

**Mr Wajahat Habibullah**  
Central Chief Information Commissioner  
Central Information Commission  
Block IV, 5 Floor  
JNU Old Campus  
New Delhi – 110067

10 November 2005

Dear Mr Habibullah

**Re: Clarifying internal procedures for how appeals will be handled by Information Commissioners to promote consistency and fairness**

I refer to our meeting on 31 October 2005 and my previous letters to your office. I note again that I am taking the liberty of writing formally to you to raise a number of questions concerning how exactly the Information Commission – and individual Commissioners in particular – will handle appeals, and to note some possible strategies based on our knowledge of other Information Commissions around the world.

Publication of internal appeals procedures

At the outset, while we recognise that the Commission's appeals procedures will to some extent be clarified via regulations made in accordance with section 27(2)(e), nonetheless, we assume that the Information Commission will itself also need to develop its own detailed internal procedural guidelines to provide guidance to Commissioners and staff. At the outset, I would urge you to capture such procedures in writing and publish them widely as a matter of priority. This would be invaluable not only to the public, but also to State Information Commissions.

Clarifying how Information Commissioners interact when processing appeals

I would also note that it is important that any procedural guidelines explicitly clarify how the Commissioners themselves will interact as a Commission as a whole. As noted at our meeting on 31 October, the Mexico Information Commission, which is comprised of 5 Commissioners, actually makes all appeal decision jointly, during weekly meetings. In Mexico, each Commissioner is allocated appeal cases randomly, is responsible for investigating said cases and then reports back to the collegium with recommendations which are then discussed at their weekly meeting before a final vote is taken. Notably, except for the parts of those weekly meetings which involve the discussion of sensitive information, the meetings are actually open to the public.

I understand from our discussions that you are considering actually allocating Information Commission specific public authorities/Departments for which they will independently manage all appeals. I would urge to reconsider this approach. In a worst case scenario, it could lead to public authorities/Departments

cultivating a special relationship with the Commissioner responsible for their appeals, to the detriment of decision-making impartiality. Notably, the Mexican Information Commission actually considered whether to have Commissioners specialise, but opted against this approach because they were concerned about the possibility of corruption. In more practical terms, it may also lead to certain Commissioners being overloaded with appeals.

Giving Commissioners a limited number of public authorities/Departments to handle may also limit the ability of the Commissioners to develop their expertise on the law in general, which is crucial in these early days. Commissioners may end up only considering a few exemptions on a regular basis, whereas the Act should ideally be viewed at all times in a holistic fashion and expertise and understanding should be broadly cultivated.

#### Ensuring consistent appeals procedures and outcomes

CHRI is also concerned that, if it is envisaged that Information Commissioners will make decisions individually, clear systems will need to be in place to ensure that the law is applied *consistently* by the different Commissioners. In this context, I am still not entirely clear whether you, as the Chief Information Commissioner, will review all decisions to ensure consistency? If not, will it be a procedural requirement – rather than an option – that all appeals are discussed at weekly meetings? In this context, is it even envisaged at this stage that such weekly meetings will be an institutionalised procedural requirement, rather than just an option that can be dispensed with? You mentioned that you envisage that complex decisions at least will be discussed at weekly meetings, but I am not clear what criteria will be used to determine when an appeal is considered “complex”? I would urge you to clarify these issues in a written guidance note or appeals manual which is published widely.

In terms of ensuring consistency of decisions, it is important at this early stage to consider how the Information Commission will capture precedents, for the benefit of Central Information Commissions, staff and State Information Commissions. In many jurisdictions, written decisions are collected and circulated in hard copy via monthly updates circulars/newsletters/legal services. Alternatively, decisions – whether they are in letter form or actually delivered as a more detailed judgment – are uploaded onto the Information Commissioners website. I would encourage you to visit the site of the Queensland Information Commission at <http://www.infocomm.qld.gov.au/?p=28>, as they have an excellent system for capturing decisions. The Canadian Act has also been well annotated (see for example [http://www.infocom.gc.ca/acts/view\\_article.e.asp?intArticleId=29#16,1](http://www.infocom.gc.ca/acts/view_article.e.asp?intArticleId=29#16,1) and scroll down).

#### Ensuring the Commission does not operate like a “court”

Another key issue, which has been raised at a number of meetings we have held with State government officials during our training meetings, is the challenge of ensuring that the Information Commission remains easily

accessible to the public and does not turn into another overly legal forum which is dominated by lawyers.

In other countries, most Information Commissions discourage the use of lawyers because the whole *raison d'être* of the Commission is that it is a quick, speedy, simple forum which can be easily utilised by any member of the public, not just those who can afford sophisticated legal representation. Although the Commission does have the powers of a civil court under s.18(3) of the Act, nonetheless, the Commission is not supposed to operate like a court.

I would strongly encourage the Information Commission to make it clear to parties that there will be no advantage in bringing a lawyer to proceedings because the Information Commission staff will anyway fill in any gaps in research resulting from a lack of legal representation. In the event that officials nonetheless engage legal counsel, the Information Commission, as an openness champion, should be alert to ensure that arguments in favour of disclosure are not overlooked simply because the complainant did not use a lawyer.

#### Promoting mediation of disputes

More generally, it is preferable for the Information Commission to promote a non-adversarial approach to handling appeals. In this respect, I would also like to take this opportunity to suggest that the Commission should consider incorporating mediation as one of its strategies – as is done in many Information Commissions throughout the world. Information Commission staff can talk to the parties and see if a compromise can be reached on disclosure, i.e. by releasing most records, or partially disclosing a certain record, etc, and a more formal hearing need only be conducted where mediated agreement cannot be reached. The assumption that an adversarial approach will be the standard should be quashed as early as possible, as part of the Commission's push to promote openness as a positive, natural activity, rather than one which must be forced upon officials.

I am aware that I have raised a wide variety of issues in this letter. I would be happy to discuss these further with you, your fellow Commissioners and/or your staff at your convenience if this would be useful. If we can be of assistance in any other way, for example, by assisting with international research or by sharing international contacts or best practice standards, please do not hesitate to get in contact with me or my office on 9810 199 745 or (011) 2685 0523 or email me at [majadhun@vsnl.com](mailto:majadhun@vsnl.com) or [maja@humanrightsinitiative.org](mailto:maja@humanrightsinitiative.org). Alternatively please contact my colleagues – Mr. Venkatesh Nayak ([venkatesh@humanrightsinitiative.org](mailto:venkatesh@humanrightsinitiative.org)) or Ms Charmaine Rodrigues ([charmaine@humanrightsinitiative.org](mailto:charmaine@humanrightsinitiative.org)) – for any further information or assistance.

Respectfully yours



Maja Daruwala  
Director

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  - Mr B V R Subramaniam, Private Secretary to the Prime Minister, Prime Minister's Office, Room # 152, South Block, New Delhi - 110001
  - Mr Arun Bhatnagar, Secretary, National Advisory Council (for distribution to all NAC members) 2 Motilal Nehru Place, New Delhi - 110001
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