THE UTTARAKHAND RIGHT TO INFORMATION RULES, 2012

AN ANALYSIS WITH RECOMMENDATIONS FOR CHANGE

Submitted by

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1. Introduction

1.1 Uttarakhand was one of the earliest States in India that took the initiative to implement the *Right to Information Act* (RTI Act) in 2005. The State Government held sensitization conferences and intensive capacity building workshops for Public Information Officers during the four-month preparatory period stipulated by the Act. Commonwealth Human Rights Initiative provided technical assistance for these efforts and later worked with the Administrative Training Institute at Nainital to conduct training-of-trainers workshops for all major departments and public authorities. The template drawn up by the Government of Uttarakhand, in association with Tata Consultancy Services, served as a model for the Central and other State Governments, to place in the public domain, information that is required to be proactively disclosed in terms of Section 4(1)(b) of the RTI Act. The Uttarakhand Government also issued detailed guidelines for the effective implementation of the RTI Act. Later on 13 October, 2005 the Uttarakhand Government notified Rules pertaining to fees and costs collectible under the RTI Act as well as the procedure to be followed for filing and deciding second appeals at the Uttarakhand Information Commission.

1.2 In January 2013 the Uttarakhand Government has prepared a new set of RTI Rules combining the fees and cost Rules and the appeals Rules. It is not clear whether these Rules have been notified in the official gazette or not. Having a single set of Rules is a welcome step as potential requestors of information will have easy access to the knowledge of all procedures to be followed while using the RTI Act. However some of the new Rules that the Uttarakhand Government proposes to notify are clearly in excess of the rule-making powers granted under Section 27 of the RTI Act. While the RTI Rules notified in 2005 were in harmony with the RTI Rules notified by the Central Government, some of the new RTI Rules proposed by the Uttarakhand Government are likely to create confusion and increase the inconvenience levels for potential applicants and appellants. Some of these proposed Rules are decidedly anti-poor and violate the principles of equality and the rule of law recognized by the Constitution. If implemented, they will increase the litigation burden at the first and second appeal stage. Even more distressing are the attempts to curtail the inherent powers of the Uttarakhand Information Commission. The proposed Rules seek to take away Commission's inherent powers to oversee compliance with its orders. In short the Rules are not citizen-friendly and seek to beef up the increasingly adversarial nature of the interaction between the information-seeker and the public authority. Parliament had

never intended for the processes of seeking and receiving information to be adversarial in nature.

1.3 Further, the Government has not made public any justification for replacing the existing set of Rules nor has it provided any explanation for imposing more restrictions on the processes for obtaining information. The RTI Act was drafted in consultation with civil society in 2004-05 as a result of which simple procedures were created for the purpose of seeking and providing information. However the Uttarakhand Government does not appear to have held consultations with civil society while drafting the new RTI Rules. The absence of citizen feedback is glaringly evident in the restrictive aspects of the new RTI Rules.

1.4 CHRI urges the Government of Uttarakhand to desist from notifying the proposed Rules, if it has not been done so already. If the Rules have been published in the Official Gazette, CHRI demands that they be withdrawn immediately and the *status quo ante* be restored (the 2005 fee and cost Rules and the State Information Commission (Appeals Procedure) Rules may be revived temporarily). CHRI submits that the State Government immediately hold meaningful consultations with civil society organizations as well as the Uttarakhand Information Commission to ascertain the true nature of difficulties posed in the usage and the implementation of the RTI Act in the State and then identify solutions for addressing them.

1.5 CHRI endorses the critique of the proposed RTI Rules 2012 that the office-bearers of the RTI Club, Dehradun submitted to the Chief Minister, Government of Uttarakhand on 11/01/2013.

1.6 CHRI has also analysed the new RTI Rules proposed by the Uttarakhand Government from the point of view of the letter and spirit of the RTI Act and the developing jurisprudence around RTI. The major findings emerging out of this analytical exercise and recommendations for change are explained below.

2. Removing redundancy in the 'Definitions' portion of the proposed RTI Rules

2.1 The proposed Rule 2(*chha*) contains definitions of the terms- "information", "record" and the "right to information". These definitions are taken *ad literatim* from the Definitions Section of the RTI Act. It is a widely recognized principle that the meanings assigned to words and phrases in the principal Act will carry the same sense when such words are used in the Rules notified under the Act. Further, the rule-making power is

vested in the appropriate governments in order to give effect to the provisions of the Act by working out the details of the procedures and processes that public authorities implementing the RTI Act are required to observe. The rule-making power cannot be used to create new and restrictive meanings for terms and phrases used in the principal Act. The definition of the term "information" contained in Section 2(h), read with Section 2(j) of the RTI Act, clearly indicates that the right of access extends only to such information that is held by or is under the control of a public authority in material form. What is not available in material form cannot be sought or provided for under the RTI Act. By adding explanatory notes (*ek*) and (*do*) to the definition of the term 'information, the proposed Rules create opportunities for Public Information Officers (PIOs) to reject requests without cross-checking the records. In several other jurisdictions, PIOs exhibit a similar tendency of summarily rejecting requests for information that are in the form of queries. If the proposed Rule were to be notified, PIOs would hastily rejecting all requests that are posed as questions without bothering to ascertain whether the information sought is actually held by the public authority in material form. The proposed Rule 2(*chha)* in effect creates an additional ground for PIOs to reject information requests hastily without due application of mind. This will only increase the burden of deciding appeals on the designated First Appellate Authorities and the Uttarakhand Information Commission as aggrieved applicants will contest every such rejection. There is no need to add to the litigation burden of the State Government and the public authorities under its jurisdiction. The proposed Rule 2(*chha*) may be deleted.

Recommendation for change:

The proposed Rule 2(*chha*) may be deleted.

3. Confusion regarding disclosures to be made under Section 4 of the RTI Act

3.1 The proposed Rule 3 empowers the State Government to "prescribe" ( ) items and topics of information that may be proactively/voluntarily disclosed under the RTI Act, by publishing them in the official Gazette. Presumably, this new Rule seeks to give effect to clause (xvii) of Section 4(1)(b) of the RTI Act where the appropriate governments are empowered to prescribe items and topics, over and above the sixteen categories of information listed in that provision, for the purpose of proactive disclosure. While the Government's intent is laudable, what is already required to be prescribed through the Rules cannot again be left for prescription at a later date. The Government of Uttarakhand must mention the topics and items of information deserving to be voluntarily disclosed in the Rules themselves. There is no provision under the RTI Act for an appropriate government to delegate its rule-making power and leave the matters to

be decided at a later date. Public authorities cannot and do not have the power to prescribe such lists on their own. This task is clearly vested with the State Government in terms of the language and meaning of Section 4(1)(b)(xvii) of the RTI Act. Further, under Section 4(4) of the RTI Act, the PIO is merely the custodian of the information required to be proactively disclosed under clause (b). The PIO does not have the duty to update the information at regular intervals. The duty of updating the information disclosed under Section 4(1)(b) is that of the public authority. The relevant provision of the RTI Act reads as follows:

*" **4**. (1) Every public authority shall—*

X X X

b) publish within one hundred and twenty days from the enactment of this Act,—

X X X

and thereafter update these publications every year;"

Therefore placing the burden of updating the information disclosed proactively, on the PIO, is unjustified as he/she may not have the means to update the obsolete information. This task must be carried out by a committee of senior officers of the public authority after evaluating the contents of the information disclosed proactively.

3.2 Further, the proposed Rules do not provide a mechanism or procedure for giving effect to clauses (c) and (d) of Section 4(1). The relevant clauses read as follows:

*" **4**. (1) Every public authority shall—*

X X X

(c) publish all relevant facts while formulating important policies or announcing the decisions which affect public;

d) provide reasons for its administrative or quasi-judicial decisions to affected persons."

These important clauses place an obligation of routine disclosure of information which may be of general public interest. If the proactive disclosure obligations contained in clauses (b), (c) and (d) are complied with, and the information made accessible to people, in the manner explained in that Section (see the explanation of the term 'dissemination"), the need for people to seek information by filing formal RTI applications would come down considerably. This would reduce the burden on PIOs who also have other official duties to handle. No Rules have been proposed to give effect to these crucial clauses of Section 4(1). It is advisable for the State Government to

prescribe criteria and procedures for making new information, generated or collected by the Government, accessible to people, as a matter of routine, and in accordance with the provisions of the RTI Act.

Recommendation for change:

The proposed Rule 3 may be replaced with detailed guidelines for updating the information required to be proactively disclosed under Section 4 and also for the purpose of disclosure of new information of public interest in a routine manner. The Government of Uttarakhand may hold consultations with the Uttarakhand Information Commission, civil society actors and representatives of public authorities, with substantial public dealing, to identify the kinds of information that may be disclosed in a routine manner.

4. Problematic aspects of the request process under the proposed Rules

4.1 The proposed Rule 5(*kha*) empowers the PIO to set aside written requests for information that are not accompanied with the prescribed application fee. If the proposed Rule is implemented the PIO will not be required to take any action on such RTI applications. This proposed Rule is *ultra vires* of the RTI Act as it permits inaction on the part of the PIO. Rule-making powers are delegated to the appropriate government for the purpose of giving effect to its provisions, not for frustrating them. The PIO has a duty to deal with all requests for information even if they are not accompanied with an application fee. Only the time limit of 30 days, within which to process the application, does not start until the application fee is paid or the fee waiver is claimed by the applicant, with documentary proof. Under Section 5(3) of the RTI Act, the PIO has a duty to provide render reasonable assistance to the applicant while making a request. Inaction on an RTI application, for whatever reason, does not amount to "reasonable assistance" that a PIO is required to render to an applicant as desired by Parliament in Section 5(3) of the RTI Act. Instead the PIO may communicate with the applicant asking him/her to pay up the application fee or furnish proof of BPL identity, as the case may be. When the applicant chooses either of these options, the 30-day clock will start. In the matter of *Dr. B J Waghdhare vs Nuclear Power Corp. of India Ltd.* (Appeal No. CIC/ WB/A/2006/00323 decision dated 08/12/2006) the Central Information Commission has ruled that processing an RTI application must not be contingent on the payment of the application fee. The relevant para from the decision is reproduced below:

*"3. … Under Sec. 7(1), on receipt of a request u/s 6, the CPIO shall as expeditiously as possible and **in any case within 30 days of the receipt of the request provide the information on** payment of such fee as may be prescribed. It is, therefore,*

clear that ***whereas the information may be provided only once the fee is received, it is not open to the CPIO to begin process of the application for information from the date the fee is received."*** [emphasis in the original]

Recommendation for change:

The proposed Rule 5(*kha*) may be deleted.

4.2 The proposed Rule 5(*ga*) requires an applicant seeking information from multiple public authorities to submit information requests to each public authority separately. The intention of this proposed Rule is no doubt in tune with the provisions contained in Section 6 of the RTI Act. However its implementation in the absence of certain essential pre-conditions can cause enormous inconvenience to potential applicants. In order for an applicant to send an RTI application to the specific public authority that is likely to have the information, a list of all public authorities must be available in the public domain. In the absence of such a list an applicant untrained in the details of governmental hierarchy would not be able to differentiate between public authorities and different offices of the same public authority. For example, in many States the head of the district police administration is designated as the public authority while PIOs and APIOs are designated at various police stations under his/her jurisdiction. These police stations are not public authorities in their own right, but are constituent offices of the public authority based at the district headquarters. So it is technically possible to send requests for information held by multiple police stations in a single RTI application directed to the PIO at the district police office. The proposed Rule 5(*ga*) can be misused to reject RTI applications for information which may be held by more than one office of the same public authority. This will only increase litigation at the first and second appeal stages under the RTI Act. The proposed Rules 5(*ga*) may be implemented only after all public authorities are listed publicly with the contact details of their PIOs and also along with details of their jurisdiction disclosed in terms of Section 4(1)(b)(xvi) of the RTI Act. Further the Uttarakhand Government must also perform diligently its duty of educating people about the processes of seeking and obtaining information under the RTI Act as enjoined in Section 26. The emphasis must be on training and capacity building rather than imposing restrictions through the Rule-making route.

Recommendation for change:

- **The proposed Rule 5(*ga*) may be deleted.**
- **A list of all public authorities identifiable in Uttarakhand in terms of the criteria provided in Section 2(h) of the RTI Act may be compiled and disseminated proactively in the manner provided in Section 4.**
- **The Uttarakhand Government must make serious efforts by drawing up a plan of action**

and allocating resources for the purpose of educating people about the processes of filing information requests.

4.3 The proposed Rule 5(*gha*) relates to the explanatory note below the proposed Rule 2(*chha*) in the Definitions portion. We have already indicated why these definitions may be deleted. In view of this reasoning, Rule (*gha*) may also be deleted. Whenever information sought by an applicant does not exist in material form, the PIO may inform the applicant so. This advice may be issued in the form of guidelines instead of in the form of Rules. Such Rules end up creating opportunities for PIOs to reject information requests without applying their mind. The rejection of requests simply because they are drafted in the form of queries is not uncommon in many public authorities. Such action amounts to violation of the provisions of the RTI Act and consequently the violation of an applicant's fundamental right to information. Procedural issues must not be allowed to become the cause for violation of a citizen's fundamental right.

Recommendation for change:

The proposed Rule 5(*gha*) may be deleted. Instead citizen-friendly processes for dealing with information requests may be drawn up in the form of implementation guidelines and circulated to all PIOs. These guidelines may be included in the RTI-related training programmes conducted by all administrative/officer training institutes in the State.

4.4 The proposed Rule 5(*cha*) requires a PIO to advise the applicant to approach any other public authority when it is not clear from the RTI application as to which public authority other than his/her own is likely to have the information sought. This proposed Rule is likely to be misused as well. It is the duty of the Uttarakhand Government to ensure that all public authorities under its jurisdiction are identified and listed along with the contact details of their respective PIOs. Similarly it is the duty of the Government to ensure that all public authorities under its jurisdiction comply with their proactive disclosure obligations under Section 4 of the RTI Act. If these preconditions are met with, a PIO will have no difficulty identifying the correct public authority that is likely to have the information sought by the applicant. The proposed Rule will provide an excuse for PIOs to simply reject a portion of the request on the ground that the public authority does not hold it and also because the holder of the information cannot be identified. Instead the Government must issue guidelines for disposing RTI applications in a citizen-friendly manner. The proposed Rule 5(*cha*), if implemented will increase the burden of First Appellate Authorities and the Uttarakhand Information Commission, as disputes regarding what the PIO ought to or ought not to have done will increase manifold.

Recommendation for change:

The proposed Rule 5(*cha*) may be deleted. Instead implementation guidelines for disposing RTI applications in a citizen-friendly manner may be circulated to all public authorities and PIOs.

4.5 The proposed Rule 5(*chha*) seeks to stop the ticking of the 30-day clock on the ground that the PIO has entered into a correspondence with the applicant to clearly identify the categories of information sought in the RTI application. This proposed Rule is *ultra vires* of the RTI Act. With the exception of the time taken for payment of additional fee, there is no provision anywhere in the RTI Act to stop the 30-day clock mid-way before completion of the disposal process. Under Section 7(3)(a) of the RTI Act, the time elapsed between the dispatch of the fee intimation letter and the actual payment of the additional fee, will not be taken into consideration for the purpose of calculating the statutory deadline of 30 days for making a decision on the information request. With the exception of extension of the time limit while dealing with requests for third party information, no other excuse for exceeding the 30-day deadline is permissible under the provisions of the RTI Act. New exceptions cannot be introduced through the rule-making route. The powers of delegated legislation cannot be exercised in violation of the provisions of the principal Act.

4.6 The PIO has a duty to make all efforts to contact the applicant within the stipulated period for the purpose of clearly identifying the information sought. If the applicant is not reachable, and if there is proof of action that the PIO has taken to contact him/her, the delay caused in making a decision on the RTI application will be said to be reasonable. A PIO who has acted reasonably need not fear penalty because the RTI Act provides for penalties only if there is no justified cause for delay. If the proposed Rule were to be implemented, nothing prevents a PIO from seeking clarifications one after the other without bringing the decision-making process to a close within the statutory deadline. This can become a stalling tactic and the applicant will be forced to take recourse to the remedial measures available under the RTI Act. The burden of litigation before the First Appellate Authorities and the Uttarakhand Information Commission will increase manifold. Clearly such an undesirable situation can be avoided.

Recommendation for change:

The proposed Rule 5(*chha*) may be deleted. Instead implementation guidelines for disposing RTI applications in a timely manner may be circulated to all public authorities and PIOs.

4.7 The proposed Rule 5(*ja*) lays down the procedure for rejecting requests. This is welcome, however the proposed Rule does not provide any guidance beyond what is

contained in Section 7(8) of the RTI Act. The power of rule-making is vested in the appropriate governments in order to enable them to flesh out the details of the processes and procedures provided for in the principal Act. Time and again Information Commissions have admonished PIOs for not issuing speaking orders while rejecting information requests. PIOs are known to merely invoke the relevant exemption under Sections 8, 9, 11 or 24 while rejecting information requests. This bad practice can be cured if the Rules require the PIOs to issue detailed speaking orders, weighing the pros and cons of disclosure, while rejecting a request. The Government of Uttarakhand has not seized the opportunity to provide adequate guidance to the PIOs in the proposed Rules for this purpose. Drafting such an speaking order is not an easy task. It requires some amount of training and practice. The Government of Uttarakhand may hire the services of retired judges with an impeccable track record for the purpose of training PIOs (and also First Appellate Authorities) in the art of drafting speaking orders.

Recommendation for change:

The proposed Rule 5(*ja*) may be amended to require the PIO to issue speaking orders explaining the arguments and counter arguments for withholding access to the requested information. The Government of Uttarakhand may employ the services of retired judges with an impeccable track record to train PIOs and First Appellate Authorities in the art of drafting speaking orders while rejecting RTI applications. The administrative/officer training institutes may facilitate this process.

4.8 The proposed Rule 5(*jha*) merely repeats the provision contained in Section 7(9) of the RTI Act where access to information must be given to a requestor in the form that he/she desires. Section 7(9) limits this rule with two exceptions, namely, where the public authority is likely to spend a disproportionate amount of time or resources in collecting or compiling the information or if providing access in the form requested may harm the safety and preservation of the record in question. No value is added by simply repeating the provisions of the principal Act in the Rules. Instead the Government may explain that the PIO may not reject a request on grounds mentioned in Section 7(9). That is a positively worded provision, so if access cannot be provided in the form sought by the requestor, access must be provided in some other form such as inspection of the record or in electronic form. Often PIOs are known to reject RTI applications by invoking Section 7(9). Such actions are illegal because Section 7(1) of the RTI Act clearly states that an information request may be rejected only for reasons provided for in Sections 8 and 9.

Recommendation for change:

The proposed Rule 5(*jha*) may be amended to require the PIO to provide information to the applicant in some form that is agreeable to him/her such as by way of inspection or in

electronic form. The Rule may also clearly state that no request may be rejected on grounds described in Section 7(9) of the principal Act.

5. Problematic aspects of the fee payment process under the proposed Rules

5.1 The proposed Rule 6(*ka*) requires an information requestor to draw put the instrument of payment of application fee in favour of the Finance Officer or the Accounts Officer of the concerned public authority. No guidance is available in the public domain as to which of these two designations may be chosen while sending the application fee to any public authority. Such uncertainties cause delays in the processing of the RTI application. PIOs are known to return the instrument of payment to the applicant on the pretext that it is not drawn in favour of the account-holder's name in the public authority. The entire process of fee receipts under the RTI Act must be systematized. The system must be convenient and predictable for the citizen. This is also a primary requirement of the rule of law which is a hall mark of democratic governance.

5.2 It is advisable for the Uttarakhand Government to notify only one designation common to all public authorities in whose favour fee payment instruments may be drawn. This will create more convenience for citizens. Additionally, post offices may be requested to collect fees under the RTI Act and transfer the sums to the concerned public authority. This requires the Uttarakhand Government to proactively work out an arrangement with the Department of Posts, Government of India. There is a strong likelihood that the Dept. of Posts may accept this responsibility in return for a small share in the fee as commission. It makes sound business sense for the Dept. of Posts and the Uttarakhand Government will gain popularity for creating convenient fee payment mechanisms for citizens. If the dual nomenclature were allowed to be implemented, litigation will increase as applicants whose fee payment instruments are not accepted will file appeals. There is no reason why the proposed Rules must be allowed to increase the litigation burden on the First Appellate Authorities and the Uttarakhand Information Commission.

5.3 Also, the Government's proposal to identify people who have an income of less than Rs. 12,000 per year as belonging to BPL category for the purpose of the RTI Act needs to be debated widely. BPL cut off levels are political decisions often unsupported by hard reasoning. The identification of persons belonging to the BPL category is closely linked to the implementation of various social development programmes sponsored by the State and the Central Governments. Care must be taken to ensure that no indigent person is deprived of free access to information because of the income criteria.

Recommendation for change:

- **The proposed Rule 6(*ka*) may be amended to indicate a common designation in all public authorities in whose favour instruments of fee payment may be drawn under the RTI Act.**

5.4 The proposed Rule 6(*kha*) requires an information requestor to draw up the instrument of payment of additional fee in favour of the Finance Officer or the Accounts Officer of the concerned public authority. For reasons already discussed at para #5.1 above about a similar requirement for payment of the application fee, the proposed Rule may be amended to indicate a common designation across all public authorities in Uttarakhand for the purpose of fee payment.

Recommendation for change:

The proposed Rule 6(*kha*) may be amended to indicate a common designation in all public authorities in whose favour instruments of fee payments may be drawn under the RTI Act.

5.5 Clause (*do*) underneath the proposed Rule 6(*kha*) stipulates fee payment for inspection of records at the rate of Rs. 5 for every 15 minutes or its fraction, after the completion of the first hour. This fee rate is higher than the benchmark set by the Central Government. Under the RTI Rules 2012, notified by the Central Government, the rate for inspection of records for every second hour or its fraction is Rs. 5 (See Rule 4(f). There is no reason why the Government of Uttarakhand should charge a higher rate.

Recommendation for change:

Clause (do) underneath the proposed Rule 6(*kha*) may be amended to reflect a fee rate of Rs. 5 for every subsequent hour or its fraction for inspecting official records under the RTI Act.

5.6 Clause (*ek*) underneath the proposed Rule 6(*ga*) stipulates the rate for fee payment for obtaining information in electronic form. The references are to floppies and diskettes. These modes of computerized data storage are outdated as none of the modern computers have floppy drives or diskette drives. People have graduated to the use of compact discs, digital video discs (for voluminous data) and USB pen/flash drives. It is appropriate to charge fees for providing information through these latest electronic means instead of the outmoded instruments.

Recommendation for change:

Clause (*ek*) underneath the proposed Rule 6(*ga*) may be amended to indicate fee rates for providing information in the form of compact discs, digital video discs and USB pen/flash drives.

6. Anti-poor nature of some of the proposed fee Rules

6.1 The *proviso* under the Rule 6(*ka*) casts an unnecessary burden on applicants who are below the poverty line (BPL). The proposed Rule requires a BPL applicant to submit a copy of proof of his/her poverty status certified by a Gazetted officer. This is wholly unnecessary under the RTI Act. Proof of BPL status is issued by various Government Departments. These documents are not created by citizens belonging to the BPL category. Even bogus BPL cards, wherever they exist, have been issued by some government officer or the other, using official stationery. So the burden of certifying one's BPL status should not be placed on the citizen. Obtaining a certified copy of the BPL certificate itself is a cumbersome and expensive process for a BPL person. Often a Gazetted officer may not be available within easy reach. It is not uncommon for touts and officials to demand bribes for providing certified copies of official documents. The proposed Rule not only creates unnecessary obstacles for the most marginalized of society to exercise their fundamental right to access information but also forces them to become targets and victims of corruption. This *proviso* is clearly anti-poor.

6.2 Instead, the BPL applicant may only be required to submit a clear photocopy of proof of his/her BPL identity. If there is any doubt, the PIO may verify the applicant's status with the concerned authorities within the statutory deadline of 30 days.

6.3 Clause (*do*) underneath the proposed Rule 6(*gha*) requires applicants belonging to the BPL category to pay additional fees at rates meant for all other citizens, if the information they seek runs into more than 50 pages of A-4 size. While the intention of the Uttarakhand Government to prevent misuse of the fee waiver provisions meant for BPL applicants is laudable, this cannot become a pretext for making a Rule that violates the provisions of the principal Act. The proviso underneath Section 7(5) of the RTI Act clearly states that no fee of any kind (either application fee or additional fee or fee for information in electronic form) shall be charged from persons belonging to the BPL category. The Rule-making route must not be used to subvert the intention of Parliament to provide BPL applicants free access to information. If Parliament had intended to cap the amount of information that BPL persons could get free of cost, it would have done so in the principal Act itself. However there is no limitation on the extent of information a BPL person may obtain free of charge under the RTI Act. Instead of introducing a cap the Government of Uttarkhand may permit the BPL applicant to inspect the information beyond 50 pages free of charge and make notes at his/her own expense. Such a rule would be in harmony with the provisions of the principal Act and also ensure that the public authority's resources are not disproportionately diverted on account of providing information free of charge to BPL applicants.

6.4 The last part of the *proviso* underneath Clause (do) of the proposed Rule 6(gha) places a bar on every public authority from parting with information free of cost beyond 50 pages per month. This is an arbitrary and unreasonable restriction on the right of multiple BPL persons to seek and obtain information free of cost. If this measure were to be implemented not more than a handful of BPL applicants would be able to obtain information in any given month. All other BPL applicants would be charged for the information they seek at the prescribed rates applicable to non-BPL applicants. This proposed *proviso* is in complete violation of the RTI Act which does not place any restriction on public authorities regarding the number of applications from BPL persons they may entertain every month. The RTI Act gives effect to a fundamental right protected under Article 19(1) of the Constitution. The proposed *proviso* creates a ground for treating BPL applicants unequally. This proposed Rule amounts to a violation of Article 14 of the Constitution which guarantees every person, equality before the law.

6.5 The last part of Clause (*teen*) of the proposed Rule 6(*gha*) requires a BPL applicant to pay additional fee at regular rates for obtaining information in electronic or paper form beyond 50 pages or if the cost is more than Rs. 100. This is clearly a violation of the complete fee waiver provided to BPL applicants by the principal Act. This right cannot be taken away using the rule-making power.

Recommendation for change:

- **The proviso underneath the proposed Rule 6(*ka*) may be amended to do away with the requirement of attaching certified copies of proof of BPL identity.**
- **Clause (*do*) underneath the proposed Rule 6(*gha*) may be amended to indicate that BPL applicants may inspect any information above 50 pages free of charge and make notes using their own paper and stationery.**
- **The last sentence of the *proviso* underneath Clause (*do*) of the proposed Rule 6(*gha*) may be deleted.**

7. Problem areas in relation to the responsibilities of the Public Information Officer

7.1 The proposed Rule 7(*kha*) makes a provision for the transfer of an application from one public authority to another. This issue is already dealt with in Section 6(3) of the RTI Act and also in Rule 5 of the proposed Rules in sufficient detail. The proposed Rule 7(*kha*) is redundant. Redundant Rules must be deleted in order to avoid confusion. The Rules should be simple and create conveniences instead of complications for citizens.

Recommendation for change:

The proposed Rule 7(*kha*) may be deleted.

7.2 The proposed Rule 7(*gha*) describes the procedure that the PIO must follow while processing requests for information relating to third parties. The PIO is required to examine the application if no response is received from the third party, despite the passage of 10 days from the date of issue of notice inviting objections to disclosure. This Rule does not adequately guide the PIO in relation to third party matters. The RTI Act permits the extension of the 30-day time limit by 10 more days in third party-related requests. So a total of 40 days is available to the PIO for making a decision on the RTI application. Under Section 11(1) of the RTI Act the PIO is required to issue notice within five days of receiving the RTI application. So even if 10 days have lapsed since the dispatch of the notice, 25 days are continue to be available to send reminders, if no reply is received from the third party. The PIO must be required to send at least two reminders to the third party in such matters in order to account for delays due to postal transit. This amounts to reasonable action to protect the rights of third parties.

Recommendation for change:

The proposed Rule 7(*gha*) may be amended to require the PIO to send at least two reminders at 10-day intervals to the third party, if no reply is forthcoming and record proof of action taken on the file.

7.3 The proposed Rule 7(*nka*) requires the PIO to reject a request for information that falls within one or more categories of exemptions to disclosure listed under Section 8. This proposed Rule completely ignores the intention of Section 8. Section 8(1) merely states that there is no obligation on a public authority to disclose information if the conditions or circumstances listed in clauses (a) to (j) are attracted. This only means that an applicant cannot seek this information as a matter of right unlike other information not falling under these clauses. The exemptions should not be interpreted to mean that they are set in stone and constitute classes of information that will not be made public. This is an erroneous reading of the exemptions clauses. The public interest overrides that are included in clauses (d), (e) and (j) of Section 8(1) as well as the public interest override contained in Section 8(2) which generally applies to all clauses in Section 8(1) requires the public authority to disclose even exempt information if the public interest is served better. In the case of clause (j), the PIO and in the cases of clauses (d) and (e) the competent authorities as defined in Section 2(e) of the RTI Act have a duty to make a decision whether exempt information may be disclosed in the public interest. The proposed Rule 7(*nka*) is contrary to this scheme of Section 8 and is likely to misguide the PIO.

Recommendation for change:

The proposed Rule 7(*gha*) may be amended to require the PIO to disclose information as per the scheme of Section 8(1), 8(2) and 8(3) of the RTI Act.

7.4 The proposed Rule 7(*cha*) requires the PIO or the First Appellate Authority to reject requests for personal information of any individual unless public interest is better served by disclosure. This is a mere repetition of the provision contained in Section 8(1)(j) of the principal Act. The proposed Rule 7(*cha*) is redundant and may be deleted.

Recommendation for change:

The proposed Rule 7(*cha*) may be deleted.

7.5 The proposed Rule 7(*chha*) requires the PIO to provide access only to such information that is not covered by the exemptions. The second sentence under this proposed Rule bars the PIO from providing copies or even inspection of the exempt records. This Rule is redundant for the same reasons explained at para #7.3. There is no absolute bar on disclosure of information under Section 8. Section 8(2) and the public interest overrides contained in clauses (d), (e) and (j) of Section 8(1) vest in the public authority, the competent authority or the PIO, as the case may be, the discretionary power to disclose even exempt information in public interest. The proposed Rule 7(*chha*) does not convey this idea clearly and is likely to misguide the PIO.

Recommendation for change:

The second sentence of the proposed Rule 7(*chha*) may be deleted.

8. Problematic areas in relation to disposal of first appeals

8.1 The proposed Rule 8(*ka*) requires the appellant to clearly state the grounds for appeal instead of merely claiming that he is aggrieved by the PIO's decision. While the grounds for appeals must be made clear in the first appeal letter, it is also not reasonable for the First Appellate Authority to expect that an appellant draft the first appeal in the manner of lawyers drafting appeals for submission in courts. Parliament had intended for appeals procedures to be simple and convenient for citizens. The Rules must not be used as a pretext for creating complications for citizens who already have a grievance with the quality of information provided by the PIO. Some First Appellate Authorities may not hesitate to reject first appeals at the very outset under this proposed Rule instead of going into the merits of each case. All appeals must be handled in a caring

and sensitive manner. The First Appellate Authority may contact the appellant to clarify any matter in the appeal letter that is unclear or provide him a hearing to explain his/her grievances.

Recommendation for change:

The proposed Rule 8(*ka*) may be amended to require the First Appellate Authority to contact the appellant for seeking any clarifications regarding the first appeal. The proposed Rule must also state that an appeal must not be rejected merely on minor technical grounds.

8.2 The proposed Rule 8(*kha*) provides the First Appellate Authority with the discretionary power to direct the appellant either to be present during a hearing or to file his/her submission in writing. This proposed Rule unnecessarily complicates the first appeal process. Nothing in the RTI Act empowers the First Appellate Authority to compel the attendance of the first appellant. The appellant is at liberty to choose to attend a hearing or excuse himself/herself from personal appearance. Also, the grievances of the appellant would all be recorded in the appeal letter itself which initiates the first appeal proceedings. So, unless the First Appellate Authority undertakes to provide a copy of the reply filed by the PIO to the appellant giving him/her an opportunity to submit a counter/rebuttal, there is no need for making a Rule that compels the attendance of an appellant or forces him/her to make a written submission.

Recommendation for change:

The proposed Rule 8(*kha*) may be amended to make the personal appearance of the appellant or filing of rejoinders/rebuttals to the PIO's reply optional during the first appeal proceedings.

8.3 The proposed Rule 8(*ga*) does not contain any guidance for the First Appellate Authority regarding time limits within which to decide the appeal. Under Section 19(6) of the RTI Act all appeals must ordinarily be decided within 30 days of submission. However in exceptional cases, the First Appellate Authority may take a maximum of 15 more days and record in his/her order, the reasons for delay. More often than not, this provision is ignored and appeals are decided as if 45 days were available as a matter of right to the First Appellate Authority. This practice violates the clear provisions of Section 19(6) of the RTI Act. The Government has a duty to ensure that adequate guidance is available for First Appellate Authorities regarding timelines.

Recommendation for change:

The proposed Rule 8(*ga*) may be amended to direct the First Appellate Authority make all efforts to dispose of appeals within 30 days. When extension of time is required, the First Appellate Authority must clearly record cogent reasons for delayed disposal in his/her order.

8.4 The proposed Rule 8(*gha*) requires the First Appellate Authority to direct the PIO to provide the requested information as early as possible, if it is not covered by any of the exemptions. This direction contains no guidance as to time limits for compliance. The First Appellate Authority must be required to stipulate a deadline for the PIO to provide access to information having regard to the efforts that may be required to obtain it, make a copy and dispatch it to the requestor. In the absence of time limits laid down in the order, PIOs are likely to unduly delay compliance. This will lead to unnecessary litigation before the Uttarakhand Information Commission. An Office Memorandum circulated by the Department of Personnel and Training (DoPT), Government of India on 09 July, 2007 (**No. 10/23/2007-IR; Subject: Disposal of first appeals under the RTI Act, 2005**) requires the First Appellate Authority to direct the PIO to supply the information within a specific time line. However, the DoPT has also indicated that it is preferable for the First Appellate Authority to furnish the information to the appellant directly if it is accessible to him/her. This example of good practice was circulated to the Chief Secretaries of all States including Uttarakhand. The proposed Rules may be amended to include such a provision.

Recommendation for change:

The proposed Rule 8(*gha*) may be amended to require the First Appellate Authority to either provide access to information himself/herself if it is accessible easily, or stipulate in his/her order a deadline within which the information must be furnished to the appellant, having regard to the efforts that may be required to obtain the information from its custodian or place of storage.

8.5 The proposed Rule 8(*nka*) requires the First Appellate Authority to direct the PIO to permit inspection of the information or provide copies of the records that are not covered by any exemption. While this proposed Rule is laudable, it does not recognise circumstances where appeals may have been filed due to lack of any response from the PIO. Under Section 7(6) of the RTI Act, a person, who does not receive the information within the specified time limit, is entitled to obtain the information free of charge. This principle will continue to apply even at the appeal stage if the PIO did not bother to reply or provide information to the requestor within the time limit. In such cases the First Appellate Authority has no power to order disclosure of information on payment of a fee.

Recommendation for change:

The proposed Rule 8(*nka*) may be amended to indicate that the First Appellate Authority's order of disclosure on payment of fee is subject to Section 7(6) of the principal Act.

8.6 The proposed Rule 8(*chha*) treats the exemptions listed under Section 8(1) as blanket exclusions from disclosure. The use of the term *"nishiddh"* conveys this idea. For reasons explained at para #7.3 above, the exemptions listed in Section 8(1) are not absolute. This point must be made clear in the Rules in order to avoid misinterpretation of the provisions of the principal Act.

Recommendation for change:

The proposed Rule 8(*chha*) may be suitably amended to convey the sense that the exemptions listed in Section 8(1) are discretionary in nature and not absolute.

8.7 The proposed Rule 8(*ja*) requires the First Appellate Authority not to compel the PIO to disclose information that is covered by the exemptions or if it does not fall within the definition of the term 'information'. In view of our recommendations at para #2.1 above this proposed Rule is redundant and may be deleted.

Recommendation for change:

The proposed Rule 8(*chha*) may be deleted.

8.8 Clause (*ek*) of the proposed Rule 9(*ga*) provides details of the procedure to be followed in an appeal proceeding affecting the rights of third parties. However this Clause applies only to second appeal proceedings before the Uttarakhand Information Commission. Similar Rules must be prescribed for the first appeal stage as well.

Recommendation for change:

A new sub-Rule may be introduced in the proposed Rule 8 along the lines of clause (*ek*) of the proposed Rule 9(*ga*) for the guidance of the First Appellate Authority in matters relating to third parties.

9. Problematic aspects relating to the Uttarakhand Information Commission's working

9.1 Clause (*chaar*) under the proposed Rule 9(*kha*) takes away the power of the Uttarakhand Information Commission to cause inquiries to be launched into any second appeal matter. This is contrary to Rule 5 relating to the disposal of second appeals contained in the *State Information Commission (Appeal Procedure) Rules 2005* (SIC Rules) which the proposed Rule seeks to supersede. This amounts to emasculating the Information Commission by taking away its inherent powers. Some experts have argued

that the powers of a civil court vested in the Information Commission under Section 18(3) of the RTI Act are not available for the purpose of deciding second appeals. Therefore under the existing SIC Rules a provision was made to enable the Information Commission to summon officers along with with official records, collect evidence on oath, enforce the attendance of witnesses and examine them. However by not providing for such powers in the proposed Rules and on the contrary barring the Information Commission from conducting inquiries, the Government will end up turning the Commission into a lame duck or a paper tiger whom no public authority will respect. This proposed Rule is also bad in law for the reason that the Information Commission is the sole authority established for the purpose of adjudicating information access disputes. The jurisdiction of courts is barred under Section 23 of the RTI Act except by way of an appeal. No other remedy is available otherwise under the RTI Act if a public authority or a PIO or the First Appellate Authorities violate its provisions. By virtue of being the appellate body of last resort under the RTI Act, the State Information Commission exercises all powers that a First Appellate Authority or a PIO may exercise. This position is well established in laws relating to administrative and quasi-judicial tribunals. Therefore the proposed Rule 9(*kha*) is *ultra vires* of the RTI Act and is unlikely to survive judicial scrutiny. The High Court of Uttarkhand is likely to strike down this proposed Rule if challenged before it. Therefore it is advisable for the Government of Uttarakhand to replace this Rule with Rule 5 of the current SCI Rules.

Recommendation for change:

Rule 5 of the existing SIC Rules may be substituted for the proposed Rule 9(*kha*).

9.2 Clause (*chha*) of the proposed Rule 9(*kha*) seeks to prevent the Uttarakhand Information Commission from summoning the PIO or the First Appellate Authority to a hearing on a second appeal, ordinarily. This proposed Rule ignores the fact that under Section 19(5), the burden of proving that the denial of information is justified is on the person denying the request. This burden falls on the First Appellate Authority also if he/she upholds the decision of denial. As an entity external to the public authority that rejected a request for information, the Information Commission has no way of ascertaining the veracity of the facts presented by all parties to a second appeal matter. The Information Commission is required to summon the concerned officers in order to inquire into an appeal. This power is inherent in the Commission and may be used at its discretion. The proposed Rule takes away this power to a large extent. This proposed Rule clearly violates the scheme of disposing appeals provided for in the RTI Act. Under Section 27 of the RTI Act, Parliament vested rule-making powers in appropriate governments to carry out the provisions of the principal Act, not frustrate them or curtail their ambit. If implemented the proposed Rule will be used as an excuse by PIOs and First Appellate Authorities to ignore the summons of the Commission. Such a situation cannot be permitted to develop in the context of adjudicating disputes relating to the exercise of a fundamental right.

Recommendation for change:

Clause (*chha*) of the proposed Rule 9(*kha*) may be deleted.

9.3 Clause (*saat*) of the proposed Rule 9(chha) treats the penalty proceedings launched under Section 20 of the RTI Act as being separate from the second appeal proceedings. This proposed Rule is *ultra vires* of the RTI Act because the Information Commission's power to impose penalty on a PIO is provided for in Section 19 which pertains to second appeals. The power to impose penalty on the PIO is a part and parcel of the many actions that the Information Commission is empowered to take under Section 19(8) of the RTI Act in a second appeal proceeding. Section 20 lists the grounds and the procedure for imposing penalty. Therefore there is no justification for treating the penalty proceedings as distinct from the appeal proceedings where the appellant has a right to be present. The appellant has the option of attending these proceedings or waiving attendance as he/she has such a right in relation to his/her own appeal matter. This issue must be clarified in the Rules because when the appellant is present at a penalty hearing the Information Commission may permit him/her the opportunity to rebut the PIO's arguments against imposition of penalty.

Recommendation for change:

Clause (*saat*) of the proposed Rule 9(*kha*) may be amended to require the State Information Commission to inform the appellant of the date of a penalty hearing so that he/she may decided whether or not to attend the hearing. If choosing to attend the hearing, the appellant must be afforded an opportunity to rebut the PIO's arguments against imposition of penalty.

9.4 The proposed Rule 9(*gha*) prescribes various modes by which notice of the Commission's hearing may be served on parties to a second appeal. Clause (*teen*) prescribes service by ordinary post. It is advisable to serve notice by means of recorded mail such as Registered Post or Speed Post with due acknowledgement which have a higher certainty of delivery.

Recommendation for change:

Clause (*teen*) in the proposed Rule 9(*gha*) may be substituted with a reference to recorded mail in the form of Registered Post or Speed Post with due acknowledgement.

9.5 The proposed Rule 9(*nka*) permits the appellant as well as the public authority to be represented by lawyers before the Uttarakhand Information Commission. While lawyers may not be barred from assisting a party in the Information Commission's proceedings, permitting the public authority to be represented by lawyers places an undesirable and

wholly avoidable compulsion on the appellant to hire a lawyer. Parliament had intended for appeals procedures under the RTI Act to be simple and unencumbering for appellants. This is the reason why nowhere in the principal Act are appeals proceedings described as judicial proceedings within the meaning of that term as defined in Section 193 of the *Indian Penal Code*, *1860*. Therefore the State Information Commission may permit the presence of advocates only when complicated legal interpretation is foreseen in any case. Otherwise, the proceedings before the Commission will not remain citizen-friendly any more. The phrasing provided in Rule 7(4) of the existing SIC Rules may be retained.

9.6 Further, Clause (*do*) of the proposed Rule 9(*nka*) is silent about the manner of disclosure of the orders of the Uttarakhand Information Commission to the general public. All orders of the Uttarakhand Information Commission must be placed in the public domain as they pertain to matters of transparency. They must be made available on the website of the Commission in the form of a database with keyword search facility.

Recommendation for change:

- **The proposed Rule 9(*nka*) may be substituted with the existing Rule 7(4) of the SIC Rules.**
- **Clause (*do*) of the proposed Rule 9(*nka*) may be amended to require the Uttarakhand Information Commission to upload all its decisions on its website in the form of a database with keyword search facility.**

9.7 Rule 10(*ka*) bars appellants from approaching the Uttarakhand Information Commission under Section 18 with a complaint about non-compliance of its orders made in second appeal proceedings. If this proposed Rule were implemented, a public authority can virtually flout any order of the Commission without any fear, until the appellant moves the High Court. This proposed Rule ignores the law laid down by a Division Bench of the Karnataka High Court in the matter of ***G Basavaraju vs. Smt. Arundhati and Another***, [Contempt of Court Case No. 525 of 2008, judgement dated 27/01/2009 2009(2) KarLJ 465]. The Division Bench held as follows:

"*10. … The powers of the Commission to entertain and decide the complaints, necessarily shows that, the Commission has the necessary power to adjudicate the grievances and decide the matters brought before it, in terms of the provisions contained in the RTI Act. The legislative will, incorporating Section 20 in the RTI Act, conferring power on the Commission to impose the penalties, by necessary implication is to enable the Commission to do everything which is indispensable for the purpose of carrying out the purposes in view contemplated under the Act. In our considered view, provisions of Section 20 can be exercised*

by the Commission also to enforce its order. The underlying object in empowering the Commission to impose the penalty and/or to resort to other mode provided therein, cannot and should not be construed only to the incidents/events prior to the passing of an order by the Commission, but are also in aid of the order passed by the Commission and its enforcement/execution, as otherwise, the legislative will behind the enactment gets defeated." [emphasis supplied]

9.8 Therefore the proposed Rule 10(*ka*) is bad in law and takes away an inherent power of the Uttarakhand Information Commission. If this proposed Rule were implemented, the Uttarakhand Commission would become a lame duck or a paper tiger with no powers to enforce its orders.

Recommendation for change:

The second sentence of the proposed Rule 10(*ka*) may be deleted.

9.9 The proposed Rule 10(*nka*) states that the Uttarakhand Information Commission may recommend disciplinary proceedings against a PIO who persistently contravenes the provisions of the RTI Act. However there is no requirement for the Commission to follow the principles of natural justice while coming to this conclusion. The Supreme Court of India has recognized this lacuna in Section 20(2) of the RTI Act. In the matter of ***Manohar s/o Manikrao Anchule vs State of Maharashtra and Another*** [Civil Appeal No. 9095 of 2012, decision dated 13/12/2012] the Apex Court held as follows:

"30. All the attributable defaults of a Central or State Public Information Officer have to be without any reasonable cause and persistently. In other words, besides finding that any of the stated defaults have been committed by such officer, the Commission has to further record its opinion that such default in relation to receiving of an application or not furnishing the information within the specified time was committed persistently and without a reasonable cause. Use of such language by the Legislature clearly shows that the expression 'shall' appearing before 'recommend' has to be read and construed as 'may'. There could be cases where there is reasonable cause shown and the officer is able to demonstrate that there was no persistent default on his part either in receiving the application or furnishing the requested information. In such circumstances, the law does not require recommendation for disciplinary proceedings to be made. It is not the legislative mandate that irrespective of the facts and circumstances of a given case, whether reasonable cause is shown or not, the Commission must recommend disciplinary action merely because the application was not responded to within 30 days. Every case has to be examined on its own facts. We would hasten to add here that wherever reasonable cause is not shown to the satisfaction of the Commission and the Commission is of the opinion that

there is default in terms of the Section it must send the recommendation for disciplinary action in accordance with law to the concerned authority. In such circumstances, it will have no choice but to send recommendatory report. The burden of forming an opinion in accordance with the provisions of Section 20(2) and principles of natural justice lies upon the Commission." [emphasis supplied]

Recommendation for change:

The proposed Rule 10(*nka*) may be amended to require the Uttarakhand Information Commission to recommend disciplinary action against a PIO only after applying the principles of natural justice.

9.10 The proposed Rule 11(ka) requires the public authority receiving a penalty order or an order for compensation payable to the appellant, to realise the amounts after two months of the date of the order. The intention of this proposed Rule is not clear. It may not be possible to collect the maximum amount of penalty (Rs. 25,000) or a large sum offered as compensation within two months. While compliance with such orders must begin within two months (to allow for time to appeal against such an order to the Uttarakhand High Court), the public authority may decide upon the number of installments for realisation of the penalty amount or payment of compensation.

9.11 The proposed Rules 11(*kha*) and 11(*ga*) do not require a public authority to report back compliance with the penalty orders or the compensation orders of the Uttarakhand Commission. This is a serious lapse as the Commission's orders must be complied with within a specific time limit or the order must be challenged before the High Court within a similar time limit. It is the duty of the public authority to report to the Commission action taken on its orders.

9.12 The proposed Rule 11(*gha*) requires that the Uttarakhand Information Commission close all proceedings of penalty and compensation payable under the RTI Act when the public authority confirms receipt of orders to that effect from the Commission's office. The proposed Rule does not permit the Information Commission to start any other proceeding in this regard. This proposed Rule, if implemented, will render the Uttarakhand Information Commission toothless. For reasons explained in para #9.8 above, the Information Commission has the powers under Section 18 read with Sections 20(1) and (2) to secure compliance with its orders imposing penalty or granting compensation. The proposed Rule is bad in law and must be deleted.

Recommendations for change:

- **The proposed Rule 11(*ka*) may be amended to allow for the realisation of the penalty**

amount or payment of compensation in installments.

- **The proposed Rules 11(*kha*) and 11(*ga*) may be amended to require the public authority to report to the Uttarakhand Information Commission, action taken on its penalty orders or compensation orders.**
- **The proposed Rule 11(*gha*) may be suitably amended to recognise the power of the Uttarakhand Information Commission to continue existing proceedings or launch proceedings, afresh, under the RTI Act, to secure compliance with its orders imposing penalty or granting compensation.**

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About CHRI

CHRI is an independent, international, non-partisan, non-government organisation headquartered in New Delhi with offices in London, UK and Accra, Ghana. CHRI works for the practical realisation of the human rights of people in the countries of the Commonwealth. CHRI was a member of the drafting committee that put together the civil version of the Draft Right to Information Bill in 2004. CHRI was invited twice by the Department-related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice to advise it on best practice principles relating to the right to information. CHRI has designed and conducted training workshops for several thousand senior and middle-level officers of the Central Government and about 15 State Governments including the Government of Uttarakhand. CHRI advocates for simple and convenient information access procedures. More information about our work is available on our website: www.humanrightsinitiative.org