Submission regarding the recommendations of the Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice on the *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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Introduction

1. The Commonwealth Human Rights Initiative (CHRI) has been following the development of the *Right to Information Bill 2004* (RTI Bill) very closely. CHRI was heavily involved in developing the recommendations for amending the *Freedom of Information Act 2002* which were submitted by the National Campaign for the People's Right to Information (NCPRI) to the National Advisory Council (NAC) and used as the basis for the NAC's recommendations to Government. More recently, CHRI was invited to make two presentations on how to improve the RTI Bill to the Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice.

2. CHRI welcomes the Report of the Parliamentary Standing Committee which was tabled on 21 March 2005 in the Rajya Sabha. It is very positive that the Committee convened promptly and encouraged the input of civil society groups from throughout the country. It is also commendable that the report was tabled quickly to facilitate the passage of an improved RTI Bill in the current Budget session of Parliament. However, while CHRI endorses most of Parliamentary Standing Committee's recommendation, CHRI nonetheless wishes to draw to your attention:
   (i) Key issues regarding the Committee's recommendations which must still be addressed before the Bill is finalised and enacted;
   (ii) Additional issues, not dealt with by the Committee, which should be addressed by Parliament before the Bill is finalised and enacted.

3. CHRI urges the Government to incorporate the recommendations below in any amendments tabled in Parliament prior to consideration of the RTI Bill during the current Budget session. CHRI further urges the Government to enact the RTI Bill as a matter of urgent priority, to ensure that people in all parts of India can begin simply and effectively exercising their – fundamental right to information without further delay.

Outstanding Issues re Parliamentary Standing Committee Recommendations

Clarify the Jurisdiction of the new Information Commissioners

New	Clarify the separate and exclusive jurisdiction of the Central Information Commissioner and the State Information Commissioners

4. The Parliamentary Standing Committee has recommended that the Act require both Central and State Information Commissions to be established. It is understood that this recommendation reflects the Committee's view to make the Act applicable to both Central and State/local bodies. If these recommendations are accepted, then it should be clarified that the Central Information Commission will only hear appeals in relation to requests for information held by Central public authorities and State Information Commissions will only hear appeals in relation to requests for information held by State and local public authorities. Notably, if Parliament accepts the recommendation of the Committee regarding including "non-government organisations" within the scope of the Act (see paragraph 24 for more on this point), consideration will also need to be given to clarifying which Commission has jurisdiction over appeals relating to rejections by non-government organisations.

Strengthening the Section and Appointment Process for Information Commissioners

s.12(5A) & new	Insert a requirement that the selection of the Central and State Information Commissioners and their Deputies should be chosen via a process which involves

s.14A(5A)	public consultations, including by way of requesting nominations from the public and publishing the reasons forwarded by the bureaucracy in support of nominees.

5. It is essential that the people chosen to be Information Commissioners 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 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 recommended, in accordance with agreed criteria (see paragraph 6 below on this point).

6. The Parliamentary Standing Committee has recommended amendments to the qualification criteria included at s.12(5). While this is positive, CHRI recommends that the following additional 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 or a tax defaulter;
   (d) have knowledge of the workings of Government;

   be otherwise competent and capable of performing the duties of his or her office."

s.12(6) & new s.14A(6A)	Reinsert s.12(6) but amend to clarify that Information Commissioners and Deputies: (i) Cannot at any time have been Members of either a Central or State legislature; (ii) Once selected, must cease to be a member of any political party, must divest themselves of any position of profit and must cease to carry on any other business or profession.

7. The Parliamentary Standing Committee has recommended the deletion of s.12(6). However, while CHRI agrees that the current clause is confusingly worded, CHRI is of the view that the substance of the provision must be retained in the final Bill. The key issue to clarify is that, while during the selection process, a candidate may well be involved in certain political or economic activities, once a candidate is selected, they must divest themselves of all positions and memberships which may cause a conflict of interest with their duties of independence and impartiality. In light of the fact that Information Commissioners must be people who are considered impartial, it is also important that they should not be ex-parliamentarians as such people may be perceived to have a bias in favour of the bureaucracy/government. This will ensure maximum public confidence in the Commissioners.

Ensure Autonomy for Information Commissioners

s.12(7) & s.14(6)	Amend to ensure that Information Commissions have the autonomy to determine where their offices will be located, subject to budgetary considerations.

8. At present, although the Government has indicated an intention to make the Information Commissioners independent bodies, the Bill nonetheless contains certain restrictions on the their powers. For example, the Bill only permits Information Commissioners to set up other offices with their 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(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

9. 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.

10. 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(8A) & s.14(7)	Insert a new provision which indicates that the Information Commissioner will have the power to employ his/her own cadre of staff

11. For the Information Commissions to be truly independent, it is key that they are able to employ their own 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. In England, the Information Commissioner has the power to set his/her staff's service conditions and in States/provinces in Canada and Australia, some Information Commissioners have the power to employ their staff outside the normal public service framework.

s.15(2)	Amend to permit Information Commissioners to initiate their own investigations in relation to any matter, whether or not they have received a specific complaint, eg. persistent cases of departmental non-compliance.

12. Section 15(2) currently refers to the power of Information Commissions to initiate inquiries. However, this clause does not properly empower the Information Commissions 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 Information Commissions to take public authorities to task for persistent non-compliance with the law.

Strengthen the Penalty Provisions

s.17(1)	Clarify that the Information Commission can sanction the offence of unreasonable delay and that the penalty will be a personal fine of Rs 250 payable for each day's delay

13. It is a small sign of progress that the Parliamentary Standing Committee has recommended that s.17(1) be amended to permit sanctions for unreasonable delay in processing requests, the current procedure proposed is unnecessary bureaucratic, It is also problematic that no amount has been specified as a penalty. In accordance with 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, the Bill should be amended to enable the appellate authorities under the Bill to impose a fine for unreasonable delay:

    "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 have the power to impose a penalty of rupees two hundred fifty, which amount must be reviewed and, if appropriate, 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."

New	Make it an offence punishable by a personal fine of at least Rs 2000 and/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
	Make it an offence to refuse to accept an application, attracting personal penalties by way of a minimum fine.
	Include departmental penalties of a minimum of Rs 10,000? 1 lakh? for persistent non-compliance with the law
	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
	Reiterate that the appellate authority and Information Commission are empowered to impose all penalties available under the law

14. 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 this law. Bureaucrats should not be permitted to wilfully 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 the Jamaican *Access to Information Act 2002.* Notably, the majority of international Acts which contain penalty provisions permit the imposition not only of a fine but for summary imprisonment. 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, 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. This provision does not take away from the power to impose penalties permitted under ss.197 and 204 of the Indian Penal Code.

(2) Where a 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.

15. 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. A minimum fine of Rs2000 should be considered, as this is a simple provision to comply with and non-compliance should therefore be strictly sanctioned.

16. 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 law to withhold information. The minimum fine should be sufficiently large to act as a deterrent.

Tighten the Exemptions

s.21(1)	Delete the blanket exemption for intelligence and security agencies.
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

17. It is positive that the Parliamentary Standing Committee has recommended that s.21(1) be amended to permit disclosure of information held by security and intelligence agencies where it relates to human rights violations. However, CHRI continues to recommend that s21 be deleted altogether because it is still so broad in scope that it undermines the purported commitment made to maximum disclosure and minimum exemptions. 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 ensure that the exempted agencies are undertaking their activities in a professional manner if they cannot access basic information about their activities. This approach 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.

18. 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?

s.8(1)(a)	Amend to require that disclosure would "cause serious harm" not just "prejudicially affect" the relevant interests
s.8(1)(c)	Amend to protect information "disclosure of which would constitute a legal breach of confidence" not information which was simply given to the Government in confidence
s.8(1)(e)	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. 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.

20. It is positive that the Parliamentary Standing Committee has attempted to tighten s.8(1)(c). However, the insertion of a new protection for "information obtained from or furnished by a third party on condition of strict confidentiality" is problematic. The key issue should be whether disclosure would actual be legally detrimental to the Indian Government because it might expose the Government to an action for *legal breach of confidence.* The current test leaves too much discretion to the third party. If a third party hands a public official non-sensitive information and/or information in the public interest but tells the official that it must be kept confidential, does the officer have no discretion him/herself regarding disclosure? Why should the third party be able to unilaterally decide what should be kept confidential?

21. While it is encouraging that the Parliamentary Standing Committee has revised s.8 to shorten the list exemptions, it remains troubling that that very broad exemption in s.8(1)(e) remains unaltered. While *some* information in *some* Cabinet papers may be sensitive, it is not the case that *all* Cabinet papers are *always* sensitive. And even if many 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.

22. Additionally, the clause is problematic in practice because there is no guidance in the Act as to what constitutes a "Cabinet paper" such that 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. Although the proviso in s.8(1)(e) 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". This formulation would still allow preparatory Cabinet papers which were not used in the decision-making process to be withheld.

23. 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.

Clarify Whether Private Bodies Are Covered

s.2(g)	Clarify whether the insertion of the term "non-government organisations is intended to bring private bodies within the scope of the law and if so, review the entire Bill to ensure that its provisions appropriately deal with the special issues that may arise in respect of private sector information disclosure

24. It is notable that the Parliamentary Standing Committee has recommended in s.2(g) that "non-Government organisations" should fall within the definition of public authority for the purposes of defining what bodies are covered by the law. This term is very broad – covering all organisations in the profit and non-profit sectors. While CHRI agrees that private bodies should be covered by the law, if this was indeed the intention of the proposed changes to s.2(g) then CHRI recommends that the entire Bill be reviewed to ensure that it appropriately deals with the special issues that pertain to information held by non-government organisations. For example, will all non-government organisations be covered, no mater their size? Will they be covered by the same proactive disclosure requirements as public bodies under s.4? Will they have to follow the same processes – for example, appointing a PIO and an appellate authority, even if they are very small bodies? When considering these issues, CHRI recommends that the South African *Promotion of Access to Information Act 2000* be considered as a model - it has comprehensive provisions in relation to private sector bodies.

Fees

s.6(1)	Delete the reference to fees being payable for applications for information
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
s.7(5A)	Insert a new clause requiring that no fees (for applications or for access) will be charged for BPL families
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

25. It is positive that the Parliamentary Standing Committee has recommended at p.24 of the report that "people living below the poverty line should be exempted from paying any fee for accessing information and in other cases it should not exceed the cost of supplying the information." In accordance with these recommendations, the following clause should be included in the Bill:

(5) 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."

(5A) Below Poverty Line (BPL) families shall be provided information free of cost

(7A) 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. 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.

<u>Miscellaneous</u>

Preamble	Delete paragraph 3 as not being in the proper spirit of the law, which promotes maximum disclosure and minimum exemptions

26. It is positive that the Parliamentary Standing Committee has attempted to insert a more comprehensive Preamble but paragraph 3 if not appropriate. The right to information is a fundamental right under the Constitution. Concerns about "efficiency" and "optimum use of limited fiscal resources" are never justifiable grounds on which to limit a fundamental right.

ss.5(5) & 5(6)	Reject the Parliamentary Standing Committee's recommendation that clauses requiring other officials to assist PIOs when requested be deleted

27. The Parliamentary Standing Committee has recommended that ss.5(5) and (6) be deleted because they could "do more harm than good". This reasoning is not compelling however. The relevant sections impose an obligation on all officers within a public authority to assist a PIO if requested. In fact, these are *key* provisions because they ensure that PIO's are adequately supported in their activities and that obligations under the law are shared by all and do not become an impossible burden on PIOs. They should be retained, and the penalties provisions should be reviewed to ensure that any officer who does not comply with the obligations under the law can be penalised, not just PIOs.

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

28. It is common to include a clause 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. It is positive that the current Bill purports

to release information after 10 years. However, s.8(4) purports to operate as a blanket *disclosure* provision because it attempts to apply some of the exemption provisions – even after the passage of 10 years! In particularly, it is notable that s.8(e) which protects Cabinet papers is still supposed to apply. As noted in paragraphs 21-23 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, 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.

29. 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.

Additional Recommendations

Key issues

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

30. The RTI Bill currently permits only citizens to utilize the law to access information. This is a flawed approach in practice and could have major implications as many of the poorest of the poor in India may not have the necessary documentation to PROVE their citizenship. 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). 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.

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

31. 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.8(3)	Amend this section to require that a public authority ”shall” not “may” allow access to information if in the public interest

32. 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.19	Amend to require that the Act “overrides” all other laws and consider repealing all legal provisions which are inconsistent with the law.

33. 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.

Process issues

s.2(d)	Reinsert the term “file notings” from the NAC draft RTI Bill into the definition of “information” and include “photocopies” as well

34. 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, it should be made clear to bureaucrats that under the law they must be released.

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

35. Considering that the Parliamentary Standing Committee has now recommended the establishment of at least an additional 28 new Information Commissions’ offices, it is essential that the contact details of all of these news bodies are proactively disclosed. Additionally, even the intermediate appellate authorities’ contact details should be published.

s.6(1)	Require that requesters must receive a written acknowledgement from the PIO of receipt of their application

36. The Bill does not provide for an acknowledgement receipt to be issued by the PIO upon receipt of an application. A receipt is important however, because it serves as a record for the applicant and sets the clock running in terms of the time limits imposed on PIOs for responding to queries. It is one way of dealing with problems evidenced at the State level where requesters have had a great deal of difficulty submitting applications and receiving timely responses.

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

37. 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). 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) and thereby make administration of the law simpler.

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

38. 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.

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)

39. 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.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"
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 37 above for details)

40. 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 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.

41. 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.

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)

42. 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 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.

s.22(1)	Amend to require that the Information Commissioner submits his reports to Parliament for consideration by the Parliamentary Standing Committee
s.22(3)(d)	Amend to require reports to Parliament to includes the particulars of any fines/penalties collected/imposed.

43. 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".

s.16(10) & s.24(2)(f)	To ensure the Information Commission's autonomy is not impeded, amend to explicitly recognise that any Rules which are made relating to the Information Commission must first be approved by the Information Commission.

44. 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. 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 under this Act.