

**The Jammu and Kashmir Right to Information Bill, 2009**

**Tabled in the Jammu & Kashmir Legislative Assembly**

**In Perspective**

submitted by

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### **Introduction**

The Government of Jammu and Kashmir tabled *The Jammu and Kashmir Right to Information Bill, 2009 (the Bill)* in the J&K Legislative Assembly on 7<sup>th</sup> March 2009. The Statement of Objects and Reasons given at the back of the Bill indicates that it is intended to replace the current *J&K Right to Information Act, 2004* (J&K RTI Act) as amended by the *J&K Right to Information (Amendment) Act* (J&K RTI Amendment Act) in 2008. The Bill contains provisions that are similar to *The Right to Information Act, 2005* (Central RTI Act) enacted by Parliament. The Government has claimed that this Bill is intended to bring the erstwhile law governing people's access to information from public authorities in J&K, on par with the Central RTI Act.

CHRI congratulates the Government of J&K for taking this important step towards fulfilling an electoral promise made to the people of J&K. Before tabling the Bill in the J&K Assembly, the J&K Government advertised the draft Bill in the public domain inviting people to comment on its provisions. Civil society organisations in J&K and elsewhere in India and abroad welcomed this decision as it provided an opportunity for people to participate in the making of a seminal law that aims to transform the fundamental operating principle of Government from obsessive secrecy to compulsory openness. However a reading of the text of the Bill tabled in the J&K Assembly reveals that the Government has ignored almost all the important recommendations made by civil society organisations for strengthening the Bill further. Of the 29 recommendations submitted by CHRI to the Department of Law, only one minor change has been incorporated fully in the Preamble. **The public consultation process has been reduced to mere eyewash. CHRI has listed below, the major problems with the provisions of the Bill.**

### **Major problem areas**

#### **1. Citizens outside J&K denied access rights**

The right to information has acquired the status of a deemed fundamental right within the scope of Article 19(1)(a) of the Constitution of India which guarantees every citizen the right to freedom of speech and expression irrespective of gender, race, caste, profession or place of birth or residence. This position has been upheld in several landmark decisions of the Supreme Court of India. The Bill intends to create a practical regime for people to access information from all public authorities in J&K save a handful of notified security and intelligence organisations. In other words this Bill will lay down mechanisms and procedures for exercising this fundamental right. Section 3 of the draft Bill put out for public consultation intended to provide this right to citizens. This implied that all citizens living elsewhere in India would have access rights in J&K as well. It may be recollected here that they cannot use the Central RTI Act to obtain information from public authorities in J&K as it does not cover this State. However people in J&K can obtain information from public authorities under the Government of India and all other State Governments by using the Central RTI Act.

CHRI and other civil society organisations had recommended that all human beings irrespective of nationality should have the right to obtain information as it is a basic human right recognised under Article 19 of the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR). India being a signatory to the UDHR and having ratified the ICCPR, is duty-bound to take steps to ensure the right to information to all persons irrespective of nationality. So CHRI had made recommendations to expand the scope of the Bill to cover all human beings.

Instead of expanding the scope of section 3, the Bill tabled in the J&K Assembly drastically narrows it down by providing for the right to seek and obtain information only to people residing in J&K. All other citizens living elsewhere in India have in one stroke been disenfranchised by the Government of J&K as they will have no right to access information from public authorities in J&K if this Bill becomes law.

**Section 3 violates the principles of equality and non-discrimination – the hallmark features of India’s Constitution.** Section 3 of the Bill is in serious violation of Article 13 of the Constitution of India as it curtails a fundamental right of all citizens living outside J&K. Neither the J&K Government nor the J&K Legislature has the power to bring into existence any law that curtails the fundamental right of citizens living outside J&K. Further, this provision is in violation of Article 15 of the Constitution that ordains all governments and state agencies not to discriminate against any citizen on grounds of religion, race, caste, gender or **place of birth**. The Bill seeks to discriminate between citizens of India on the basis of place of residence. **This is unconstitutional.** Most importantly, this provision is in violation of Article 14 of the Constitution which states that the State shall not deny to any person equality before the law or the equal protection of the law. **This provision is not likely to stand the test of constitutional validity and is in serious danger of being declared *ultra vires* of the Constitution if challenged before the High Court or the Supreme Court.**

It must also be pointed out that the persons who drafted the provisions of this Bill did not apply their minds adequately to make changes in other provisions to correspond with the altered Section 3. Therefore anomalies exist in other parts of the Bill where references to citizens have not been amended to reflect the position in section 3. There are references to the term ‘citizen’ in eight places in the Bill (in para 6 of the Preamble, sub-clause (xv) of clause (b) of sub-section (1) of section 4 relating to proactive disclosure, sub-section (1) of section 8 relating to exemptions and at least five places in the Statement of Objects and Reasons. These anomalies are indicative of careless drafting and can cause havoc during implementation. **CHRI recommends that section 3 be amended to state that the right to information is available to every person and all references to the term ‘citizen’ elsewhere in the Bill be substituted with the term ‘person’.**

## **2. 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 from day one, 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 designation 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. **CHRI had recommended the incorporation of 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. This recommendation has been ignored.**

### **3. Creating more convenience in the application process**

**3.1 Application fee:** 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 had recommended that the reference to application fee be deleted in the Bill. This recommendation has been ignored.**

**3.2 Allowing for applications to be made in local languages:** 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 Ladakh to make requests in Ladakhi. CHRI does not demand that the records requested must also be translated into 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. So giving people access to documents in French does not cause any problem. **CHRI had recommended that people living in Ladakh at least be allowed to make requests in Ladakhi. This recommendation has been ignored. CHRI recommends that people in Kashmir be allowed to make requests in Kashmiri also as it is a recognised language under the Eighth Schedule of the Constitution of India.**

### **4. Information Commission-related**

**4.1 Composition of the selection committee:** 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 equation in the Committee. **CHRI had recommended 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. This recommendation has been ignored.**

**4.2 Staffing autonomy:** 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 had recommended 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. This recommendation has been ignored.**

**4.3 Filling up vacancies:** 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 had recommended 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. This recommendation has been ignored.**

**4.4 Suo motu powers:** 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 had recommended that the Bill be amended to provide the Information Commission with powers to take *suo motu* cognizance of non-compliance and initiate an inquiry. This recommendation has been ignored.**

**4.5 Separating complaints from appeals:** 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 had recommended that the Bill be amended to separate the grounds which can form the basis for filing a first appeal and complaint. This recommendation has been ignored.**

**4.6 Vetting proactive disclosure of public authorities:** 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 had recommended 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. This recommendation has been ignored.**

**4.7 Deciding on 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 had recommended that the Information Commission and not the Government be empowered to settle such disputes. This recommendation has been ignored.**

**4.8 Streamlining penalties:** 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 had recommended that contraventions like delays or absence of a response be treated differently from other contraventions for the purpose of levying penalties. CHRI had also recommended that the law must provide for a process for the recovery of penalty from the Public Information Officer. This recommendation had been ignored.**

**4.9 Penalising errant appellate authorities:** 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. **CHRI had recommended 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. This recommendation has been ignored.**

## **5. Partial exclusion of security and intelligence agencies**

Section 21 of the Bill 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 had recommended that section 21 be deleted entirely. This recommendation has been ignored.**

## **6. Absence of rule-making 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 had recommended 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. This recommendation has been ignored.**

## **7. Third party rights**

**7.1 Restricting 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 had recommended that the scope of the definition of 'third party' be narrowed down. This recommendation has been ignored.**

**7.2 Contradiction in 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 had recommended that the proviso to sub-section (1) of section 11 be deleted. This recommendation has been ignored.**

## 8. Drafting error not rectified

Line 4 of sub-section (1) of section 10 of the Bill contains a reference to the Bill as if it were an Ordinance. This is due to the fact that the Bill was originally drafted to be passed as an Ordinance after the fall of the previous government. During the consultation, process civil society organisations had pointed out this drafting error in their submissions. CHRI had recommended the replacement of this sub-section with a better formulation of the same provision. **The persons responsible for drafting this Bill have not paid serious adequate attention to rectifying this error.**

## 9. Procedural error committed while tabling the Bill

The Bill has been introduced under sub-sections (1) and (3) of section 84 of the Constitution of J&K. This is wrong procedure. Sub-section (1) relates to the introduction of money bills in the Assembly. A money Bill is defined in section 77 of the J&K Constitution. According to section 77 a money bill relates to:

- “(a) the imposition, abolition, remission, alteration or regulation of any tax;*
- (b) the regulation of the borrowing of money or the giving of any guarantee by the State, or the amendment of the law with respect to any financial obligations undertaken or to be undertaken by the State;*
- (c) the custody of the Consolidated Fund or the coverage or the Contingency Fund of the State, the payment of moneys into or the withdrawal of moneys from any such Fund;*
- (d) the appropriation of moneys out of the Consolidated Fund of the State;*
- (e) the declaring of any expenditure to be expenditure charged on the Consolidated Fund of the State, or the increasing of the amount of any such expenditure;*
- (f) the receipt of money on account of the Consolidated fund of the State or the Public Account of the State or the custody or issue of such money; or*
- (g) any matter incidental to any of the matters specified in clauses (a) to (f)...”*

The J&K RTI Bill does not purport to do any of the above. Therefore it is only a financial bill within the meaning of sub-section (3) of section 84 of the J&K Constitution. By declaring the Bill as a money Bill, the Government has unconstitutionally tied the hands of the Governor of J&K to give his assent to the Bill (The Governor cannot withhold assent to a money bill). The previous government had used this ploy to force the Governor to give his assent to the *J&K RTI Amendment Bill, 2008* even though it did not match the description of a money Bill given in section 77 of the J&K Constitution. The Governor had been compelled to give his assent even though he had expressed misgivings about the shortcomings of the Bill. The present Government has once again taken recourse to this ploy to force the hand of the Governor.

**CHRI recommends that the Speaker of the J&K Assembly recognise and rectify this anomaly before the Bill is passed. CHRI recommends that the Speaker certify this Bill as a financial Bill within the meaning of section 84 of the J&K Constitution, and not as a money Bill, while sending it to the J&K Legislative Council. CHRI recommends that the Government of J&K incorporate in the Bill all recommendations given by civil society organisations and advocates.**