, stating specifically than any fees "shall not exceed the actual cost of supplying

the information". The following clause should be included in the Bill to address this problem with the current draft:

"Any fees payable by the applicant shall be reasonable, shall in no case exceed the actual cost of copying the information or in the case of samples of materials the cost of obtaining the sample, and shall be set via regulations at a maximum limit taking account of the general principle that fees should not be set so high that they undermine the objectives of this Act in practice."

s.7(7A)	Insert a new clause allowing fees to be waived if their imposition would cause financial hardship or if it is in the public interest

13. Provision should be made to allow the waiver of fees levied under the Bill where that is in the public interest, such as where a large group of people would benefit from release/dissemination of the information or where the objectives of the law would otherwise be undermined (for example, because poor people would be otherwise excluded from accessing important information). Such provisions are regularly included in access laws in recognition of the fact that fees may prove a practical obstacle to access in some cases (see s.29(5) of the Australian *Freedom of Information Act* for example).

    (1) Upon receiving a notice under section X, an applicant may request the Public Information Officer to reduce and/or waive any fee imposed for access to information.

    (2) Without limiting the matters the Public Information Officer may take into account in determining whether or not to reduce or not to impose the charge, the Public Information Officer must take into account:

    (a) whether the 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) whether the 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.

s.7(8)	Amend so that the rejection notice required to be sent contains the same information required under s.10(2) in respect of partial rejections

14. The Bill permits information to either be entirely or partially withheld. In each case, a written notice must be sent to the requester advising of the decision. However, currently the two provisions are not consistent – s.7(8) which applies in cases where an application is completely rejected requires a less helpful notice to be sent to the requester than s.10(2) which applies where an application is only partially rejected. Section 7(8) should be amended to require the same information to be provided to a requester as under s.10(2). Notably, this is also more appropriate in practice because it will enable bureaucrats to use the same format for all rejection notices (whether full or partial). This will assist with making administration of the law simpler.

Section 8

s.8(1)(a)	Amend ss.(i) to require that disclosure would "cause serious harm" not just "prejudicially affect" the relevant interests

15. The key principle underlying any exemption is that its purpose must be to genuinely protect and promote the public interest. All exemptions should therefore be concerned with whether disclosure would actually cause or be likely to cause harm. In this context, the form of the harm test in s.8(1)(a) – "prejudicially affect" – should be reviewed because it is arguably too ambiguous and too low a test. Consideration should be given to requiring instead that the disclosure would "cause serious harm". This test is less open to abuse.

s.8(1)(d)	Amend to require that disclosure would "cause serious harm" and/or to specifically permit disclosure if it would reveal a breach of the law or a public safety, health or environmental risk

16. The discussion in paragraph 15 above applies equally if not more so to s.8(1)(d). While a lower test of harm may be preferred for such sensitive information as information related to national security and international relations, there is no need why a similarly low test should be applicable to commercial information. Currently, it is only required that disclosure might "harm" commercial interests. Consideration should be given to requiring instead that the disclosure would "cause serious harm".

17. Additionally, consideration should be given to including a proviso that information will be released if disclosure *"would reveal evidence of a substantial contravention of, or failure to comply with the law or an imminent or serious public safety, public health or environmental risk".* This type of information might well harm commercial interests – but it is still inarguable in the public interest to require release in such cases nonetheless.

s.8(1)(f)	Delete this section, because this type of information is already protected by s.8(1)(a)(i)

18. Section 8(1)(f) should be deleted because it duplicates the protection provided by s.8(1)(a) in relation to information related to international relations, but is not as well-drafted because it contains no harm test. The key issue for any exemption should be whether harm will be caused by disclosure, whereas, s. 8(1)(f) focuses instead only on the confidential nature of the information. Just because information was given to the Indian Government in confidence however, does *not* mean that it should necessarily *remain* confidential. At the time it was communicated it may have been sensitive, but at the time it is requested it may be harmless. Why should disclosure be prevented in such cases? As long as the more general protection in s.8(1)(a) is retained (which guards against disclosures that would cause harm to international relations), the relevant interests will be protected. This also reduces the chances that the provision will be abused by corrupt officials who may connive with foreign officials in confidence but then seek to hide their activities using this clause. What if the confidential information that was passed on relates to a corrupt deal undertaken by a previous administration? Is it really legitimate that it be withheld? What harm will it cause the nation – in fact, will it not be of benefit in exposing corrupt dealings and making government more accountable?

s.8(1)(i)	Tighten the wording of this section to protect only genuinely sensitive information by: • Deleting the words "including records of deliberations of the Council of Ministers, Secretaries or other officers" • Amending the remaining words to read "*papers submitted to Cabinet, where disclosure would seriously frustrate the success of a policy, by premature disclosure of that policy"* • Amending the proviso to require that all papers submitted to Cabinet will be suo moto disclosed after a decision has been made, unless they are covered by some other exemption

19. Section 8(1)(i) is inappropriate because best practice maintains that it is improper to provide exemptions for entire classes of information. While *some* information in *some* Cabinet papers may be sensitive – and on that basis, will be covered by one of the other exemption provisions in the Act - it is not the case that *all* Cabinet papers are *always* sensitive. Furthermore, because there is no guidance in the Act as to what constitutes a "Cabinet paper" for the purpose of this clause, the provision could easily be abused; the Government could simply send politically sensitive documents to Cabinet to deliberately protect them against disclosure. Likewise,

individual departments could stamp documents as “Cabinet papers” even if they are never seen by Cabinet but only used for preparation purposes, and on that basis the documents could still be exempted.

20. Although the proviso in s.8(1)(i) paragraph 2 has been arguably designed to permit the disclosure of some level of Cabinet information, the current wording does not necessarily require that actual “Cabinet papers” are disclosed, but only that decisions are published along with “material on the basis of which the decisions were taken”. Again though, this formulation would still allow preparatory Cabinet papers which were not used in the decision-making process to be withheld.

21. International best practice does not support such a strict approach to protecting Cabinet information. The appropriate protection for Cabinet documents should be directed at whether premature disclosure would undermine the policy process. Thus, an exemption should only be available to protect information submitted to Cabinet where disclosure would *“seriously frustrate the success of a policy, by premature disclosure of that policy”* (and of course, if it otherwise contained sensitive information covered by another exemption). In recognition of the fact that Cabinet papers are largely time sensitive, it is worth noting that in Wales, Cabinet proactively discloses all minutes, papers and agendas of its meetings within 6 weeks unless there are overriding reasons not to. In Israel, Cabinet decisions are automatically made public on the Prime Minister's Office website.

22. Notably, while Cabinet papers may well be sensitive, it is completely inappropriate to extend the same level of protection to lower level decision-making such as that of “Secretaries and other officers”. This is an unjustifiably broad protection which could very easily be abused by officials of all ranks to keep documents secret. This clause in s.8(1)(i) should be deleted.

s.8(3)	Amend this section to require that a public authority ”shall” not “may” allow access to information if in the public interest

23. It is very positive that s.8(3) allows for the disclosure of information in the public interest notwithstanding that it is covered by an exemption. However, to ensure that this power is not used discretionarily but instead, is a required practice, the clause should be amended to read: “A public authority SHALL, notwithstanding the exemptions specified in sub-section (1), allow access to information if public interest in disclosure of the information outweighs the harm to the public authority”.

s.8(4)	Remove the words “subject to the provisions of clauses (a) and (i) of sub-section (1)” and remove the proviso that all decisions of the Government are final

24. Section 8(4) purports to operate as a blanket *disclosure* provision. It is common in right to information laws to include such a clause. The intent of such provisions is to ensure the compulsory declassification/release of all government documents – whether or not they were at one time considered sensitive – on the basis that after a certain period of time has passed, all documents are accepted as no longer being sufficiently sensitive to warrant non-disclosure. Throughout the world, different time periods are used; it is positive that the current Bill purports to release information after 10 years.

25. The intent of the provision is undermined by the fact that s.8(4) still attempts to apply some of the exemption provisions – even after the passage of 10 years! In particularly, it is notable that s.8(i) which protects Cabinet papers is still supposed to apply. As noted in paragraphs 19-22 above, this exemption is anyway too broad, such that it is doubly problematic if it continues to apply even after 10 years. Conversely, in Ireland, although some Cabinet documents are exempt under the regime, the exemption for cabinet records (apart from records of cabinet discussions)

expires 10 years after the decision is made, at which point the records become available. The provision should be amended to read:

"Any information relating to any occurrence, event or matter which has taken place or occurred ten years before the date on which any request is made under section 6, shall be provided to the person making the request under that section."

26. It is illogical and inappropriate that the decision of the Government as to the computation of the lapsed period under s.8(4) is final and unappealable. In accordance with s.15, all other decisions which affect non-disclosure are able to be appealed. Decisions under s.8(4) should be no different.

Section 11

s.11(2)	To ensure that third party rights cannot be used to delay processing of applications, amend to start counting the time for making third party representations from the date the notice is "sent" not the date of receipt of the notice by the third party

27. Section 11(2) should be amended to require that third parties are allowed 10 days from the relevant notice is "sent" by the public authority. Otherwise, both public authorities and third parties could delay decisions by arguing that notices were never received by the third party. Notably, the Rules under the Act could specify that notices are required to be sent by registered post, to ensure that third parties are properly served with notices;

Section 12

s.12(4)	Tighten the wording to clarify that the Information Commission is autonomous & independent but that Deputy Information Commissioners are subject to legal directions from the Information Commissioner

28. It is positive that s.12(4) attempts to ensure that the Information Commissioner operates autonomously. However, the wording of the provision is ambiguous, because while it states that the Information Commissioner will be autonomous, it is not entirely clear whether the Deputy Information Commissioners are actually autonomous themselves and therefore are not subject to directions from the Information Commission. This is not appropriate.

29. The Information Commission should be designed so that the Information Commission is completely autonomous from Government interference and is headed by the Information Commissioner, who is supported by Deputies who are subject to his/her direction. Otherwise, Deputies could make inconsistent decisions and adopt varying processes for handling appeals, which could confuse the public. Section 12(4) should read:

"(4) The general superintendence, direction and management of the affairs of the Commission shall vest in the Information Commissioner who may exercise all such powers and do all such acts and things under this law autonomously, without being subjected to directions by any other authority under this Act. The Commission shall have budgetary, operational and decision-making autonomy and be completely independent of the interference or direction of any other person or authority, other than the Courts.

(4A) The Information Commissioner will be supported by the Deputy Information Commissioners who will be under his superintendence, direction and management, but will not be subject to directions by any other authority under this Act."

s.12(5A)	Insert a requirement that the selection of the Information Commissioner and his/her Deputies should be chosen via a process which involves public consultations, including by way of requesting nominations from the pubic and publishing the reasons forwarded by the bureaucracy in support of nominees.

30. It is essential that the people chosen to be the Information Commissioner and Deputies are carefully selected. Ideally, a process should be chosen which includes some element of public participation. For example, when a list is being drawn up by the bureaucracy of possible candidates for the positions, it should be required that the relevant department also call for nominations from the public. Any list which is put together by the bureaucracy should also be published at least 2 weeks prior to consideration by the selection committee mentioned in s.12(3) and the public should be permitted to make submissions to the selection committee on this list. Notably, at a minimum, the list prepared by the bureaucracy should also include a detailed explanation of the reasons for the candidate being nominated, in accordance with agreed criteria (see paragraph 31 below on this point).

s.12(5)	Elaborate upon the criteria for the Information Commissioner and his/her Deputies to ensure at a minimum that they are committed to transparency and accountability in Government, are not tainted in any way by allegations of corruption or criminality, are respected by civil society and have the expertise to do the job

31. In addition to the requirements stated at s.12(5) and (6), the following criteria should be included in the law to ensure that Commissioners are all committed to transparency and accountability in government and have proper expertise to fill this role:

> *"The person appointed as the Information Commissioner or a Deputy Information Commissioner shall -*
>
> *(a) be publicly regarded as a person of integrity and good repute who can make impartial judgments;*
> *(b) have a demonstrated commitment to good governance, transparency and accountability;*
> *(c) not have any criminal conviction or criminal charge pending and not have been a bankrupt;*
> *(d) have knowledge of the workings of Government;*
> *(e) be otherwise competent and capable of performing the duties of his or her office."*

s.12(7)	Amend to ensure that the Information Commission's autonomy is not impeded, by replacing the words "with the previous approval of the Central Government" with "at his/her discretion if his/her budget permits"

32. At present, although the Government has indicated an intention to make the Information Commissioner an independent body, the Bill nonetheless already contains certain restrictions on the Information Commissioner's powers. For example, currently, the Bill only permits the Information Commissioner to set up other offices with the Government's prior permission, This is not appropriate. As long as the Information Commissioner has sufficient funds to set up and maintain an office, he/she should be able to determine when and where that office should be established. This is an operational decision which should lie with the Information Commissioner.

s.12(8)	Amend to ensure that the Information Commission's autonomy is not impeded by replacing the words "as may be specified by the Central Government" with "as may be specified by the Information Commissioner"

33. As noted in paragraph **28** above, it is essential that the Information Commissioner and his/her Deputies are completely autonomous from Government. In contrast, s.12(8) completely undermines the authority of the Information Commissioner by requiring that Deputy Information

Commissioners perform within such areas "as may be specified by the Central Government". This is completely unjustifiable. How can the Information Commissioner run his/her office effectively, if his/her Deputies take their orders from someone else? In practice, this clause will cause serious confusion and severely restrict the Information Commissioner's ability to implement his/her mandate properly. The Information Commissioner should be able to control his/her staff. In this context, it is notable that in the UK, the Information Commissioner (under Part 1 of Schedule 5 of the *Data Protection Act*) specifically has the power to determine the salary and conditions of service of his/her staff.

s.12(8A)	Insert a new provision which indicates that the Information Commissioner will have the power to employ his/her own cadre of staff

34. For the Information Commissioners to be truly independent, it is key that he/she is able to employ his/her staff and define their job descriptions, etc. As some other Commissions in India have shown, it can undermine the effectiveness of a Commission if staff are only engaged by seconding public servants. Many may not have the specific skills needed to do the relevant job and/or the necessary commitment. Additionally, in a position where it is of crucial importance that staff are impartial and not biased towards the bureaucracy, it is essential for the Information Commissioner to have the power to employ staff who are not members of the public service, if they have relevant skills.

Section 13

s.13(6)	Amend to require that the Information Commissioner and his/her Deputies are of a higher rank

35. At the moment, the Information Commissioner is only ranked at a level which is **23 [check]** in order of government seniority. This could severely limit the influence of the Information Commissioner within the bureaucracy and could encourage some more senior bureaucrats to disregard his/her directions. Conversely, in Canada, the Information Commissioner is paid at the same level as a Federal Court judge and has all the powers exercisable by a Deputy Head of Department.

Section 15

s.15(1)	Clarify that the Information Commissioner can hear appeals where an applicant has received no response to an appeal under s.16(1)

36. Although s.15(1) already includes a catch all provision at sub-clause (f) which is designed to allow the Information Commissioner to effectively hear any case he/she needs to, for the sake of clarity, consideration should specifically be given either to including a new provision or amending sub-clause (c) to make it clear that the Information Commissioner can hear appeals where an appellate authority has not given a complaint a response within the time limits prescribed in the law. This will avoid the problems that have been witnessed in Karnataka and Maharashtra where the second appellate bodies have sometimes refused to hear complaints on the basis that no "order" or "decision" has been made by the first appellate body.

s.15(2)	Amend to permit the Information Commissioner to initiate his/her own investigations in relation to any matter, whether or not he/she has received a specific complaint, eg.

	persistent cases of departmental non-compliance

37. Section 15(2) currently refers to the power of the Information Commission to initiate inquiries. However, this clause does not properly empower the Information Commission to initiate investigations *even in the absence of a specific complaint by an aggrieved applicant*. An additional provision should therefore be included replicating s.30(3) of the Canadian *Access to Information Act 1982*, which gives the Information Commission the power to initiate its own investigations. In practice, this provision is used to allow a Commission to investigate patterns of non-compliance, either across government or within a department and produce reports and recommendations for general improvements rather than in response to specific individual complaints. This is a very useful power and will be particularly useful in India in terms of enabling the Information Commission to take public authorities to task for persistent non-compliance with the law.

Section 16

	Insert a heading prior to s.16 titled “Appeals”

s.16(1)	Amend to require appeals to be sent to the Head of the Public Authority, who can then delegate this power as appropriate. This body should be called the “Appellate Authority” Insert an additional clause clarifying that where the appellate authority does not make an order in time, that will be considered a deemed refusal which can be appealed to the Information Commission

38. Section 16(1) requires appeals against rejection notices to be sent to “the officer immediately superior to the PIO in the concerned Public Authority” for consideration, before being sent to the Information Commissioner. This provision is very basic and needs to be elaborated upon to ensure that there is sufficient clarity to enable effective implementation. Currently it is not clear how the public will identify who the appellate authority is – because the hierarchy in public authorities often differs so that it will not always be easy to know who is superior to a PIO.

39. It would be more appropriate therefore if the appellate authority were simply stated to be, in all cases, the Head of the Public Authority and provisions were included to allow the Head to delegate this authority as necessary. Requesters could then simply address their appeal to the Head of the Public Authority, and the Public Authority upon receipt of the appeal could then forward it to the specific officer responsible for handling appeals. This would also ensure that a sufficiently senior person was responsible for dealing with appeals. Section 4(1)(b) should also be amended to require the suo moto disclosure of the names and contact details of appellate authorities as well as PIOs.

s.16(1), s.16(2)	Amend to clarify that: • Where the first appeal body under s.16(1) does not make an order within time, that will be deemed to be a decision of the appeal body for the purpose of second appeals; and • The Information Commission can deal with appeals even where no order has been made by the first appeal body (see paragraph 36 above for details)

s.16(4)	To ensure that third party rights cannot be used to delay processing of applications, amend s.16(4) to make it explicitly subject to s.16(6) which sets out time limits for

	processing appeals (see paragraph 27 above for details)

s.16(10)	To ensure the Information Commission's autonomy is not impeded, amend to clarify that the Commission will be responsible for prescribing its own rules of procedure (see

Section 17

s.17	Make it an offence punishable by a personal fine of at least Rs 2000 or imprisonment to: mala fide deny a request for information; knowingly give incorrect, misleading or incomplete information; destroy information subject to a request; obstruct the activities of a Public Information Officer, any Information Commission or the courts; or refuse to accept an application for information

40. It is absolutely essential that, at a very minimum, provisions are inserted into the Bill which permit the punishment of officers who deliberately attempt to circumvent, ignore or undermine the law. Bureaucrats should not be permitted to willfully flout the law. These offences are very common throughout the world. For example, see s.77 of the UK *Freedom of Information Act 2000*; or s.67 of the Canadian *Access to Information Act 1983* or s.34 of th Jamaican *Access to Information Act 2002.*

41. Notably, the majority of international Acts which contain penalty provisions permit the imposition not only of a fine but for summary imprisonment. Two issues should be noted in this respect:

    (i) Fines need to be sufficiently large to act as a serious disincentive to bad behaviour. Corruption – the scourge that access laws assist to tackle – can result in huge windfalls for bureaucrats. The threat of fines and imprisonment can be an important deterrent, but must be large enough to balance out the gains from corrupt practices. For this reason, a minimum fine should be included, but not maximum. If an official destroyed a record which showed that she/he misappropriated 10 lakh of public funds, then the appeal body should be able to impose a fine commensurate to that harm.

    (ii) Although imprisonment may seem a very harsh penalty for a public servant, the wording of the provision proposed below contains a reasonable amount of discretion for the appeal body imposing the penalty. A prison term does NOT need to always be awarded, but in very serious cases, the option should be available to the appeal body. Notably, the possibility of a prison term is already raised by s.17(1) of the Bill. One interesting case study to note is that of the State of Texas in the US, where prison terms can be imposed for non-compliance with the law and to strengthen these penal provisions, in 2003 the Attorney General decided to actually dedicate a special prosecutor entirely to prosecuting violations of the Texas *Public Information Act*.

42. There has been some concern raised by the Standing Committee that it is not appropriate for the Information Commission to be able to impose either fines or terms of imprisonment. However, research from other Indian activists points to the fact that the power to fine has been given in India to people like Customs Inspectors, and sales tax and excise officials, while the power to imprison has been conferred on Divisional Forest Officers and Labour Commissioners. The Information Commissioner has too important a role to play within Government, not to have his/her powers extended to impose such penalties. If there is a legal issue with giving the Information Commissioner this power, then consideration should be given to constituting him/her as a tribunal if needs be, or seconding a judicial officer to support the Information Commissioner as necessary.

43. Based on provisions in other laws throughout the world, it is recommended that the following clause could be inserted:

(1) Where it is found in appeal that any Public Information Officer or appellate authority has –
(i) Mala fide denied or refused to accept a request for information;
(ii) Knowingly given incorrect or misleading information,
(iii) Knowingly given wrong or incomplete information,
(iv) Destroyed information subject to a request;
(v) Obstructed the activities of a Public Information Officer, any appellate authority [see s.16(1)], Information Commission or the courts; or
commits an offence and the Information Commissioner shall impose a fine upon summary conviction of not less than rupees two thousand or imprisonment of up to two years or both.

(2) Where an potential offence under sub-section (1) is identified by the appellate authority under s.16(1), he/she shall immediately refer the decision as to whether a penalty shall be imposed to the Information Commissioner.

s.17	Make it an offence to fail to supply information sought in time, without reasonable cause, with a personal penalty of Rs 250 payable for each day's delay

44. Penalties should also be available to penalise officers for poor performance of their duties. Most notably in this respect, the Bill should include penalties for unreasonable delay in processing requests. This is a common type of provision in India already. For example, s.12 of the Maharashtra Act, s.8 of the Goa Act, s.9 of the Delhi Act read with Rule 6 of the Delhi Rules, s.9 of the Karnataka Act and s.8 of the Madhya Pradesh Act all permit the imposition of penalties for delay. Accordingly, it is recommended that the following provision be inserted into the Bill:

"Where any Public Information Officer has, without any reasonable cause, failed to supply the information sought, within the period specified under section X, the appellate authority, Information Commissioner and/or the courts shall impose a penalty of rupees two hundred fifty, which amount must be increased by regulation at least once every five years, for each day's delay in furnishing the information, after giving such Public Information Officer a reasonable opportunity of being heard."

s.17	Make it an offence to refuse to accept an application, attracting personal penalties by way of a minimum fine.

45. The Bill should also include a penalty – by way of fine – for unreasonable rejection of applications. This would ensure, particularly in the early days of implementation, that there is a strong imperative for officials to learn about the law and apply it properly. They should not simply be able to plead ignorance and rely on that ignorance to block applicants from requesting information.

s.17	Require that where a penalty is imposed an officer shall also be liable to appropriate disciplinary action under the service rules applicable to him

46. In addition to the possibility of fines and/or imprisonment, the Bill should also require that where a penalty is imposed on any officer under the Bill, *"the officer shall also be liable to appropriate disciplinary action under the service rules applicable to him".* This possibility of imposing additional disciplinary sanctions is permitted under a number of Indian right to information laws – see for example, s.9 of the Delhi Act read with Rule 6 of the Delhi Rules, s.9 of the Karnataka Act and s.10 of the Rajasthan Act – and should be replicated at the national level.

s.17	Require that where an official or authority fails to comply with a notice of any appeals body, the appeals body may certify in writing to a court that the official or authority has failed to comply with that notice, following which the court may inquire into the matter

	and deal with the officer or authority as if they had committed a contempt of court

47. To strengthen the powers of the Information Commissioner, it is important that an additional sanction is available to penalise officials who fail to comply with the orders of the Information Commissioner. Without such a provision the Information Commissioner may have difficulty implementing his/her mandate in practice because officials could simply attempt to ignore his/her rulings. In England, to deal with this issue, s.54 of the UK *Freedom of Information Act 2000* requires that where an official *"fails to comply with a notice of any appeals body, the appeals body may certify in writing to a court that the official has failed to comply with that notice, following which the court may inquire into the matter and deal with the authority as if it had committed a contempt of court."* In Ireland, the Irish *Freedom of Information Act 1997* makes it an offence to fail or refuse to comply with a requirement of the Commissioner concerning production of documents or attendance of a person before the Commissioner in connection with an appeal, punishable with a fine or imprisonment for up to 6 months or both.

s.17	Include departmental penalties of a minimum of Rs 10,000? 1 lakh? for persistent non-compliance with the law

48. In order to ensure that public authorities properly implement the law, they too should be liable for sanction for non-compliance. This would ensure that heads of department take a strong lead in bedding down the law and ensuring that staff across their authority undertake their duties properly. An additional provision should be included in the Bill to penalise public authorities for persistent non-compliance with the law. A fine could be imposed for example, where a public authority fails to implement the suo moto disclosure provisions in a timely manner, does not appoint PIOs or appellate authorities, consistently fails to process applications promptly and/or is found on appeal to consistently misapply the provisions of the law to withhold information. The minimum fine should be sufficiently large to act as a deterrent.

s.17	Reiterate that the appellate authority and Information Commission are empowered to impose all penalties available under the law

49. The Bill currently only empowers the Information Commissioner to authorise a Government official to file a complaint against a PIO for persistent non-compliance. This is an unnecessarily cumbersome process and effectively makes the Information Commissioner a toothless tiger, as it cannot sanction defaulting officers itself. To ensure that penalties are able to be quickly and effectively used to punish and deter bad behaviour, the Appellate Authority under s.16(1) and at least the Information Commission need to be given the power to sanction non-compliant officers.

Section 18

s.18	Amend to require that the Act "overrides" all other laws

50. A good right to information law should specifically state that it *overrides* all other inconsistent legislation. A right to information law should be comprehensive, both in the right it extends and the restrictions it recognises. The list of exemptions should therefore be considered inclusive and other laws should not be permitted to extend them. While it is positive that s.18 currently at least states that it will have effect notwithstanding other laws, officials could still legitimately harbour concerns about which laws apply if other laws restricting the right are kept on the law books. It is thus important to make it explicit that the Right to Information Bill is of paramount importance.

Section 20

s.20	Delete on the basis that it is both unconstitutional an inconsistent with the right to appeal to the High Court offered by s.16(11)

51. Section 20 of the Bill, which attempts to bar the jurisdiction of the Courts, needs to be deleted. 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 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. In any case, section 16(11) of the Bill now expressly allows appeals from the Information Commissioner to the High Court so that this clause makes little sense.

Section 21

s.21(1)	Delete the blanket exemption for intelligence and security agencies. At the least, require the release of information from these organisations where the information pertains to allegations of human rights violations

52. The complete exemption for certain security and intelligence agencies from the scope of the Bill via section 21 undermines the purported commitment made to maximum disclosure and minimum exemptions, in principle. Notably, security agencies can have an incredibly significant impact on the public's rights – such that they require *extra public oversight* rather than less! How can the public in practice ensure that the exempted agencies are undertaking their activities a professional manner if they cannot access basic information about their activities. It is not suggested that tactical information is released during times of war – but at the same time, if an allegation of misconduct or criminal behaviour is made against an intelligence of security agency or its staff, the public should have a right to access information in that regard.

53. In practice, it is unnecessary to fully exempt these bodies because any genuinely sensitive information they hold will be protected by the exemptions in section 8(1)(a)(i) (which protects against disclosures which may prejudicially affect the sovereignty and integrity of India or security), section 8(1)(g) (which protects against disclosure which would endanger a person's safety or identify an informant) and section 8(1)(h) (which protects against disclosures which would impede an investigation or apprehension or prosecution of offenders). In any case, s.10 of the Bill, which allows for exempt information to be severed from a document, should protect sensitive information sufficiently. If a document contains sensitive information, that information can be excised and the remainder of the document released.

54. This approach also does not accord with international best practice. For example, most Acts simply include an exemption for disclosures which would harm national security – see for example, s.33(1) of the Australian Act, s.6(a) of the New Zealand Act, ss.24(1)(a) and (b) of the Irish Act or s.15(1) of the Canadian Act.

55. Section 21 should be deleted in its entirety. If this position is not accepted however, then at the very least the recommendation of the NAC should be accepted so information pertaining to allegations of human rights violations should not be excluded under s.21.

s.21(2)	In the event that s.21 is retained, remove the power to add agencies to the list in the Schedule. At the least, include criteria to guide the use of the power in s.21(2) to prescribe additional agencies

56. While CHRI strongly urges the Government to delete s.21 in accordance with international best practice, in the event that the provision is retained, then the list of agencies which are given a blanket exemption from scrutiny must be assuredly kept to a minimum. Ideally, it should not be possible to add to the list in the Schedule. However, if this recommendation is not adopted, then at the very least, some clear criteria should be set down for what intelligence and security agencies can be added to the Schedule. This begs the question – what was the original criteria used to select the agencies which are currently on the list?

Section 22

s.22(1), s.22(4)	Amend to require that the Information Commissioner submits his reports to Parliament for consideration by the Parliamentary Standing Committee

57. To ensure that the Information Commissioners reports have proper weight and are given serious consideration by decision-makers, it is important that s.22(1) and (4) are amended to require that the Information Commissioner submits his reports to Parliament rather than to the Central Government. Otherwise, under the current formulation, the Government could simply sit on the report and parliamentarians would not have an opportunity to assess how effectively the law is being implemented. Section 49 of the UK *Freedom of Information Act 2000* and s.38 of the Canadian *Access to Information Act 1983* specifically requires that the Information Commissioner submits his/her report to Parliament within 3 months from the end of the financial year. Section 40 of the Canadian Act clarifies that this requires the Information Commissioner to give the report to the Speaker of each House for tabling in Parliament.

58. Consideration should also be given to specifically requiring that the Report of the Information Commissioner be sent to a Parliamentary Committee for consideration and review. The Committee could then call on the Government to take action on key issues as necessary. This is the practice in Canada, where Information Commissioner reports are sent to a Parliamentary Committee “designated or established to review the administration of the Act”.

Section 24

s.24(2)(f)	Amend to explicitly recognise that any Rules which are made relating to the Information Commission must first be approved by the Information Commission.

59. If the Information Commissioner is to have complete autonomy in reality, then he/she must be given the power to develop his/her own procedures and processes for handling appeals. However, the Bill currently gives the Government sole power to make rules for the Information Commission. In practice, this power could be used to undermine the work of the Commissioner.

60. In accordance with best practice, the Information Commissioner should be given the power to lay down his/her own procedures/processes. For example, s.37(7) of the Irish *Freedom of Information Act 1997* provides that the procedure for conducting an appeal "shall be such as the Commissioner considers appropriate in all the circumstances of the case and, without prejudice to the foregoing, shall be as informal as is consistent with the due performance of the functions of the Commissioner". In Canada, s.34 of the *Access to Information Act 1983* provides that the Information Commissioner may determine the procedure to be followed in the performance of any duty or function of the Commissioner under this Act.