

# **Detailed Analysis of the Indian Right to Information Bill 2004 & Recommendations For Amendments**

*In a government...where all the agents of the public must be responsible for their conduct, there can be but few secrets. The people...have a right to know every public act, everything that is done in a public way, by their public functionaries...The responsibility of officials to explain or to justify their acts is the chief safeguard against oppression and corruption.*

- Justice K K Mathew, Supreme Court of India



Submitted by the  
**Commonwealth Human Rights Initiative**  
February 2005

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## SUMMARY OF RECOMMENDATIONS – CLAUSE BY CLAUSE

At this stage, CHRI has not made any recommendations about whether the RTI Bill can and/or should cover both State and Central public authorities. CHRI may submit an additional note on this topic shortly.

RTI Bill	Summary Recommendation	Detailed analysis
s.2(c)	Amend the definition of “Government” to ensure that it is consistent with the definition of “public authority in s.2(g)	
s.2(k)	Amend the definition of “third parties” to EXCLUDE public authorities	Para 28
s.2(g), s.2(j), s.3	Broaden the right to information to allow access to information held by private bodies – ideally wherever access is needed “for the exercise or protection of any right”, but at least “where the functions of the body are of a public nature; where the body provides services under a contract with a public authority; where the body is owned, controlled or receives aid directly or indirectly from the Government; or where the body’s office bearers are appointed by the Government”	Para 4
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	Para 1-3
s.4	Include an additional provision requiring the suo moto publication of all contracts entered into by public authorities	Para 25
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	Para 18
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	Para 30
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	Para 31
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	Para 32
s.8(1)(a)	Amend ss.(i) to require that disclosure would “cause serious harm” not just “prejudicially affect” the relevant interests	
s.8(1)(d)	Amend to require that disclosure would “cause serious harm”	
s.8(1)(f)	Delete this section, because this type of information is already protected by s.8(1)(a)(i)	
s.8(1)(i)	Delete this section as all sensitive information should already be protected by the remaining exemptions. Alternatively, tighten the provision to protect only against harm that could be caused by “premature disclosure of Cabinet documents”.	Para 13
s.8(3)	Amend this section to require that a public authority “must” not “may” allow access to information if in the public interest	Para 16
s.8(4)	Remove the words “subject to the provisions of clauses (a) and (i) of sub-section (1)” and remove the proviso that all decisions of the Government are final	Para 14
s.11(2)	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	Para 28
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	Para 20
s.12(5)	Elaborate upon the criteria for the Information Commissioner and his/her Deputies to ensure at a minimum that they are committed to transparency and accountability in	Para 19

	Government, are not tainted in any way by allegations of corruption or criminality, are respected by civil society and have the expertise to do the job	
s.12(7)	Amend to ensure that the Information Commission's autonomy is not impeded, by replacing the words "with the previous approval of the Central Government" with "at his/her discretion if his/her budget permits"	Para 21
s.12(8)	Amend to ensure that the Information Commission's autonomy is not impeded by replacing the words "as may be specified by the Central Government" with "as may be specified by the Information Commissioner"	Para 21
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)	Para 22
s.15(2)	Amend to permit the Information Commissioner to initiate his/her own investigations in relation to any matter, whether or not he/she has received a specific complaint, eg. persistent cases of departmental non-compliance	Para 23
	Insert a heading prior to s.16 titled "Appeals"	
s.16(1)	Amend to require appeals to be sent to the Head of the Public Authority, who can then delegate this power as appropriate. This body should be called the "Appellate Authority" Insert an additional clause clarifying that where the appellate authority does not make an order in time, that will be considered a deemed refusal which can be appealed to the Information Commission	Paras 17-18 Para 22
s.16(4)	Amend to make explicitly subject to s.16(6)	Para 28
s.16(10)	To ensure the Information Commission's autonomy is not impeded, amend to clarify that the Commission will be responsible for prescribing its own rules of procedure	Para 21
s.17	Make it an offence punishable by a personal fine of at least Rs 2000 or imprisonment to: mala fide deny a request for information; knowingly give incorrect, misleading or incomplete information; destroy information subject to a request; obstruct the activities of a Public Information Officer, any Information Commission or the courts; or refuse to accept an application for information	Para 6(a)
s.17	Make it an offence to fail to supply information sought in time, without reasonable cause, with a personal penalty of Rs 250 payable for each day's delay	Para 6(b)
s.17	Require that where a penalty is imposed an officer shall also be liable to appropriate disciplinary action under the service rules applicable to him	Para 7
s.17	Require that where an official or authority fails to comply with a notice of any appeals body, the appeals body may certify in writing to a court that the official or authority has failed to comply with that notice, following which the court may inquire into the matter and deal with the officer or authority as if they had committed a contempt of court	Para 8
s.17	Include departmental penalties of a minimum of Rs 10,000 for persistent non-compliance with the law	Para 9
s.17	Reiterate that the appellate authority and Information Commission are empowered to impose all penalties available under the law	Para 10
s.20	Delete on the basis that it is both unconstitutional and inconsistent with the right to appeal to the High Court offered by s.16(11)	Para 24
s.21(1)	Delete the blanket exemption for intelligence and security agencies. At the least, require the release of information from these organisations where the information pertains to allegations of human rights violations	Paras 11-12
s.21(2)	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	Para 12
s.22(2)(f)	Delete this provision – see the recommendation in relation to s.16(10) above	

# DETAILED ANALYSIS OF THE RTI BILL 2004

## Extend the coverage and scope of the law

### Do not restrict the law to “Citizens”

1. The RTI Bill currently permits only citizens to utilize the law to access information. This is a flawed approach in practice. This could have major implications as many of the poorest of the poor in India may not have the necessary documentation to PROVE their citizenship. This requirement could easily be abused by resistant bureaucrats to refuse to accept applications. Furthermore, in a country which has such a large population of long-term refugees and permanent residents – none of whom have citizenship papers – this requirement will work to deny the right to information to key sections of the community.
2. Good international practice supports the extension of the Act to allow all persons access to information under the law, whether citizens, residents or non-citizens (such as asylum seekers). This approach has been followed in a number of jurisdictions, including the United States and Sweden, the two countries with the oldest access laws. This change may require the inclusion in s.2 of a definition of “person”.
3. 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.

### Allow access to information held by “private bodies”

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

## Strengthen the penalties provisions

### Include personal penalties for a broader range of offences

5. The Bill is seriously weakened by the fact that only a very limited offences and penalties provision was included in the draft tabled in Parliament. Specifically identifying a comprehensive list of offences and then including appropriate sanctions is essential to ensuring timely disclosure in jurisdictions where the bureaucracy is unused to hurrying at the request of public.
6. There are two types of offences which should be included:
  - (a) Offences which penalise officers who deliberately attempt to circumvent, ignore or undermine the law. These offences are common in almost all access laws around the world. Bureaucrats should not be permitted to willfully flout the law.

*Where it is found in appeal that any Public Information Officer has –*

    - (i) *Mala fide denied 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 Information Commission or the courts; or*
    - (vi) *Refused to accept an application for information without reasonable cause; commits an offence and will be liable upon summary conviction to a fine of not less than rupees two thousand imprisonment of up to two years or both.*
  - (b) Offences which penalise officers for poor performance of their duties.

*Where any Public Information Officer has, without any reasonable cause, failed to supply the information sought, within the period specified under section X, the appellate authority, Information Commissioner and/or the courts shall impose a penalty of rupees two hundred fifty, which amount must be increased by regulation at least once every five years, for each day's delay in furnishing the information, after giving such Public Information Officer a reasonable opportunity of being heard.*
7. In addition to personal penalties, the Bill should also require that where a penalty is imposed on any officer under the Bill, *“the officer shall also be liable to appropriate disciplinary action under the service rules applicable to him”*.
8. In the same way as the UK law penalises non-compliant officers, the Bill should also require that where an official *“fails to comply with a notice of any appeals body, the appeals body may certify in writing to a court that the official has failed to comply with that notice, following which the court may inquire into the matter and deal with the authority as if it had committed a contempt of court.”*

### Include departmental penalties for persistent non-compliance

9. In order to ensure that public authorities properly implement the law, they too should be liable for sanction for non-compliance. Thus, 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 is found on appeal to consistently misapply the provisions of the law to withhold information. The minimum fine should be sufficiently large to act as a deterrent.

### Empower the Appellate Authorities and the Information Commission to impose penalties

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

## Remove all blanket exemptions and tighten the remaining provisions

### Remove the blanket exemption for intelligence and security agencies

11. The complete exemption for certain security and intelligence agencies from the scope of the Bill via section 21 undermines the purported commitment made to maximum disclosure and minimum exemptions, in principle. In practice, it is unnecessary to fully exempt these bodies because any genuinely sensitive information they hold will be protected by the exemptions in section 8(1)(a)(i) (which protects against disclosures which may prejudicially affect the sovereignty and integrity of India or security), section 8(1)(g) (which protects against disclosure which would endanger a person's safety or identify an informant) and section 8(1)(h) (which protects against disclosures which would impede an investigation or apprehension or prosecution of offenders).
12. Section 21 should be deleted in its entirety. If this position is not accepted however, then at the very least the recommendation of the NAC should be accepted so information pertaining to allegations of human rights violations should not be excluded under s.21. Additionally, s.21(2) should be amended to include criteria to guide the use of power to prescribe additional bodies which are excluded from the law. Otherwise, this provision could be abused to exempt an ever-growing number of bodies.

### Remove the blanket exemption Cabinet documents

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

### Ensure the release of ALL information after a suitable passage of time

14. Section 8(4) purports to operate as a blanket *disclosure* provision. It is common in right to information laws to include such a clause. The intent of such provisions is to ensure the compulsory declassification/release of all government documents – whether or not they were at one time considered sensitive – on the basis that after a certain period of time has passed, all documents are accepted as no longer being sufficiently sensitive to warrant non-disclosure. Throughout the world, different time periods are used; it is positive that the current Bill purports to release information after 10 years. However, the intent of the provision is undermined by the fact that s.8(4) still attempts to apply some of the exemption provisions – even after the passage of 10 years! The provision should be amended to read:
  - *Any information relating to any occurrence, event or matter which has taken place or occurred ten years before the date on which any request is made under section 6, shall be provided to the person making the request under that section.*

15. 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.

### Tighten the public interest override

16. 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”.

## Clarify and strengthen the appeals process

### Make the Head of the Public Authority responsible for first appeals

17. Section 16(1) requires appeals against rejection notices to be sent to “the officer immediately superior to the PIO in the concerned Public Authority” for consideration, before being sent to the Information Commissioner. This provision is very basic and needs to be elaborated upon to ensure that there is sufficient clarity to enable effective implementation. Currently it is not clear how the public will identify who the appellate authority is – because the hierarchy in public authorities often differs so that it will not always be easy to know who is superior to a PIO.
18. It would be more appropriate therefore if the appellate authority were simply stated to be, in all cases, the Head of the Public Authority and provisions were included to allow the Head to delegate this authority as necessary. Requesters could then simply address their appeal to the Head of the Public Authority, and the Public Authority upon receipt of the appeal could then forward it to the specific officer responsible for handling appeals. This would also ensure that a sufficiently senior person was responsible for dealing with appeals. Section 4(1)(b) should also be amended to require the suo moto disclosure of the names and contact details of appellate authorities as well as PIOs.

### Include more detailed qualification criteria for the Information Commissioner and Deputies

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

*The person appointed as the Information Commissioner or a Deputy Information Commissioner shall -*

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

### Ensure appropriate autonomy for the Information Commission

20. 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. The Information Commission should be designed so that the Information Commission is autonomous from Government interference and is headed by the Information Commissioner, who is supported by Deputies who are subject to his/her direction. In the absence of this, 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 who will be under his superintendence, direction and management, but will not be subject to directions by any other authority under this Act.*

21. To ensure that the Information Commission can indeed operate autonomously from Government, the following clauses should be amended:

- Section 12(7): The Information Commissioner should be empowered to set up other offices *at his/her discretion if his/her budget permits*, and not “subject to previous approval of the Central Government”
- Section 12(8): Deputy Information Commissioners shall perform their functions within such areas *as may be specified by the Information Commissioner* and not “as may be specified by the Central Government”. This recognises clearly that the Information Commissioner is responsible for *autonomously* implementing his/her mandate, with the *support* of Deputies.
- Section 16(10): Amend to clarify that the Information Commission will be responsible for prescribing its own rules of procedure. Otherwise the Commission’s autonomy may be diluted via regulation at some later stage.

Clarify that the Information Commission can hear appeals even where no order has been made

22. Noting the difficulty that has been encountered in some states in India where second appeal bodies have refused to hear cases where no order has been made by the first appeal body, s.15(1) and ss.16(1) and (2) should be amended 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.

Empower the Information Commission to initiate its own investigations into non-compliance

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

Remove the bar for appeals to the Courts

24. Section 20 of the Bill, which attempts to bar the jurisdiction of the Courts, needs to be deleted. The Supreme Court has held on numerous occasions that the right to information is a constitutionally entrenched fundamental right. Decisions made by bureaucrats in relation to a constitutional right must be amenable to challenge in a court of law. Such appeals fall within the original jurisdiction of the High Court and the Supreme Court under Articles 32, 139 and 226 of the Constitution. Additionally, section 16(11) of the Bill now expressly allows appeals from the Information Commissioner to the High Court.

**Extend the *suo moto* disclosure provisions**

Require regular publication of all government contracts

25. 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.*

26. As noted in paragraph 17 above, s.4(1)(b) should also be amended to require the suo moto disclosure of the names and contact details of all appellate authorities under s.16(1).

### **Clarify the request and response process**

#### Clarify the third party provisions

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

28. To ensure that public authorities and third parties themselves cannot use the third party provisions to delay processing applications:

- Section 11(2) should be amended to require that third parties are allowed 10 days from the relevant notice is “sent” by the public authority. Otherwise, both public authorities and third parties could delay decisions by arguing that notices were never received by the third party. Notably, the Rules under the Act could specify that notices are required to be sent by registered post, to ensure that third parties are properly served with notices;
- Section 16(4) should be explicitly made subject to the time limits for disposing of appeals which are set out in s.16(6).

#### Tighten the fee provisions

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

30. If any fees are imposed, the law should specifically require that rates are set with a view to ensuring that the costs imposed for access are not so high as to deter potential applicants. At the most, fees should be limited only to cost recovery, with no additional margin for profit, and a maximum limit should be imposed. Charges should only cover reproduction costs, not search or collation/compilation time. The following clause should be included in the Bill to address this problem with the current draft:

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

31. Provision should be made to allow the waiver of fees levied under the Bill where that is in the public interest, such as where a large group of people would benefit from release/dissemination of the information or where the objectives of the law would otherwise be undermined (for example, because poor people would be otherwise excluded from accessing important information). Such provisions are regularly included in access laws in recognition of the fact that

fees may prove a practical obstacle to access in some cases (see s.29(5) of the Australian *Freedom of Information Act* for example).

- (1) *Upon receiving a notice under section X, an applicant may request the Public Information Officer to reduce and/or waive any fee imposed for access to information.*
- (2) *Without limiting the matters the Public Information Officer may take into account in determining whether or not to reduce or not to impose the charge, the Public Information Officer must take into account:*
  - (a) *whether the payment of the charge, or part of it, would cause financial hardship to the applicant, or to a person on whose behalf the application was made; and*
  - (b) *whether the giving of access to the document in question is in the general public interest or in the interest of a substantial section of the public.*

#### Make rejection notices consistent

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