

The Jammu and Kashmir Right to Information Bill, 2009

Recommendations for Improvement

submitted by

Ms. Maja Daruwala, Venkatesh Nayak

&

Dr. Raja Muzaffar Bhat



Commonwealth Human Rights Initiative (CHRI)

**B-117, First Floor, Sarvodaya Enclave,
New Delhi – 110 017**

Tel: 011-2685 0523 / 2686 4678

Fax: 011-2686 4688

Email: info@humanrightsinitiative.org

majadhun@vsnl.com & venkatesh@humanrightsinitiative.org, budgam_social@rediffmail.com

March 2009

The Jammu and Kashmir Right to Information Bill, 2009

Recommendations for Improvement

submitted by

Commonwealth Human Rights Initiative

Introduction

The Jammu and Kashmir Right to Information Bill, 2008 (the Bill) seeks to replace the erstwhile *Jammu and Kashmir Right to Information Act, 2004* and the *Jammu and Kashmir Right to Information (Amendment) Act, 2008*. CHRI congratulates the Government of Jammu and Kashmir (J&K) for initiating this process in response to the longstanding demand from civil society, the media and advocates of transparency. The Bill is closely modelled on the provisions of *The Right to Information Act* (Central RTI Act) passed by Parliament in 2005. In fact, the Bill goes further than the Central RTI Act in two respects. First, the Bill stipulates a time limit for the disposal of information access disputes by the Information Commission- a provision which is missing from the Central RTI Act. Second, the Bill requires the appellate authority designated in a public authority to refer to the State Information Commission, every violation of the law committed by the designated Public Information Officer (PIO). This will ensure that no instance of violation of the law escapes the notice of the Information Commission and there are consequences if the provisions of the law have not been followed without reasonable cause. These are indeed welcome steps and indicate the willingness of the Government to learn from the implementation experience regards the Central RTI Act and provide for a better guarantee of people's right to information from public authorities in J&K.

CHRI also congratulates the Government of Jammu and Kashmir for initiating the process of consulting people and civil society on the contents of the Bill. However the text of the Bill tabled in the J&K Assembly on 7th March 2009 indicates that hardly any recommendation made by civil society organisations has been incorporated in the Bill. The public consultation has been reduced to a mere eyewash.

CHRI recommends modification of the Bill in twenty-eight (28) places. These recommendations are based on the experience gathered regards the implementation of the Central RTI Act in other parts of India. These modifications, if incorporated into law, can secure people's right to information in a more effective manner in J&K.

Recommendations for modification

Chapter I

1. Entry into force:

Sub-section (3) of Section 1 states that the Bill shall come into force at once. In other words it will become operational immediately upon receiving the assent of the Governor. This is likely to create several problems. First, the Government will become duty bound to accept information requests from people even before the appointment/designation of Public Information Officers (PIOs) and Assistant PIOs for this purpose. But the Bill provides every public authority a time limit of 100 days for appointing PIOs and APIOs. Within a month of the date of enforcement, applicants not satisfied with the response received from the public authorities will begin submitting first level appeals under section 16(1). The identification of appellate authorities is not likely to be completed in such a short period. Further, the Information Commission- an independent appellate authority envisaged in the Bill-

will also have to be set up within a month of its enforcement to deal with complaints against non-disclosure of information that people may file soon after the completion of the first 30 days of the law's existence. In the absence of designated officers and a fully functional Information Commission, enforcement of this law will cause enormous problems which are avoidable.

Similarly no public authority will be in a position fulfil its proactive disclosure obligations, under clause (b) of sub-section (1) of section 4, on day one of the enforcement as the Bill allows a time limit of 120 days to prepare for the same.

Therefore CHRI recommends a staggered scheme of implementation of various provisions of the Bill along the lines of sub-section (3) of section (1) of the Central RTI Act.

Recommendation: Sub-section (3) of section 1 may be substituted with the following:

"The provisions of sub-section (1) of section 4, sub-section (1) and (2) of section 5, section 12, 13, 24 and 25 shall come into force at once, and the remaining provisions of this Act shall come into force on the one hundred and twentieth day of its enactment."

2. Definition of competent authority:

3.1 Clause (iii) of sub-section (b) of section 2 defines the competent authority in the executive sphere in J&K. The Governor has been made the competent authority for the purpose of making rules applicable to public authorities other than the legislature and the judiciary. The current formulation of this provision in the Bill includes authorities constituted by or under the Constitution of India in addition to those established or constituted under the Constitution of J&K. This is likely to create problems regards jurisdiction. For example, offices of any Department, agency or public sector enterprise established or constituted by the Government of India but functioning in J&K will become obligated to provide information under this provision. This is undesirable as citizens living in J&K can already access information from such bodies under the Central RTI Act. The Bill should ideally cover only those bodies in J&K which do not come under the purview of the Central RTI Act in order to avoid confusion. **CHRI recommends that the Bill clearly state that the reference is to public authorities established and operational in J&K.**

3.2 Clause (ii) of sub-section (b) of section 2 identifies the Chief Justice of the High Court as the competent authority for the High Court of J&K. This provision is modelled along the lines of the Central RTI Act. Under section 25 the competent authority is given the powers to make rules for the implementation of the provisions of this Bill. It may be recollected here that all lower courts in J&K are under the administrative control of the High Court. It is important that the Bill specifies that the rules made by the Chief Justice will be applicable in the lower courts as well. The current wording creates the impression that the rules made by the Governor will be applicable to the courts. **CHRI recommends that the provision be modified to make it explicit that the rules made by the Chief Justice will be applicable to the lower courts as well.**

Recommendations:

1. In line 2 of clause (iii) of sub-section (b) of section 2, the words- "*in Jammu and Kashmir*" may be inserted after the words "*established or constituted*".

2. In clause (ii) of sub-section (b) of section 2, the words- *“and all other courts in functioning in Jammu and Kashmir”*.

3. Simplify the title of the Information Commission:

The Bill refers to the Information Commission of J&K as the State Information Commission. Similarly the term ‘State’ is prefixed to the designation of the Chief Information Commissioner and Information Commissioners. This is unnecessary as the Bill aims to create only one Information Commission. There is no need to copy the terminology used in the Central RTI Act as that law provides for the establishment of such bodies at the Central and State levels. **CHRI recommends that the word ‘State’ wherever suffixed to the terms ‘Information Commission’ or ‘Chief Information Commissioner’ or ‘Information Commissioner’ be deleted.**

Recommendation:

Delete the word ‘State’ in all provisions where it is suffixed to the terms ‘Information Commission’ or ‘Chief Information Commissioner’ or ‘Information Commissioner’.

4. Avoid duplication in the definition of public authority:

Clause (ii) of sub-section (f) of section 2 includes any “authority, body or institution of self government established or constituted... by any other law made by Parliament within the definition of a ‘public authority’”. If this formulation were to be enacted, all departments, agencies and bodies at the level of the Union of India will become obligated to provide information under this law. This is undesirable as such bodies are already covered by the Central RTI Act and citizens living in J&K can access information from them under that law. There is no need to impose another law of the same nature on such bodies. **CHRI recommends that this clause be deleted to avoid duplication.**

Recommendation: Clause (ii) of sub-section (f) of section 2 may be deleted.

Chapter II

5. Restrict the definition of ‘third party’:

Sub-section (l) of section 2 defines a third party. The present formulation includes a public authority within the definition of this term. This is similar to the formulation contained in the Central RTI Act. However this is not in tune with international best practices. The whole of Government and State agencies form the second party from whom citizens have the right to seek information. Third party rights in other RTI laws around the world are available only to private individuals or private sector entities as they cannot invoke the exemptions clause on their own. They need the intercession of the public authority. Therefore third party procedures are built into the law to ensure that they are given an opportunity to file objections if any person seeks information relating to them. There is no need to privilege public authorities with third party protection as the exemptions clause contained in section 8 of the Bill are more than adequate to protect the interests of any government department. Therefore **CHRI recommends that the scope of the definition of ‘third party’ be narrowed down.**

Recommendation: Sub-section (I) of section 2 may be replaced with the following:

“third party” means a person other than the citizen making a request for information and does not include a public authority.”

6. Widen the scope of the definition of ‘right to information’:

7.1 Section 3 of the Bill which states as to who can exercise the right to information is inadequate and vaguely worded for three reasons. First, this is a law applicable only to J&K. The Central RTI Act is not applicable to J&K. Consequently citizens living in other parts of the country cannot exercise their right to information from public authorities established in J&K. This is an unreasonable restriction on their fundamental right to information which is a deemed fundamental right under Article 19(1)(a) of the Constitution of India and should be exercisable throughout its territories without exception. **CHRI recommends that the Bill provide for the right of access to all citizens of India irrespective of their place of residence.**

7.2 Second, the experience of implementing the Central RTI Act during the last three years has shown that some officers deny an applicant access to information if he/she has applied as a representative of an NGO, media house or private company. The reasoning is that the applicant is not seeking information in his/her individual capacity. This is unfair practice and the Central Information Commission has in several decisions held such actions to be unlawful and not in keeping with the spirit of the law. A citizen does not lose his/her citizenship status merely by acting as the representative of an organisation. If the restrictive interpretation were to be adopted then all officers and employees working under the J&K Government would not be able to exercise their right to information under this law. This was not the intention of the framers of the Constitution who carefully drafted the fundamental rights chapter. All fundamental rights should be available to people irrespective of their professional or private affiliations.

7.3 Third, the Central RTI Act also recognises only the citizens’ right to information in India. This is unnecessarily restrictive as RTI is a universally recognised human right enshrined in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. India played a seminal role in the drafting of both documents and is duty bound to provide all these rights to all people within its jurisdiction. The trend the world over is to have an information access law that can be used by foreign nationals also. The logic behind such a practice is that information that is fit for disclosure to citizens is not likely to become harmful in the hands of foreigners. Any sensitive information will not be disclosed even to citizens by invoking the exemptions clauses, so there need be no fear of it falling into the hands of foreigners. Furthermore as tourism constitutes a large part of the economic activity in J&K and the influx of foreign tourists is likely to go up with the return of peace and tranquillity in the State in recent months, they should also have the right to information. In any case the information that the public authorities will upload on websites can be accessed by any foreigner sitting in any corner of the planet with an internet connection. **CHRI recommends that the reference to citizens be replaced with the term ‘persons’ in the Bill.**

Recommendation:

In line 2 of section 3, the word- *“persons”* may be substituted for the term *“citizens”*. Similarly the word *‘person’* may be substituted for the term *‘citizen’* in other provisions of the Bill wherever they may occur.

7. Widen the scope of proactive disclosure:

Sub-clause (xvi) of clause (b) of sub-section (1) of section 4 requires every public authority to proactively disclose the name, designation and other particulars of the Public Information Officer (PIO). It is important that similar details about the Assistant PIO (APIO) and the relevant Appellate Authority (AA) be also proactively disclosed to people. **CHRI recommends that this sub-clause be expanded to include the obligation to proactively disclose the names, designations and particulars of APIOs and AAs.**

Recommendation:

At the end of sub-clause (b) of sub-section (1) of section 4, the words- "*Assistant Public Information Officers and Appellate Authorities*" may be added.

8. Empower the Information Commission to monitor the content and accessibility of proactive disclosure:

A comprehensive scheme for *suo motu* disclosure of information is the heart and soul of any RTI Act. The more extensive the proactive disclosure, fewer the requests for information will be, thereby reducing the workload of public authorities. This cannot be done without the involvement of the Information Commission which will be a specialist organisation on issues related to transparency. **CHRI recommends that the Information Commission be clothed with powers to prescribe disclosure schemes and monitor accessibility of proactive disclosure of all public authorities covered by this Bill.**

Recommendation: The following new clause may be inserted as a new sub-section (5) below the Explanation to sub-section (4) of section 4.

"Every public authority shall develop, and revise from time to time, a disclosure scheme for the information required to be disclosed under clause (b) with the approval of the Information Commission."

9. Drop application fees:

Sub-section (1) of section 6 envisages the levying of a fee on a citizen at the time of making a request. This is in tune with the Central RTI Act. However, the Department-related Standing Committee of Parliament on Personnel and Public Grievances has publicly stated that it is in favour of recommending stoppage to the practice of charging application fees. This is a welcome move which civil society organisations have been demanding for more than three years. Application fees serve little purpose and often a public authority ends up spending several times the fee amount in order to realise the value of the instrument through which it is paid. There is no reason why J&K cannot take the lead in this regard. **CHRI recommends that the reference to application fee be deleted in the Bill.**

Recommendation:

In the line 3 of sub-section (1) of section 6, the words- "*accompanying such fee as may be prescribed*", may be deleted.

10. Streamline the process for dealing with information requests:

The experience of implementation of the Central RTI Act has shown that often the absence of a nodal cell in large-sized public authorities with multiple PIOs results in an application moving from table to table in search of the PIO who has jurisdiction over its subject matter. The Central Information Commission has in some significant decisions directed large sized public authorities with multiple PIOs to form a nodal cell which will receive all information requests first. The cell identifies the section/unit that is most likely to have the information and forwards the application to the concerned PIO. This is an innovation which prevents wastage of time in disposing applications and can be built into the proposed RTI Bill in J&K. **CHRI recommends that a new sub-section be included in section 5 of the Bill to make it obligatory for large-sized public authorities to appoint nodal cells to deal with all information requests at the initial stage.**

Recommendations: A new sub-section (6) may be inserted after sub-section (5) in section 5.

“Where a public authority has appointed more than one Public Information Officer, it shall constitute a nodal cell, and it shall be the responsibility of such nodal cell to forward to the relevant Public Information Officer, as expeditiously as possible, any information request received by that public authority.”

11. Provide for applications to be made in Kashmiri and Ladakhi:

Sub-section (1) of section 6 of the Bill allows people to make information requests in English, Urdu and Hindi. The inclusion of local official languages is a welcome move as many people in J&K will be comfortable making requests in their own languages. The J&K Government can go further and allow people living in Kashmir and Ladakh to make requests in Kashmiri and Ladakhi. Kashmiri is a language recognised under the Eighth Schedule of the Constitution of India. CHRI does not demand that the records requested must also be translated into Kashmiri or Ladakhi before they are provided to the requestor. It would not be out of place to make such a demand because in countries like Canada the local RTI laws do place such an obligation on public authorities. However it is required by law in Canada to have all public documents printed in English and French. **CHRI recommends that people should be allowed to make requests in Kashmiri and Ladakhi.**

Recommendation:

In line 3 of sub-section (1) of section 6- “; *Ladakhi, Kashmiri*” may be inserted after the words- “*English, Urdu*”.

12. Streamline the fee related provisions:

Section 7 of the Bill deals with the subject of charging fees for providing access to information. Sub-section (3) provides the procedural details for charging the fee that is first mentioned in sub-section (1). Keeping in view the aforementioned recommendation to delete the reference to application fee, sub-section (3) will have to be suitably amended. Decisions of various Information Commissioners in different jurisdictions under the Central RTI Act have also caused confusion as to what kinds of charges can be collected from the requestor. Some Commissioners have held as valid actions of public authorities charging wages of officers engaged in searching and collating the requested information. This practice is against the principle of

reasonableness which relates to the decision on fees chargeable mentioned in the proviso to sub-section 5. A decision from the full bench of the Central Information Commission is awaited on this topic. Meanwhile there is no reason why J&K should not streamline the fee-related provisions in the Bill along the lines of international best practice principles which require that only actual reproduction costs be collected from a requestor. **CHRI recommends that the fee related provisions be tightened to prevent scope for misuse.**

Further, CHRI recommends that no fees should be charged for providing information relating to life and liberty as it is an urgent request. As the time between despatch of fee intimation and actual payment is not calculated while reckoning the time taken for providing information this can lead to unnecessary delays. It is better that such information be provided free of cost as it relates to life and liberty which may be under threat from a State agency.

Recommendations: The following changes may be incorporated in section 7:

- 1) *In line 2 of sub-section 3, the words- "a fee" and "reproducing" may be substituted respectively for the words "any further fee" and "providing".*
- 2) *In line 1 of clause (a) of sub-section 3 the word- "further" may be deleted.*
- 3) *In line 2 of clause (a) of sub-section 3 the word- "reproducing" may be substituted for the word "providing".*

- 4) *The following formulation may be substituted for the current proviso to sub-section (1):*

"Provided that where the information sought for concerns the life or liberty of a person, subject to sub-section (9) of section 7, the same shall be provided free of charge, within forty-eight hours of the receipt of the request."

13. Provide the cover of exemptions to the intellectual property rights of a public authority:

Clause (d) of sub-section (1) of section 8 protects trade secrets, intellectual property rights and matters of commercial confidence from disclosure under the Bill. This is in line with the Central RTI Act. However the error committed in drafting the corresponding provision in the Central RTI Act is repeated in the Bill. This provision currently provides protection only to third parties. A public authority which is the subject of an information request cannot invoke this provision to legitimately protect its own trade secrets or intellectual property rights. This would be harmful to researchers engaged in Universities and scientific research institutions as well as public sector enterprises who will be targeted by their counterparts in the private sector. **CHRI recommends that the protection of this clause be extended to the public authority receiving the request as well.**

Recommendation:

In line 3 of clause (d) of sub-section(1) of section 8 the words- "the public authority or" may be inserted after the words "harm the competitive position of".

14. Empower the Information Commission to decide on the sunset clause:

Sub-section 3 of section 8 contains what is known in international RTI parlance as a sunset clause. This clause indicates that even exempt information can be disclosed after the passage of a stipulated period of time (20 years in the instant case) when

disclosure would no longer harm the public interest. The proviso to sub-section 3 in the Bill vests the Government with the authority to make the final determination regards computation of time. This is along the lines of the Central RTI Act. However this is not a happy situation as the Bill provides for an independent appellate authority in the form of the Information Commission to adjudicate over disputes between a requestor and a public authority. There is no reason why the Information Commission cannot be trusted to adjudicate over a dispute relating to computation of time. **CHRI recommends that the Information Commission and not the Government be empowered to settle such disputes.**

Recommendation:

In line 3 of the proviso to sub-section (3) of section 8, the words- "*Information Commission*" may be substituted for the word "*Government*".

15. Remove the anomaly in the context of severability:

Section 10 is an important provision that provides for severing certain portions of a document if they attract one or more exemptions and providing to the applicant the remainder of the information. This is in tune with the international best practice principles of maximum disclosure and minimum exemptions that are narrowly drawn. This is closely modelled on a similar provision contained in the Central RTI Act. However the Bill repeats a procedural anomaly that is found in the Central RTI Act without improving upon it. The language of sub-section (1) of section implies that an information request must be rejected first before the severability principle is applied. This is wholly unnecessary and a waste of time. The PIO can move the appropriate authorities within the public authority to make a decision on which portions to sever from a document as per procedure provided in sub-section (2). There is no need to reject the application first and then start the proceedings all over again to determine which portions can be given. This will interfere with the appeals process also. **CHRI recommends that the procedural anomaly contained in this section be corrected.**

Recommendation: The following may be substituted for sub-section (1) of section 10:

"(1) Where the information request relates to information that is exempt from disclosure, then notwithstanding anything contained in this Act, access may be provided to that part of the record which does not contain any information which is exempt from disclosure under the Act and which can be reasonably severed from any part that contains exempt information."

16. Remove the contradiction in relation to third party rights:

The proviso to sub-section (1) of section 11 states that any information relating to third parties may be disclosed in the public interest except trade or commercial secrets protected by law. This is modelled on similar provisions contained in the Central RTI Act. However the error committed in drafting the corresponding provision in the Central RTI Act is repeated in the Bill. Trade secrets of third parties are also protected under clause (d) of sub-section (1) of section 8. However they are subject to the public interest override contained in sub-section (2) of section 8. In other

words, a public authority may disclose information exempt under this clause if there is an overriding public interest. So the same information can both be barred and disclosed in public interest. This creates an absurdity and is not good law. Furthermore the proviso will remain a dead letter as the PIO is empowered to reject a request for information under sub-section (1) of section 7 only for reasons mentioned in section 8 and 9. So the bar on disclosure contained in the proviso of section 11 would still be subject to section 8 which contains the public interest override. The proviso therefore does not serve any purpose. **CHRI recommends that the proviso to sub-section (1) of section 11 be deleted.**

Recommendation:

The proviso below sub-section (1) of section 11 may be deleted.

Chapter III

17. Change the composition of the selection committee for appointing the members of Information Commission:

Sub-section (3) of section 12 provides for a three-member committee that will select the candidates for appointment as Chief Information and Information Commissioners. The Chief Minister (CM) is the Chairperson of the Committee and the Leader of the Opposition (LOP) in the J&K Legislative Assembly and a Cabinet Minister nominated by the CM are its other members. This is in line with the Central RTI Act. However it is bad practice to have a government-dominated appointments committee. The Information Commission is designed to be an independent appellate authority. Its independence must be guarded during the appointments process as well. Therefore it is essential to have a member from outside the Government in order to balance the power equations in the Committee. **CHRI recommends that the Chief Justice of the High Court of J&K be made the third member of this committee in addition to the CM and the LOP.**

Recommendation:

Clause (c) of sub-section (3) of section 12 may be replaced with the following:

“The Chief Justice of the Jammu and Kashmir High Court”

A second Explanation may be added below the current one which may be phrased as follows:

Explanation II. – For the purpose of removal of doubts it is hereby declared that when the position of the Chief Justice has fallen vacant for any reason, the Judge of the Jammu and Kashmir High Court holding charge of the office of the Chief Justice shall be deemed to be the Chief Justice for the purpose of clause (c).

18. Staffing autonomy for the Information Commission:

The Bill makes the Information Commission completely dependent upon the State Government for staffing. This is along the lines of similar provisions found in the Central RTI Act which is not a happy position. Information Commissions in several States have been hampered in their work due to lack of adequate qualified staff and personnel. Their work output suffers immensely as a result leading to the piling up of a huge backlog of cases. It is essential for Information Commissions to have the autonomy to hire talent from the private sector as well. **CHRI recommends that the Information Commission be provided with adequate autonomy to hire staff**

from the private sector and determine the salaries and allowances payable to them in consultation with the Government.

Recommendation:

A new sub-section (7) may be inserted below sub-section (6) in section 13 as follows:

“The Information Commission may hire the services of qualified persons from the private sector for the efficient performance of its functions, and the salaries and allowances payable to and the terms and conditions of service of such persons appointed shall be such as may be determined by the Information Commission in consultation with the Government.”

19. Filling up vacancies at the Information Commission:

The RTI Bill does not contain any provision that requires filling up of vacancies in the Information Commission in a time-bound manner. This seems to be inspired by the Central RTI Act which also lacks such a directory provision. The experience from Punjab shows that the State Information Commission has remained without a Chief Information Commissioner for several months now. As members of the Information Commission handle onerous responsibilities and aggrieved persons approach the body on a daily basis it is necessary to ensure that vacancies arising in the Commission are filled up within a specific time limit. **CHRI recommends that the Bill be amended to include a provision requiring the Government to fill up vacant positions of Commissioners in the Information Commission in a time-bound manner.**

Recommendation: A new sub-section (15) may be inserted below sub-section 14 of section 14 as follows:

“The Government shall fill up any vacancy that may arise in the Information Commission due to the retirement, resignation or removal of the Chief Information Commissioner or an Information Commissioner, appointed under this Act, as expeditiously as possible, and in any case no later than a period of three months from the date of the arising of such vacancy.”

Chapter IV

20. Separate the grounds for complaint from the grounds for appeal:

The scheme for the resolution of information access-related disputes in the Bill is closely modelled on the scheme provided for a similar purpose in the Central RTI Act. In other words it is possible to file a complaint directly with the Information Commission under section 15 on all those grounds on which a citizen may file internal appeal under section 16 with the appellate authority within the public authority. This leads to duplication of efforts and causes a great deal of confusion. There is no good reason why the internal appeal process should not be exhausted before approaching the Information Commission for redress especially if the PIO has sent some communication to the requestor. This communication may be in the nature of a fee-payment intimation or an order of rejection of the information request. The requestor must be required to approach the internal appeals authority first if he/she believes that the PIO has provided incomplete, misleading or false information. **CHRI recommends that the Bill be amended to separate the grounds which can form the basis for filing a first appeal and complaint.**

Recommendation: The following changes may be incorporated to section 15 and 16.

1. Clauses (b), (d) and (e) of sub-section (1) of section 15 may be deleted.
2. The following may be substituted for subsection (1) of section 16:

“Any person who, is aggrieved by the decision of a Public Information Officer, may within thirty days from the receipt of such a decision prefer an appeal to such officer who is senior in rank to the Public Information Officer, in each public authority.”

21. Give *suo motu* inquiry powers to the Information Commission:

The Bill treats the Information Commission as a body that can initiate action only when moved by an aggrieved person. This seems to be inspired by the role envisaged for Information Commissions under the Central RTI Act. This is not in tune with international best practice principles related to information access laws. The practice in countries like Canada and the UK has been to vest the Information Commissioner with powers to take *suo motu* cognizance of instances of non-compliance with the obligations under the respective information access laws. This may be done on the basis of verbal complaints, media reports or the Commission's own perception regards non-compliance in any public authority. **CHRI recommends that the Bill be amended to provide the Information Commission with powers to take *suo motu* cognizance of non-compliance and initiate an inquiry.**

Recommendation: The following new sub-sections may be inserted below sub-section (4) of section 15.

- “(5) The Information Commission may also initiate of its own accord an inquiry, as may be appropriate, against any Office of Government or public body into any matter relating to non-compliance with the provisions of this Act including but not restricted to any of the circumstances in sub-section (1).*
- “(6) The Information Commission shall complete an inquiry initiated under sub-section (5) within such reasonable time as it may deem appropriate and shall exercise all such powers as are granted to it under this section in relation to such inquiry.*
- “(7) During or on completion of an inquiry initiated on complaint from any person or of its own accord, if it appears to the Information Commission that the practice of a public body in relation to the exercise of its functions under this Act does not conform with the provisions or spirit of this Act, it may give to the public body a recommendation specifying the steps which ought in its opinion to be taken for promoting such conformity.*
- “(8) On completion of an inquiry, initiated of its own accord under sub-section (5), the Information Commission shall submit to the Government a report of its findings along with any recommendations for ensuring better compliance with the provisions of this Act.*
- “(9) On receipt of a report from the Information Commission under sub-section (8) the Government shall cause the report to be tabled before the Jammu and Kashmir Legislature immediately, if either House of the Legislature is in session*

and where such a report is received on a date when neither House is in session, the Government shall cause the report to be tabled on the first day of the next session of either House of the Legislature.

(10) The Information Commission shall conduct an inquiry under this section in accordance with such procedure as may be prescribed."

22. Clarify the powers of the Information Commission vis-à-vis appeals and add the powers of search and seizure:

The Bill vests the Information Commission with the powers of a civil court in order to investigate any complaints preferred to it by an aggrieved person. This is in line with the Central RTI Act. However the Bill commits the same error as the Central RTI Act as it is silent about the nature of powers to be wielded by the Information Commission while deciding upon second appeals filed under sub-section (4) of section 16. This had caused some confusion in the initial stages of the implementation of the Central RTI Act. **CHRI recommends that the reference to the vesting of the powers of a civil court in the Information Commission be transferred from section 15 to section 16.**

Further, it is common practice in advanced jurisdictions to vest the Information Commission with the powers to enter the premises of a public authority and conduct searches for the purpose of seizing any documents that may be withheld from it during the process of inquiry into a complaint or second appeal. **CHRI recommends that the Bill be amended to vest the powers of search and seizure in the Information Commission.**

Recommendations:

1. Sub-section (3) may be omitted from section 15 and inserted as a new sub-section (7a) in section 16 after sub-section (7). Or it is advisable to revise the numbering to reflect the expanded list of sub-sections of section 16. In line 2 of this sub-section the words- "*or under section 15*" may be inserted after the words: "*inquiring into any matter under this section*".
2. The following may be substituted for clause (f) in the new sub-section (7A or as renumbered):
"entering the premises of any office of a public authority for the purpose conducting search and seizure of any documents or records;"
3. The following may be inserted as a new clause (g) after clause (f) in the new sub-section (7A or as renumbered):
"searching and seizing any documents or records from the office of a public authority required in relation to any proceedings before the Information Commission; and'
4. The following may be inserted as a new clause (h) after clause (g) in the new sub-section (7A or as renumbered):

"any other matter which may be prescribed".

23. Structure appropriately the penalty for diverse contraventions of the law:

The Bill provides for the imposition of penalties on the Public Information Officer for various contraventions of the law. However the construction of the provision leaves

very little room for the Information Commission to decide on the quantum of penalty in a judicious manner. This is in line with the Central RTI Act but this problem has not been rectified. **CHRI recommends that contraventions like delays or absence of a response be treated differently from other contraventions for the purpose of levying penalties. CHRI also recommends that the law must provide for a process for the recovery of penalty from the Public Information Officer.**

Recommendations:

1. The following may be substituted for sub-section (1) of section 17:

“Where the Information Commission at the time of deciding any complaint, appeal or reference is of the opinion that the Public Information Officer has without any reasonable cause, refused to receive an application or has malafidely denied the request for information or knowingly given incorrect, incomplete or misleading information or destroyed the information which was the subject of the request or obstructed in any manner in furnishing the information, it shall impose a penalty not less than two thousand rupees and not exceeding twenty-five thousand rupees.”

2. The following new sub-section (2) may be inserted after sub-section (1) in section 17:

“Where the Information Commission at the time of deciding any complaint, appeal or reference is of the opinion that the Public Information Officer has without any reasonable cause, not furnished the information within the time limit specified under sub-section (1) of section 7, shall impose a penalty of two hundred and fifty rupees each day till the information is furnished, so however, the total amount of such penalty shall not exceed twenty-five thousand rupees.

Provided that the Public Information Officer shall be given a reasonable opportunity of being heard before any penalty is imposed.

Provided further that the burden of proving that he acted reasonably and diligently shall be on the Public Information Officer.”

3. The existing sub-section (2) of section 17 may be renumbered as sub-section (3).

4. The following new sub-section (4) may be inserted after the renumbered sub-section (3) of section 17:

“The Information Commission shall direct the public authority to cause the penalty amount to be deducted, in monthly instalments, from the salary of the Public Information Officer.”

24. Give powers to impose penalty on Appellate Authorities for delay in case disposal:

The Bill contains no provision which empowers the Information Commission to proceed against an appellate authority designated under sub-section (1) of section 16 who does not make a decision on a first appeal within the time limit specified, without reasonable cause. This is in tune with the Central Act. However the experience of implementation in several States and in some of the public authorities at the Central level has shown that appellate authorities do not perform their duties under the Act conscientiously. There are several instances in States like Madhya Pradesh and Chhattisgarh where appellate authorities have conducted the first

hearings after the expiry of the stipulated deadline of 45 days. As a result of the ineffectiveness of the appeals process at this stage, aggrieved citizens feel compelled to approach the respective Information Commissions. This results in the overburdening of Information Commissions. Such a situation can be avoided in J&K by providing for sanctions against appellate authorities who contravene the law without reasonable cause. **Therefore CHRI recommends that the Bill be amended to provide for the imposition of penalties on appellate authorities of a higher order than what has been prescribed for PIOs. The term 'Appellate Authority' will have to be included in the Definitions section for this purpose.**

Recommendation:

1. The following new sub-section (5) may be inserted after the renumbered sub-section (4) in section 17 (mentioned above):

“Where the Information Commission at the time of deciding any complaint or, appeal is of the opinion that the officer designated as appellate authority did not give a decision within the time specified in sub-section (1) of section 16 without reasonable cause it shall impose a penalty not exceeding thirty thousand rupees.

Provided that such appellate authority shall be given a reasonable opportunity of being heard before any penalty is imposed.

Provide further that the burden of proving that he acted reasonably and diligently shall be on the appellate authority.”

2. The following new sub-section (6) may be inserted after sub-section 5 under section 17:

“The Information Commission shall direct the public authority to cause the penalty amount to be deducted, in monthly instalments, from the salary of the Appellate Authority.”

3. The following new sub-section may be inserted in the Definitions under section 2 of the Bill after sub-section (a):

“Appellate Authority means the officer designated under sub-section (1) of section 16”.

25. Appeals against the decision of the Information Commission:

Sub-section (10) of section 16 of the Bill contains a reference to a possible appeal against the decision of the Information Commission. However the Bill is silent as to where such an appeal shall lie. Further, section 20 prevents courts from entertaining any suit or proceedings against any order made under this law except by way of an appeal. Again the Bill is silent about the name of the court which shall have jurisdiction to entertain such appeals. This is in tune with the Central Act where similar provisions exist in sections 19 and 22 respectively, but there is no clear indication as to where such an appeal shall lie. The experience of implementing the Central RTI Act during the last three years has shown that parties aggrieved by the decision of an Information Commission challenge it in the respective High Courts through write petitions. High Courts entertain these petitions by virtue of powers granted under Article 226 of the Constitution. It is important that the Bill itself contain a clear indication as to where such appeals shall lie and the appropriate forum where such decisions may be challenged is in the High Courts as they have the power of judicial review. **CHRI recommends that the Bill be amended to state that an appeal against the decision of an Information Commission shall lie before the appropriate High Court. CHRI recommends that sub-section (8) of section 16**

also be amended to indicate that the decisions of the Information Commission are binding unless they are challenged by way of an appeal.

Recommendations:

1. A new sub-section (12) may be inserted after sub-section (11) of section 16 as follows:
“Any party, aggrieved by the decision of the Information Commission, is at liberty to approach the High Court, of appropriate jurisdiction, by way of an appeal”.
2. In line 2 of sub-section (8) of section 16 the words- *“unless challenged by way of an appeal under sub-section (12)”*, shall be inserted after the words, *“shall be binding”*.

Chapter V

26. Drop the partial exclusion granted to security and intelligence agencies:

Section 21 states that security and intelligence agencies, notified by the Government in the Gazette, will be exempt from providing information under this law, except regards matters pertaining to allegations of corruption and human rights violation. This is in line with the Central RTI Act which exempts such organisations established at the level of the Union and in the States. This is not in tune with the international best practice principle of maximum disclosure. The objective of the Bill is to hold all instrumentalities of government accountable to the governed. There is no reason why security and intelligence agencies should be exempt from such accountability mechanisms ordinarily and provide information only in a narrow set of circumstances. The sensitive information they hold in their custody are adequately protected under clauses (a), (f) and (g) of sub-section (1) of section 8 of the Bill. These exemptions may be invoked if the disclosure of information is likely to harm the public interest. There is no need to provide blanket exclusion to such bodies as the citizen tax-payer has a right to know about their functioning. J&K Government has the opportunity to take a bold step and go beyond the Central RTI Act. **CHRI recommends that section 21 be deleted entirely.**

Recommendation:

Section 21 may be deleted.

27. Remove duplication of rule-making powers:

Section 24 empowers the Government to make rules for the implementation of the law. Sub-section (1) contains general powers while sub-section 2 contains a list of specific topics on which rules are required to be prescribed. Section 25 also empowers competent authorities for making rules applicable to public authorities within their jurisdictions. As the Governor can under section 25 make rules for all public authorities other than those covered by the legislative and judicial spheres there is no need to state that the Government shall make rules on the same topics in section 24. The only rules that the Government should make are those pertaining to rules of procedure to be followed by the Information Commission. **CHRI recommends that section 24 be amended to avoid duplication.**

Recommendation:

1. The following may be substituted for sub-section (1) of section 24:

“The Government may by notification in the Government Gazette, make rules to provide for the procedure to be adopted by the Information Commission in deciding the appeals under sub-section (1) of section 16.”

2. Sub-section (2) may be deleted.

28. Include rules for first appeals process:

There is no mention of any requirement in the Bill to prescribe rules of procedure to be followed by appellate authorities while disposing first level appeals received under sub-section (1) of section 16 of the Bill. This is in tune with the Central RTI Act which also fails to provide for rules to be made for the purpose of deciding first appeals. The experience of implementing the Central RTI Act during the last three years has shown that the absence of rules is a major factor behind the lackadaisical approach of appellate authorities towards their obligations. This situation can be avoided in J&K. **CHRI recommends that the Bill be amended to place a duty on the competent authorities to prescribe rules for deciding appeals received under sub-section (1) of section 16.**

Recommendation:

1. The following may be substituted for clause (d) of sub-section (2) of section 25:

“the procedure to be adopted by the appellate authority in deciding appeals under sub-section (1) of section 16; and”

2. The existing clause (d) of sub-section (2) of section 25 may be renumbered as clause (e).
3. In line 2 of sub-section (7) of section 16, the words- *“in accordance with such procedure as may be prescribed”* may be inserted after the words, *“shall be disposed of”*.

About CHRI

CHRI is an independent, non-profit, non-partisan, international non-government organisation working for the practical realisation of human rights in the countries of the Commonwealth. CHRI is headquartered in New Delhi with offices in London, UK and Accra, Ghana.

CHRI was a member of the civil society committee that drafted the first draft text of what was later enacted by Parliament as the *Right to Information Act, 2005* (RTI Act). CHRI made several submissions to the Standing Committee of Parliament that had examined the RTI Bill in 2004-05. CHRI was invited by the Chairman of the Standing Committee to make a second round of submissions on specific issues involving relating to the Bill based on international best practice standards. CHRI had organised the first national conference on implementation of the RTI Act within two weeks of the Bill being passed by Parliament. Several representatives of the Central and State Governments, civil society and the media participated in the deliberations. International experts including the Federal Information Commissioner of Mexico, the Deputy Information Commissioner from the UK, the head of the Access to Information Implementation Unit from Jamaica, a senior official from the South African Human Rights Commission looking after RTI issues and a former official from the Canadian Information Commissioner's Office made presentations based on their countries' experience of implementing similar laws. Since then CHRI has conducted numerous training programmes for public information officers, assistant public information officers, first appellate authorities and staff of Information Commissions all over India. CHRI has published guidance notes on important implementation issues relating to the RTI Act. In 2007 CHRI had submitted a critique and specific recommendations to the Central Information Commission (CIC) for making its Management Regulations more user-friendly.

CHRI also trains civil society groups and media representatives to make use of the RTI Act in the larger public interest for securing openness in government and accountability to the law and the people of India.

CHRI is also assisting the Government of Uganda with advice on implementing their Access to Information Act. CHRI's technical advice for improving information access legislation has been acknowledged, accepted and incorporated by the governments of Malta and the Cayman Islands. CHRI has also made several submissions for improving the quality of draft access legislation produced by either governments or civil society groups in Sri Lanka, Pakistan, Bangladesh, Kenya, Nigeria, Malawi, Sierra Leone, Ghana, Swaziland, Fiji Islands, Cook Islands and Indonesia. For more information about CHRI's work please visit our website: www.humanrightsinitiative.org
