EXEMPTION FROM DISCLOSURE OF INFORMATION UNDER THE RIGHT TO INFORMATION ACT

AN INTRODUCTION

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ACKNOWLEDGEMENT

This Handbook has been prepared by the Centre for Public Administration, Dr.MCRHRD Institute of Telangana with the financial support of Department of Personnel and Training (DoPT), Ministry of Personnel, Public Grievances and Pensions, Government of India under the Centrally Sponsored Scheme on "Improving Transparency and Accountability in government through effective implementation of Right to Information Act" for the year 2019-20.

Sri Srinivas Madhav, Senior Faculty has rendered his services by compiling this Handbook with his scholarly contribution.

Sri Harpreet Singh, IAS, Director General (FAC), Dr MCR HRD IT & Prl. Secretary to Govt. of Telangana and Sri Benhur Mahesh Dutt Ekka, IAS, Additional Director General provided valuable guidance in preparation of the Handbook.

Dr Madhavi Ravulapati, Associate Professor of Law & Head, CPA, Dr. K.Tirupataiah, IFS (Retd.) Chief Consultant (Training), Sri K. Ram Gopal, Senior Faculty (Nodal Officer, CSS-RTI) and Smt. Sowmya Rani, Faculty (Nodal Officer, CSS-RTI) provided resource support in preparation of the Handbook. Prof. A. S. Ramachandra, Senior Faculty reviewed the manuscript and contributed to the improvement of the book with his valuable suggestions.

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Printer : VS Art Printers

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FOREWORD

Right to Information is a fundamental human right, crucial to human development, and a prerequisite for the realisation of other rights. There is a strong global trend towards greater recognition of RTI. In 2016, UNESCO adopted a resolution declaring '28 September of every year' as "International Day for Universal Access to Information".

The Sustainable Development Goal (SDG) Target 16.10 requires ensuring "public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements. UNESCO argues that advancing SDG 16 Target 10 on public access to information can nourish progress on all SDGs. So far over 120 countries have enacted freedom of information laws.

In India, the Right to Information Act came fully into force on 12th October 2005. It remains a milestone of great importance in the evolution of Indian democracy. The Parliament of India enacted the RTI Act with a noble intention to promote transparency and accountability in the working of every public authority. The law empowers common people with the right to seek information held by public authorities on par with the members of the Parliament or State Legislature.

The law aims to set out the practical regime of right to information for citizens to secure access to information. The practical regime includes Public Information Officers, First Appellate Authorities and Information Commissions, which are quasi judicial authorities to decide appeals and complaints filed by citizens.

Capacity building of Public Information Officers, First Appellate Authorities plays a major role in discharging their duties and responsibilities under the RTI Act diligently.

The Dr MCR HRD Institute being Apex Training Institute of the State is taking a lead role in capacity building on the RTI Act to the Public functionaries since enactment of the Act for effective implementation of the Act. Towards this end the Institute is conducting training programmes on RTI Act in the Institute as well as at district level through its Regional Centres for Training. The Institute is also conducting Workshops on different aspects of the RTI Act by involving CSOs functioning on RTI subject area apart from Govt. employees across various departments.

In addition to training programmes on the RTI Act, academic publications on various concepts of the law facilitate understanding the intricacies of the legislation. Key Decisions of the Central Information Commission and State Information Commissions and judgements pronounced by Constitutional courts need to be studied by all the decision makers under the Act. I hope the publications on Right to Information brought out by the Institute will guide all the stakeholders in effective implementation of the transparency law.

- Sri Harpreet Singh, IAS

CONTENTS

CHAPTER 1: INTRODUCTION

The Universal Declaration of Human Rights recognizes Right to information as a human right. The right to information is now guaranteed as a fundamental right by the constitutions of over 120 countries.

The Constitution of India does not contain an explicit reference to the right to information. The Constitution through Article 19(1) (a) guarantees us the right to freedom of speech and expression. The Supreme Court has consistently recognized that freedom of information was part of freedom of expression guaranteed by the Constitution.[1]

However, the right to freedom of speech and expression is subject to 'reasonable restrictions', in the interests of following:[2]

- the sovereignty and integrity of India,
- the security of the State,
- friendly relations with foreign States,
- public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

Preamble to the Right to Information Act 2005 ("RTI Act") states that right to information, "in actual practice is likely to conflict with other public interests".

Those 'other public interests' include the following:[3]

- efficient operations of the Governments,
- optimum use of limited fiscal resources
- the preservation of confidentiality of sensitive information

To "harmonise these conflicting interests", the Right to Information Act provides certain exemptions from disclosure of information.[4]

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[1] For example: *Bennett Coleman v. Union of India*, AIR 1973 SC 60.
State of UP v. Raj Narain, (1975) 4 SCC 428.
S.P. Gupta v. UOI, AIR 1982 SC 149.
People's Union for Civil Liberties v. UOI, 2004 (2) SCC 476.

[2] Article 19(2) of the Constitution of India

[3] Preamble to the Right to Information Act 2005

[4] Preamble to the RTI Act reflects this in the following terms:
Whereas the Constitution of India has established democratic Republic;
And whereas democracy requires an informed citizenry and transparency of information which are vital to its functioning and also to contain corruption and to hold Governments and their instrumentalities accountable to the governed;

The legislative drafters of the Preamble might have drawn inspiration from two significant opinions of the United States Supreme Court. Over three decades ago the court opined as follows:[5]

"[t]he basic purpose of FOIA [Freedom of Information Act] is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed."

The American court had recognized law makers' intention in enacting the FOIA in the following terms:[6]

"Congress sought 'to reach a workable balance between the right of the public to know and the need of the Government'" to protect certain information.[7]

The Universal Declaration of Human Rights, Article 19, which recognizes Right to information as a human right, states as follows:

"Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

The Right to Information empowers people with the right to know what their governments are upto and hold them accountable. Sometimes, this right comes into conflict with another human right. Article 12 Universal Declaration of Human Rights states as follows:

"No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.**"**

Right to Information laws need to balance these human rights. Protection of national security interests and trade secrecy are some other important factors to be taken care of.

And whereas revelation of information in actual practice is likely to conflict with other public interests including efficient operations of the Governments, optimum use of limited fiscal resources and the preservation of confidentiality of sensitive information;
And whereas it is necessary to harmonise these conflicting interests while preserving the paramountcy of the democratic ideal;

[5] *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

[6] *The Department of Justice Guide to the Freedom of Information Act* (2009 Edition).

[7] *John Doe Agency*, 493 U.S. at 152 (quoting H.R. Rep. No. 89-1497, at 6 (1966), reprinted in1966 U.S.C.C.A.N. 2418, 2423).

Section 3 of the RTI Act states, "Subject to the provisions of this Act, all citizens shall have the right to information." That is, the right to information is not an absolute right. It is subject to certain provisions of the Act. What are those provisions? Sections 8, 9 and 24 contain the provisions, subject to which citizens can exercise their right to information.

Exclusions

The RTI Act, through Section 24, partially excludes the following from the ambit of the Act:

- the intelligence and security organisations specified in the Second Schedule
- Information furnished by such organisations to the Central Government
- intelligence and security organizations (established by the State Government) notified in the Official Gazette

.

Detailed discussion on Exclusions can be found in Chapter 2.

Exemptions

The most difficult and perhaps the most controversial part of the Act is the application of exemptions. Public Information Officer (PIO) can only reject a request under Sections 8 and 9.

Section 7 (1) of the RTI Act states as follows:
"…the Central Public Information Officer … on receipt of a request under Section 6 shall, … either provide the information … or reject the request for any of the reasons specified in Sections 8 and 9 …"

Section 8 and Section 9 of the Act contain these exemptions. Exemptions can be divided into two categories:

- *Absolute exemptions:* Exemptions which are not subject to public interest test. Section 9 is the only absolute exemption.

- *Qualified exemptions:* Exemptions which are subject to public interest test. Here, the PIO must consider whether there is greater public interest in disclosing the information or withholding the information (popularly called - *balancing the public interest*). All the exemptions under Section 8(1) are qualified exemptions.

Exemptions under Section 8 are discretionary, not mandatory. PIOs may make discretionary disclosures of exempt information, as a matter of their discretion, when public interest in disclosure outweighs the harm to the protected interests.

Detailed discussion on public interest can be found in Chapter 3.

Time limited exemptions

Section 8(3) imposes time limit on exemptions. Clauses (**b), (d), (e), (f), (g), (h)** and **(j)** of Section 8(1) are time limited exemptions; any information relating to any occurrence, event or matter (which has taken place, occurred or happened twenty years before the date on which any request is made) cannot be withheld under these exemptions.

It is implied that clauses (**a), (c)** and **(i)** of Section 8(1) are not time limited exemptions. They are *perpetual exemptions*.

Exemptions subject to harm test

Qualified exemptions can be further divided into:

- Exemptions subject to harm test
- Exemptions not subject to harm test

Exemptions subject to harm test: Exemptions that depend on the effect of disclosure. Disclosure of information has a particular negative effect and there is an expectation of damage if the information is disclosed. Application of these exemptions depends on the effect, or likely effect, of disclosure. These exemptions contain the phrases – "would" or "would prejudicially". Clauses (**a), (c), (d), (g), (h)** and (**j)** of Section 8(1) contain these exemptions. The decision makers are required to assess the likelihood of the predicted or forecast event, effect or harm occurring after disclosure of information.

Exemptions not subject to harm test

Clauses **(b), (e), (f)** and **(i)** of Section 8(1) contain these exemptions. Here the public authority need not demonstrate any harm but simply show that the information meets the description in the clause.

Exempt all information falling within a particular category. Information is exempt because it is of a particular type. Exemptions under which it is assumed that disclosure of information of a certain kind, laid out in the section, is harmful. For whole classes of information some sort of harm is presupposed and there is no requirement on the public authority to show what that harm might be. There is no need to demonstrate prejudice to any particular purpose.

Detailed discussion on Exemptions can be found in Chapter 4.[8]

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[8] The Exemptions (for easy reference):
Section 8(1):
(a) national security
(b) contempt of court
(c) Parliamentary privilege
(d) trade secrecy

Reasons for rejection of requests

Under the RTI Act, it is very difficult for PIOs to withhold information:

- ⇒ They have to communicate the reasons for rejection of a request for information to the requester.
- ⇒ PIO can only reject a request under Sections 8 and 9.
- ⇒ Reasons should include justification for applying an exemption.

Section 7 (8) of the RTI Act states as follows:

Where a request has been rejected under sub-section (1) of Section 7, the Central Public Information Officer or State Public Information Officer, as the case may be, shall communicate to the person making the request,–

(i) the reasons for such rejection;

(ii) the period within which an appeal against such rejection may be preferred; and

(iii) the particulars of the appellate authority.

If PIO rejects a request for any of the reasons specified in Section 8 and 9, the PIO should, under Section 7 (8), communicate to the requester:

1. the period within which an appeal against such rejection may be preferred

2. the particulars of the appellate authority

3. the reasons for such rejection The phrase 'Reasons for rejection' has two components: First, the provision under which information is exempt and secondly, reasons justifying for applying such exemption. Sometimes information may fall under an exemption under section 8, but still the PIO may wish to disclose it, `if public interest in disclosure outweighs the harm to the protected interests`.

In such case the PIO may record:

1. factors favoring public interest in disclosure.
2. factors favoring non-disclosure.
3. how and why the former are more important than the later - or the other way around, if the PIO decides to withhold the information.

(e) fiduciary relationship
(f) foreign government
(g) safety of informer in law enforcement
(h) investigation
(i) cabinet papers
(j) privacy
Section 9: Copyright

The Central Information Commission (CIC), in a Decision, held as follows:
Through this Order the Commission now wants to send the message loud and clear that quoting provisions of Section 8 of the RTI Act *ad libitum*[9] to deny the information requested for, by CPIOs/Appellate Authorities without giving any *justification* or grounds as to how these provisions are applicable is simply unacceptable and clearly amounts to malafide denial of legitimate information attracting penalties under section 20(1) of the Act.[10]

CIC, in another Decision, held as follows:

The PIO has to give the reasons for rejection of the request for information as required under Section 7(8)(i). Merely quoting the bare clause of the Act does not imply that the reasons have been given. The PIO should have intimated as to how he had come to the conclusion that rule 8(1) (j) was applicable in this case.[11]

CIC, in various Decisions, observed as follows:

- PIO has to give the reasons for rejection of the request for information as required under Section 7(8) (i). Merely quoting the bare clause of the Act does not imply that the reasons have been given. The PIO should have intimated as to how he had come to the conclusion that rule 8(1)(j) was applicable in this case[12]

- PIO should indicate clearly the grounds of seeking exemptions from disclosure of information while rejecting a request.[13]
- PIO should give his own name, name of appellate officer in his communications.[14]

- The requester should be entitled to receive clear-cut replies to all his queries.[15]

Section 7 (9) is not an exemption

Section 7 (9) of the RTI Act is not an exemption. It states as follows:

An information shall ordinarily be provided in the form in which it is sought unless it would disproportionately divert the resources of the public authority or would be detrimental to the safety or preservation of the record in question.

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[9] *Ad Libitum* is a Latin term which means "at pleasure" or at the discretion of the performer.
[10] CIC/OK/A/2006/00163 – 7 July, 2006.
[11] CIC/OK/C/2006/00010 – 7 July, 2006.
[12] CIC/OK/C/2006/00010 – 7 July, 2006.
[13] 27/IC (A)/06 - 10 April. 2006
[14] CIC/OK/A/2006/00016 - 15 June 2006.
[15] CIC/AT/A/2006/00144 – 14 July, 2006.

Disproportionate diversion of resources of Public Authority

The RTI Act does not offer any definition of this phrase. But there should be some ceiling on how much time and resources a public authority can spend on a request. For example, under the UK Freedom of Information Act, an authority can refuse a request if it estimates that it will cost them in excess of the appropriate cost limit to fulfill a request. The limit is 600 pounds for central government and Parliament and 450 pounds for other public authorities.

There is no such upper limit in India. Further, a public authority cannot reject a request even if it would cause disproportionate diversion of resources to grant the request. However, it can offer the information in a different form to prevent disproportionate diversion of resources.

For example, a requester seeks certain information in electronic form and the public authority holds the information, in the form of hundreds of files. Here, the public authority has to spend its resources to convert such information into electronic form. Instead, it can offer the information in hard copy under section 7 (9). CIC, in a Decision, held as follows:[16] "Sec. 7(9) of the Act does not authorize a public authority to deny information. It simply allows the authority to provide the information in a form easy to access … But this provision does not exempt disclosure of information, only adjustment of the form in which it is provided."

[16] *Sarbajit roy v D.D.A.*, Decision No.10/1/2005- CIC, dt. 25.02.2006

CHAPTER 2: EXCLUSIONS

Sub-section (1) of section 24 of the RTI Act reads as follows :

"Nothing contained in this Act shall apply to the intelligence and security organisations specified in the Second Schedule, being organisations established by the Central Government or any information furnished by such organisations to that Government:

Provided that the information pertaining to the allegations of corruption and human rights violations shall not be excluded under this sub-section:

Provided further that in the case of information sought for is in respect of allegations of violation of human rights, the information shall only be provided after the approval of the Central Information Commission, and notwithstanding anything contained in section 7, such information shall be provided within forty-five days from the date of the receipt of request."

The RTI Act partially excludes the following from the ambit of the Act:

- the intelligence and security organisations specified in the Second Schedule
- Information furnished by such organisations to the Central Government
- intelligence and security organizations (established by the State Government) notified in the Official Gazette

However, the following information is not excluded:

- Information pertaining to the allegations of corruption
- Information pertaining to the allegations of human rights violations

Approval of the Central Information Commission is required for disclosure of information in respect of allegations of human rights violations and maximum time limit is 45 days for such disclosures. However, it appears the excluded organisations need not obtain such approval from the Central Information Commission to disclose the information pertaining to the allegations of corruption.

The nodal agency responsible for implementation of the RTI Act, Department of Personnel and Training (DOPT) under the Ministry of Personnel, Public Grievances and Pensions issued a circular on 14 November 2007 advising all the organisations specified in the Second Schedule to designate Central Public Information Officers and First Appellate Authorities within the organisations and publish the details immediately.

First amendment to the Second Schedule of the RTI Act

The Second Schedule of the RTI Act was first amended *vide* Notification General Statutory Rules **(**G.S.R.) 347 dated 28 September 2005 issued by Ministry of Personnel, Public Grievances and Pensions (Department of Personnel and Training), published in the Gazette of India on 8 October 2005.

First amendment to the Second Schedule substituted Sashastra Seema Bal (corresponding serial number in the Second Schedule -15) for Special Services Bureau (Sashastra Seema Bal was earlier called Special Services Bureau when it was formed in 1963 after the Sino-Indian war) and added the following four organizations (with corresponding serial numbers in the Second Schedule prior to the second amendment) :

19. Special Protection Group.
20. Defence Research and Development Organisation.
21. Border Road Development Board.
22. Financial Intelligence Unit, India.

Second amendment to the Second Schedule

The Second Schedule was further amended *vide* No.G.S.R.235(E) dated 27 March 2008 issued by the Ministry of Personnel, Public Grievances and Pensions (Department of Personnel and Training), published in the Gazette of India on 28 March 2008.

A copy of the Ministry of Personnel, Public Grievance and Pensions (Department of Personnel and Training) Notification G.S.R. 235 (E) dated the 28th March, 2008, publishing amendments to the Second Schedule to the Right to Information Act, 2005, under sub-section (3) of section 24 (B) of the Right to Information Act, 2005 was tabled in the Rajya Sabha on 30th April, 2008.[17]

The Second amendment omitted following three organizations (with corresponding serial numbers in the Second Schedule prior to the second amendment):

16. Special Branch (CID), Andaman and Nicobar.
17. The Crime Branch-C.I.D.- CB, Dadra and Nagar Haveli.
18. Special Branch, Lakshadweep Police.

[17] Brief Record of the Proceedings of the Meeting of the Rajya Sabha held on the 30th April, 2008, *RAJYA SABHA Parliamentary Bulletin PART - I (Two hundred and thirteenth Session).*

And added following two organizations (with corresponding serial numbers in the Second Schedule after the second amendment):

16. Directorate General of Income-tax (Investigation)
17. National Technical Research Organisation

Third amendment to the Second Schedule

The Second Schedule of the RTI Act was amended for the third time *vide* No. G.S.R. 726(E) dated 8 October 2008 issued by the Ministry of Personnel, Public Grievances and Pensions (Department of Personnel and Training). It added 'National Security Council Secretariat' to the Second Schedule.

Fourth amendment to the Second Schedule

The Second Schedule was amended for the fourth time *vide* No.G.S.R.442(E) dated 9 June 2011 issued by the Ministry of Personnel, Public Grievances and Pensions (Department of Personnel and Training), published in the Gazette of India on the same day.

The fourth amendment added following three organizations (with corresponding serial numbers in the Second Schedule after the fourth amendment)

23. Central Bureau of Investigation.
24. National Investigation Agency.
25. National Intelligence Grid.

Fifth amendment to the Second Schedule

The Second Schedule of the RTI Act was amended for the fifth time *vide* No. G.S.R. 673(E) dated 8 July 2016 issued by the Ministry of Personnel, Public Grievances and Pensions (Department of Personnel and Training). It added '26. Strategic Forces Command' to the Second Schedule.

The Second Schedule of the Right to Information Act as amended is as follows:

THE SECOND SCHEDULE

(*See* section 24)

Intelligence and Security Organisation Established by the Central Government.

1. Intelligence Bureau.
2. Research and Analysis Wing of the Cabinet Secretariat.
3. Directorate of Revenue Intelligence.
4. Central Economic Intelligence Bureau.
5. Directorate of Enforcement.
6. Narcotics Control Bureau.
7. Aviation Research Centre.
8. Special Frontier Force.
9. Border Security Force.
10. Central Reserve Police Force.
11. Indo-Tibetan Border Police.
12. Central Industrial Security Force.
13. National Security Guards.
14. Assam Rifles.
15. Sashastra Seema Bal.
16. Directorate General of Income-tax (Investigation).
17. National Technical Research Organisation.
18. Financial Intelligence Unit, India.
19. Special Protection Group.
20. Defence Research and Development Organisation.
21. Border Road Development Board.
22. National Security Council Secretariat
23. Central Bureau of Investigation.
24. National Investigation Agency.
25. National Intelligence Grid.
26. Strategic Forces Command.

CHAPTER 3: PUBLIC INTEREST

Sub-section (1) of Section 8 of the RTI Act contains certain exemptions from disclosure of information. All the exemptions under section 8(1) are qualified exemptions.

Qualified exemptions are exemptions which are subject to public interest test. Here, the PIO must consider whether there is greater public interest in disclosing the information or withholding the information (popularly called '*balancing the public interest'*).

Exemptions under section 8(1) are discretionary, not mandatory. The PIOs may make discretionary disclosures of exempt information, as a matter of their discretion, when public interest in disclosure outweighs the harm to the protected interests.

Responsibility of conducting 'public interest weighing test'

Clause (d) of sub-section (1) of Section 8 places this responsibility on the competent authority. Clause (e) does the same. Clause (j) places the responsibility on the PIO. And finally, Section 8 (2) places the responsibility on the public authority:

Notwithstanding anything in … any of the exemptions permissible in accordance with sub-section (1), a public authority may allow access to information, if public interest in disclosure outweighs the harm to the protected interests.

The RTI Act does not define 'public interest'. No other Freedom of Information Law in the world does it. Whether to include a set definition of the term within the legislation was considered extensively during the Scottish Parliament debates on the Freedom of Information (Scotland) Bill. It was decided that any attempt to define the public interest could limit its effectiveness and its potential application in future cases.

As Scottish Executive officials stated at the time: "Our understanding is that the public interest is defined nowhere in legislation. It is not defined in the UK Bill, and we are not aware that it is defined in any other legislation that refers to requirements to consider the public interest in making a decision or disclosure. That is partly because no single factor can define the public interest. Consideration of the public interest is made case by case."[18] However, recent Australian RTI laws[19] offer substantial guidance on practical application of public interest.

[18] Scottish Information Commissioner, *Briefing on the public interest test*.

Something in the public interest is simply something which serves the interests of public. However, it may not be that simple in practice. This chapter makes an attempt to make an elementary study of international experience.

'**Public**'(Latin *publicus)* means *:*

- having to do with the affairs or official affairs of all people, as opposed to just a private group'(*adjective*)[20]
- the people in general, regardless of membership of any particular group (*noun*)

'**Interest'**[21] means a right, title, claim or share in property.[22]

"**Public interest**" means:

- The well-being of the general public.
- The attention of the people with respect to events.[23]
- The general welfare and rights of the public that are to be recognized, protected and advanced.[24]

Public interest is a term used to denote political movements and organizations that are *in the public interest*—supporting general public and civic causes, in opposition of private and corporate ones (particularistic goals). The public interest can also mean more generally what is considered beneficial to the public.[25]

The term is also used in journalism, usually to describe disclosures that would assist members of the public make more informed political or personal decisions.[26]

The public interest is central to policy debates, politics, democracy and the nature of government itself. While nearly everyone claims that aiding the common well-being or general welfare is positive, there is little consensus on what exactly constitutes the public interest.

There are different views on how many members of the public must benefit from an action before it can be declared to be in the public interest: at one extreme, an action has to benefit every single member of society in order to be truly in the public interest; at the other extreme, *any action can be in the public interest as long as it benefits some of the population and harms none.*

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[19] For example, Tasmania's Right to Information Act 2009.

[20] en.wiktionary.org

[21] Alteration of earlier *interesse*, from Anglo-French, from Medieval Latin, from Latin, to be between, make a difference, concern, from *inter*-between, among + *esse* to be

[22] dictionary reference.com

[23] dictionary reference.com

[24] dictionary reference.com

[25] www.reference.com

[26] Wikipedia, the free encyclopedia.

American journalist Walter Lippman[27] wrote, "Public interest is generally taken to mean a commonly accepted good. Public interest may be presumed to be what men would choose if they saw clearly, thought rationally, acted disinterestedly and benevolently".

Indian View

The Central Information Commission has pronounced many decisions on Public Interest:

Public interest and environmental protection

Shri Piyush Mahapatra of Gene Campaign, Sainik Farms, New Delhi made two applications at the Reception of the Ministry of Environment & Forests seeking information relating to i*) research and testing of a number of GM Crops and ii) studies and allergy/toxicity tests conducted on some GM crops*. CIC held: The CPIOs of Ministry of E&F and Department of Biotechnology, both public authorities being part of the Regulatory Regime are directed to cooperate to supply the information sought by the applicant. Both the Ministry of Environment & Forests and Department of Biotechnology have an informative website. Information on research, testing and studies, being of public interest may be placed on these as available in conformity with Sec 4 (1) to ensure ease of access.[28]

Workers' Right to Information

In a landmark decision, the Central Information Commission has directed State Bank of India to disclose crucial information related to acquisition of State Bank of Saurashtra.[29]

State Bank of Saurashtra was acquired by State Bank of India in 2008. Mr. Umesh Gahoi, an employee of the acquired bank, filed a request under the RTI Act before SBI seeking disclosure of certain information related to the acquisition.

CIC held that the appellant has the right to know "how the process of acquisition of the Bank of Saurashtra by the SBI was carried out" and he was "entitled to receive all correspondence, documents, advice, expert opinions, reports of consultants in that regard".

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[27] *The Public Philosophy* (1955)

[28] CIC/WB/C/2006/00063 & CIC/WB/C/2006/00064- 30 May,2006.

[29] *Umesh Gahoi v. State Bank of India*, Appeal No. CIC/SM/A/2009/001340-AT, Date of Decision: 31 Aug. 2010.

Public interest and consumer protection

Appellant has made the case of public interest on the grounds of *adulteration in distribution of diesel and petrol*, he has however not substantiated his point as to how he would prove his allegations on the basis of disclosure of IT returns filed by the third party. Apparently there is no direct relationship between malpractices of petrol and diesel and IT returns, which is mainly the basis for seeking information.[30]

Public interest and consumer protection

Mahendra Gaur sought from Minister of Petroleum & Natural Gas and Bharat Petroleum's Corporation Ltd., information relating to off take of Petroleum products just 'before 3' days and after 3 days of the date of revision in prices for the period 1.4.2002 to 31.03.2005 with a view to estimating the loss of revenues to the Government. He has contended that just before 3 days of the date of revision in prices of petroleum products, off take rises substantially. And it steeply declines thereafter for 2, 3 days then it stabilizes.

He had asked for the following information from the Ministry of Petroleum & Natural Gas:

1. *The dates of price increase / decrease for petrol, diesel, kerosene, LPG since 1st April,2002.*
2. *The off take of the products three days prior to the date of price increase, on the day of price increase, and three days after the date of price increase since 1.4.2002 for every price increase.*

3 The names of dealers who have been given products in three days prior to price increase equivalent to their 30 days off take

4. *The overtime paid by each oil company three days prior to price increase since 1.4.2002 for every price increase.*
5. *Number of malpractices observed by the oil companies about indiscriminate release of product and action taken thereof.*

[30] 37/IC(A)/2006-12 May,2006.

During the hearing before the CIC, the CPIO of the MoP&NG agreed to provide data for a few PSU oil companies, relating to *off take of* petroleum products, before and after three days of revision in prices for the last three years from April 1, 2002 to March 31, 2005. The relevant information would be furnished within one month of the issuance of this decision. In view of confidential nature of information, only aggregative picture would be shown, while the names of oil companies and the quantity of *off take against* each of them should not be revealed, lest the information should be misused by the competitors. It was also agreed that no further question on this issue would be entertained from any requester.[31]

Public interest

Public authority should not deprive the citizens of their rights to access information that could be utilized for societal benefits.[32]

Income tax returns and public interest

Income Tax Returns filed by the assessee are confidential information, which include details of commercial activities and that it relates to third party. These are submitted in fiduciary capacity. There is also no public interest involved in the matter.

In the spirit of RTI Act, the public authority is required to adopt an open and transparent process of evaluation norms and procedures for assessment of tax liabilities of various categories of assessee. Every action taken by the public authority in question is in public interest and therefore the relevant orders pertaining to the review and revision of tax assessment is a public action. There is therefore no reason why such orders should not be disclosed. The Chief Commissioner of Income Tax is accordingly directed to supply relevant copies of the income tax assessment orders, if any, provided that such documents are not exempted under Section 8(1) of the Act.[33]

The Banks are under obligation to maintain the secrecy of the ***Bank accounts*** of its customers, including the accounts of public authorities. There is also no overriding public interest in disclosure of such information.[34]

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[31] 61 /IC(A)/2006-14 June,2006.
[32] CIC/OK/A/2006/00016 - 15 June 2006
[33] Appeal No. 22/IC(A)/2006,dt.30.03.2006
[34] Appeal No.32/IC(A)/06,dt.02.05.2006

The Commission was of the view that the information was in no way personal in nature and was in the public domain. It is, in fact, in the larger public interest to disclose the information pertaining to ***re-employment of staff*** to make decision-making process of the university transparent and accountable for its decision.[35]

Income tax returns filed by political parties

CIC pronounced a landmark decision[36] directing disclosure of Income Tax Returns filed by political parties. Association for Democratic Reforms filed an RTI application before Central Board of Direct Taxes, seeking information on the following points:

(i) Whether the political parties mentioned in the RTI-application have submitted their Income Tax Returns for the years 2002-03, 2003-04, 2004-05, 2005-06, 2006-07.

(ii) PAN Nos. allotted to these parties.

(iii) Copies of the Income Tax Returns filed by the political parties for the afore-mentioned years along-with the corresponding assessment orders, if any.

The Election Commission in their response stated that under the law the political parties are not required to furnish to the Commission information about their Income Tax Returns. However, under Section 29C of the Representation of the People Act, 1951, the political parties are required to prepare a report in respect of the contributions received by them from any person or company in excess of Rs.20,000/- in a financial year and the report is to be submitted to the Commission under the Conduct of Elections Rules, 1961. However, filing of this report is optional.

The Election Commission also stated that they have submitted a proposal suggesting an amendment so as to make it mandatory for the political parties to publish their audited accounts annually for information and scrutiny of the general public.

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[35] Appeal: No.CIC/OK/A/2006/00046,dt.02.05.2006

[36] *Anumeha, Association for Democratic Reforms v. Commissioner of Income Tax (ITA), CBDT & Others* [CIC/AT/A/2007/01029 ,CIC/AT/A/2007/01263-1270(Total : 9 Appeals)Date of Decision 29 April, 2008]

The Communist Party of India, vide their letter dated 04.04.2007 addressed to the Commissioner of Income Tax, New Delhi, stated that they have had no objection if information concerning them was disclosed. The Communist Party of Marxists also submitted 'no objection' to the disclosure of information. Other political parties objected to the disclosure. CIC held as follows:

46. In this case, the information asked for is available with the Public Authority, i.e. Income Tax Department and is asked for by a citizen. The information relates to various political parties and has been provided by them to a Public Authority in obedience to the provisions of law. The Commission has been consistently holding that the Income Tax Returns and other details concerning an assessee are not to be disclosed unless warranted by requirements of public purpose. (Mrs. Shobha R. Arora Vs. Income Tax, Mumbai (Appeal No. CIC/MA/ A/2006/00220; Decision No.119/IC(A)/2006; Date of Decision: 14.7.2006) and Ms. Neeru Bajaj Vs. Income Tax (Appeal No.s. CIC/AT/A/2006/00644 & CIC/AT/A/2006/00646; Date of Decision 21.2.2007)

47. Thus, an information which is otherwise exempt, can still be disclosed if the public interest so warrants. That public interest is unmistakably present is evidenced not only in the context of the pronouncements of the Apex Court but also the recommendations of the National Commission for the Review of the Working of the Constitution and of the Law Commission.

48. Political financing and its potentiality for distorting the functioning of the government, has been the subject of wide public debate in contemporary democracies. It is recognized that political parties do need large financial resources to discharge their myriad functions. But this recognition is tinged with the apprehension that non-transparent political funding could, by exposing political parties, and through it the organs of State which come under the control or its influence, to the corrupting influence of undisclosed money, can inflict irreversible harm on the institutions of government. There is public purpose in preventing such harm to the body-politic.

49. Democratic States, the world over, are engaged in finding solutions to the problem of transparency in political funding. Several methodologies are being tried such as State subsidy for parties, regulation of funding, voluntary disclosure by donors — at least large donors — and so on. The German Basic Law contains very elaborate provisions regarding political funding. Section 21 of the Basic Law enjoins that political parties shall publicly account for the sources and the use of their funds and for their assets. The German Federal Constitutional Court has in its

decisions strengthened the trend towards transparency in the functioning of political parties. It follows that transparency in funding of political parties in a democracy is the norm and, must be promoted in public interest. In the present case that promotion is being effected through the disclosure of the Income Tax Returns of the political parties.

50. The Commission directs that the public authorities holding such information shall, within a period of six weeks of this order, provide the following information to the appellant:-

Income Tax Returns of the political parties filed with the public authorities and the Assessment Orders for the period mentioned by the appellant in her RTI-application dated 28.02.2007.

The Commission also directs that the PAN of those political parties whose Income Tax Returns are divulged to the applicant shall not be disclosed. It has been decided not to disclose PAN in view of the fact that there is a possibility that this disclosure could be subjected to fraudulent use, reports of which have lately been appearing. It is, therefore, considered practical that while Income Tax Returns and the Assessment Orders pertaining to political parties be disclosed, there should be no disclosure of the PANs of such parties.

The Supreme Court of India in *Janata Dal v.V.H.S. Chowdhary*[37] observed that the purpose of the public interest is:
"[T]o wipe out the tears of the poor and needy, suffering from violation of their fundamental rights, but not for personal gain or private profit of political motive or any oblique consideration."

In *S.P.Gupta v. President of India,*[38] Justice Bhagawati observed:

Redressing public injury, enforcing public duty, protecting social, collective, 'diffused' rights and interests are vindicating public interest…enforcement of public interest or general interest in which the public or a class of the community have pecuniary interest or some interest by which their legal rights or liabilities are affected.

In *State of Gujarat v Mirzapur Moti Kureshi Kasab Jamat & others*[39] the Supreme Court held:

[37] [1992] 4 SCC 305.
[38] AIR 1982 SC 149.
[39] AIR 2006 Supreme Court 212.

"[T]he interest of general public (public interest) is of a wide import covering public order, public health, public security, morals, economic welfare of the community, and the objects mentioned in Part IV of the Constitution (i.e. *Directive Principles of State Policy*)."

American View

American FOI Act has no explicit public interest rider. However, fees can be waived if the disclosure of the information is in the public interest. Section (4) (A) (iii) of the Freedom of Information Act, as amended, states as follows:

Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

Section 3 of the Openness Promotes Effectiveness in our National Government Act of 2007 states as follows:

Section 552(a) (4) (A) (ii) of title 5, United States Code, is amended by adding at the end the following:

''In this clause, the term 'a representative of the news media' means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. In this clause, the term 'news' means information that is about current events or that would be of current interest to the public. Examples of news-media entities are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of 'news') who make their products available for purchase by or subscription by or free distribution to the general public.

These examples are not all-inclusive. Moreover, as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news-media entities.

A freelance journalist shall be regarded as working for a news media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity. A publication contract would present a solid basis for such an expectation; the Government may also consider the past publication record of the requester in making such a determination.''.

Key observations made by the American courts

- The only relevant public interest under the Act remains "The Citizens right to be informed about what their government is up to."
- Public oversight of Government operations is the essence of public interest under the Act.
- If the request implicates no public interest at all, public aurhority need not linger over the balance. Something outweighs nothing every time.

English View

U.K. Information Commissioner in *Boston Borough Council*[40] offered a crisp explanation:

"The central tenet for the public interest in disclosing information, in this case, surrounds the creation of *transparency* and *accountability* of public bodies in their decisions and actions. This includes the *spending of public money* and the public interest in the disclosure of information which would highlight or inform issues of *public debate."*

Scottish view

The Scottish Information Commissioner published Briefing on the public interest test as part of their *Freedom of Information (Scotland) Act 2002 Briefings Series*:[41] Many factors are likely to have to be considered on a case by case basis, depending on the request for information.

The public interest test must be applied not as a whole but to the specific use of each qualified exemption. Where authorities seek to rely on such an exemption they must provide their reasons to the applicant for claiming that the public interest does not outweigh the application of the exemption. A detailed record of decision-making processes should be kept at every step when considering exemptions, so that if the applicant requests a review or subsequently appeals to the Commissioner for a decision, there is a clear record of the arguments considered regarding the public interest test.[42]

Public authorities must be able to provide evidence of all of the factors that have been taken into consideration when the public interest test is applied to any qualified exemption that they cite. It will not be enough simply to list all the factors which are thought to be contrary to the public interest. Instead, the authority should provide all of the public interest factors, both for and against disclosure, which were taken into account in applying the test. They must be able to show that a specific detriment will occur because of the disclosure.

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[40] Reference No. FS 50064581

[41] http://www.itspublicknowledge.info/index.htm, accessed in June 2006.

[42] Emphasis added.

A detailed and objective analysis of the factors considered under the public interest test is not only important in assisting applicants to assess whether an application for review is justified, but also to allay unwarranted criticism of the view that the public body has taken, even where the original decision is subsequently overturned on review.

Australian View

Though no Freedom of Information Law in the world defines 'public interest', recent Australian RTI laws offer substantial guidance on practical application of public interest:

- Tasmania's Right to Information Act 2009.
- New South Wales' Government Information (Public Access)Act 2009
- Queensland's Right to Information Act 2009

Tasmania's Right to Information Act 2009

Schedule 1 of the Act lists 25 matters that must be considered when assessing if disclosure of particular information would be contrary to the public interest. Note that these are not the only matters for consideration. All relevant matters must be taken into account.

SCHEDULE 1 - Matters Relevant to Assessment of Public Interest

1. The following matters are the matters to be considered when assessing if disclosure of particular information would be contrary to the public interest:

(a) the general public need for government information to be accessible;

(b) whether the disclosure would contribute to or hinder debate on a matter of public interest;

(c) whether the disclosure would inform a person about the reasons for a decision;

(d) whether the disclosure would provide the contextual information to aid in the understanding of government decisions;

(e) whether the disclosure would inform the public about the rules and practices of government in dealing with the public;

(f) whether the disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability and participation;

(g) whether the disclosure would enhance scrutiny of government administrative processes;

(h) whether the disclosure would promote or hinder equity and fair treatment of persons or corporations in their dealings with government;

(i) whether the disclosure would promote or harm public health or safety or both public health and safety;

(j) whether the disclosure would promote or harm the administration of justice, including affording procedural fairness and the enforcement of the law;

(k) whether the disclosure would promote or harm the economic development of the State;

(l) whether the disclosure would promote or harm the environment and or ecology of the State;
(m) whether the disclosure would promote or harm the interests of an individual or group of individuals;
(n) whether the disclosure would prejudice the ability to obtain similar information in the future;
(o) whether the disclosure would prejudice the objects of, or effectiveness of a method or procedure of, tests, examinations, assessments or audits conducted by or for a public authority;
(p) whether the disclosure would have a substantial adverse effect on the management or performance assessment by a public authority of the public authority's staff;
(q) whether the disclosure would have a substantial adverse effect on the industrial relations of a public authority;
(r) whether the disclosure would be contrary to the security or good order of a prison or detention facility;
(s) whether the disclosure would harm the business or financial interests of a public authority or any other person or organisation;
(t) whether the applicant is resident in Australia;
(u) whether the information is wrong or inaccurate;
(v) whether the information is extraneous or additional information provided by an external party that was not required to be provided;
(w) whether the information is information related to the business affairs of a person which if released would cause harm to the competitive position of that person;

(x) whether the information is information related to the business affairs of a person which is generally available to the competitors of that person;
(y) whether the information is information related to the business affairs of a person, other than a public authority, which if it were information of a public authority would be exempt information.
Schedule 2 lists four basic matters that must not be taken into account when assessing if the disclosure of particular information would be contrary to the public interest.

SCHEDULE 2 - Matters Irrelevant to Assessment of Public Interest
1. The following matters are irrelevant when assessing if disclosure of particular information would be contrary to the public interest:
(a) the seniority of the person who is involved in preparing the document or who is the subject of the document;
(b) that disclosure would confuse the public or that there is a possibility that the public might not readily understand any tentative quality of the information;

(c) that disclosure would cause a loss of confidence in the government;
(d) that disclosure might cause the applicant to misinterpret or misunderstand the information contained in the document because of an omission from the document or for any other reason.

New South Wales' Government Information (Public Access) Act 2009
Public interest considerations in favour of disclosure

12 Public interest considerations in favour of disclosure
(1) There is a general public interest in favour of the disclosure of government information.

(2) Nothing in this Act limits any other public interest considerations in favour of the disclosure of government information that may be taken into account for the purpose of determining whether there is an overriding public interest against disclosure of government information.
The following are examples of public interest considerations in favour of disclosure of information:

(a) Disclosure of the information could reasonably be expected to promote open discussion of public affairs, enhance Government accountability or contribute to positive and informed debate on issues of public importance.

(b) Disclosure of the information could reasonably be expected to inform the public about the operations of agencies and, in particular, their policies and practices for dealing with members of the public.

(c) Disclosure of the information could reasonably be expected to ensure effective oversight of the expenditure of public funds.

(d) The information is personal information of the person to whom it is to be disclosed.

(e) Disclosure of the information could reasonably be expected to reveal or substantiate that an agency (or a member of an agency) has engaged in misconduct or negligent, improper or unlawful conduct.

(3) The Information Commissioner can issue guidelines about public interest considerations in favour of the disclosure of government information, for the assistance of agencies.

Public interest considerations against disclosure
14 Public interest considerations against disclosure
(1) It is to be conclusively presumed that there is an overriding public interest against disclosure of any of the government information described in Schedule 1.

(2) The public interest considerations listed in the Table to this section are the only other considerations that may be taken into account under this Act as public interest considerations against disclosure for the purpose of determining whether there is an overriding public interest against disclosure of government information.

(3) The Information Commissioner can issue guidelines about public interest considerations against the disclosure of government information, for the assistance of agencies, but cannot add to the list of considerations in the Table to this section.

(4) The Information Commissioner must consult with the Privacy Commissioner before issuing any guideline about a privacy-related public interest consideration (being a public interest consideration referred to in clause 3 (a) or (b) of the Table to this section).

Queensland's Right to Information Act 2009

Schedule 4

Part 1: Factors irrelevant to deciding the public interest

1 Disclosure of the information could reasonably be expected to cause embarrassment to the Government or to cause a loss of confidence in the Government.

2 Disclosure of the information could reasonably be expected to result in the applicant misinterpreting or misunderstanding the document.

3 Disclosure of the information could reasonably be expected to result in mischievous conduct by the applicant.

4 The person who created the document containing the information was or is of high seniority within the agency.

Part 2: Factors favouring disclosure in the public interest

1 Disclosure of the information could reasonably be expected to promote open discussion of public affairs and enhance the Government's accountability.

2 Disclosure of the information could reasonably be expected to contribute to positive and informed debate on important issues or matters of serious interest.

3 Disclosure of the information could reasonably be expected to inform the community of the Government's operations, including, in particular, the policies, guidelines and codes of conduct followed by the Government in its dealings with members of the community.

4 Disclosure of the information could reasonably be expected to ensure effective oversight of expenditure of public funds.

5 Disclosure of the information could reasonably be expected to allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or official.

6 Disclosure of the information could reasonably be expected to reveal or substantiate that an agency or official has engaged in misconduct or negligent, improper or unlawful conduct.

7 The information is the applicant's personal information.

8 The information is the personal information of a child within the meaning of section 25, the agent acting for the applicant is the child's parent within the meaning of section 25 and disclosure of the information is reasonably considered to be in the child's best interests.

9 The information is the personal information of an individual who is deceased (the deceased person) and the applicant is an eligible family member of the deceased person.

10 Disclosure of the information could reasonably be expected to advance the fair treatment of individuals and other entities in accordance with the law in their dealings with agencies.

11 Disclosure of the information could reasonably be expected to reveal the reason for a government decision and any background or contextual information that informed the decision.

12 Disclosure of the information could reasonably be expected to reveal that the information was—

(a) incorrect; or
(b) out of date; or
(c) misleading; or
(d) gratuitous; or
(e) unfairly subjective; or
(f) irrelevant.

13 Disclosure of the information could reasonably be expected to contribute to the protection of the environment.

14 Disclosure of the information could reasonably be expected to reveal environmental or health risks or measures relating to public health and safety.

15 Disclosure of the information could reasonably be expected to contribute to the maintenance of peace and order.

16 Disclosure of the information could reasonably be expected to contribute to the administration of justice generally, including procedural fairness.

17 Disclosure of the information could reasonably be expected to contribute to the administration of justice for a person.

18 Disclosure of the information could reasonably be expected to contribute to the enforcement of the criminal law.

19 Disclosure of the information could reasonably be expected to contribute to innovation and the facilitation of research.

CHAPTER 4: EXEMPTION FROM DISCLOSURE OF INFORMATION

This chapter attempts to discuss the most complex section of the RTI Act, section 8, in the light of relevant case law. However, this chapter does not attempt to comment on every provision of section 8. There is ample room for improvement because of the recentness of the enactment and massive increase in decisions pronounced by the Information Commissions over the past few years.

8. Exemption from disclosure of information

(1) Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen,–
(a) information, disclosure of which would prejudicially affect the sovereignty and integrity of India, the security, strategic, scientific or economic interests of the State, relation with foreign State or lead to incitement of an offence;

This is a qualified exemption. The public authorities can disclose information if they are satisfied that the larger public interest justifies such disclosure. Some experts argue the RTI Act should have provided absolute exemption (without giving discretionary power to PIO to disclose information subject to public interest test) from disclosure of such information (disclosure of which would prejudicially affect the sovereignty and integrity of India) so that PIOs need not consider public interest test when they receive requests for such information.

Prejudice
The RTI Act does not define the word 'prejudice'. *Compact Oxford Concise Dictionary* defines 'prejudice' (verb) as "cause harm to (a state of affairs)".
In legal terminology, prejudice is commonly understood to mean 'harm'. While the likelihood of prejudice may not be very high, it should not be negligible. In other words, prejudice need not be substantial, but it be more than trivial.[43]

During the U.K. Parliamentary debates, it was suggested that the key term in the non-class-based exemptions should be 'harm', but it was recognised that the use of 'prejudice' elsewhere, particularly in the Data Protection Act, supported its use in the Freedom of Information Act.

U.K. Information Commissioner's Office states as follows:[44]

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[43] Information commissioner's office (U.K.), *FOIA Awareness Guidance* No. 3.
[44] Freedom of Information Act Awareness Guidance No.20,on *Prejudice & Adverse Affect* published by U.K. Information Commissioner's Office (ICO) in October 2004 (Updated January 2006).

"The public authority is required to prove the detrimental effect of disclosing requested information. There are two issues that need to be considered with prejudice-based exemptions. Firstly, it is necessary to establish the nature of the prejudice (or other stated harm) that might result from disclosure of the information requested, and secondly, if prejudice (harm) is not certain, to determine the likelihood of it occurring.

In legal terminology, prejudice is commonly understood to mean harm and the Information Commissioner regards them as being equivalent. So, when considering how disclosure of information would prejudice the subject of the exemption being claimed, the public authority may find it more helpful to consider issues of harm or damage.

Although prejudice need not be substantial, the Commissioner expects that it be more than trivial. Strictly, the degree of prejudice is not specified, so any level of prejudice might be argued. However, public authorities should bear in mind that the less significant the prejudice is shown to be, the higher the chance of the public interest falling in favour of disclosure."

National security

National security is not defined by the RTI Act.

The U.K. Information Commission Office in its Guidance Note on 'Safeguarding national security (section 24)' states as follows:

"There is no definition of national security. However in Norman Baker v the Information Commissioner and the Cabinet Office (EA/2006/0045 4 April 2007) the Information Tribunal was guided by a House of Lords case, Secretary of State for the Home Department v Rehman [2001] UKHL 47, concerning whether the risk posed by a foreign national provided grounds for his deportation. The Information Tribunal summarised the Lords' observations as follows:

- "national security" means the security of the United Kingdom and its people;
- the interests of national security are not limited to actions by an individual which are targeted at the UK, its system of government or its people;
- the protection of democracy and the legal and constitutional systems of the state are part of national security as well as military defence;
- action against a foreign state may be capable indirectly of affecting the security of the UK ; and
- reciprocal co-operation between the UK and other states in combating international terrorism is capable of promoting the United Kingdom's national security."

GLOBAL PRINCIPLES ON NATIONAL SECURITY AND THE RIGHT TO INFORMATION ("THE TSHWANE PRINCIPLES")

Global Principles on National Security and the Right to Information ("The Tshwane Principles") were finalized in Tshwane, South Africa issued on 12 June 2013.

They are based on international (including regional) and national law, standards, good practices, and the writings of experts.

These Principles were developed in order to provide guidance to those engaged in drafting, revising, or implementing laws or provisions relating to the state's authority to withhold information on national security grounds or to punish the disclosure of such information.

PART II: INFORMATION THAT MAY BE WITHHELD ON NATIONAL SECURITY GROUNDS, AND INFORMATION THAT SHOULD BE DISCLOSED

Principle 9: Information that Legitimately May Be Withheld

(a) Public authorities may restrict the public's right of access to information on national security grounds, but only if such restrictions comply with all of the other provisions of these Principles, the information is held by a public authority, and the information falls within one of the following categories:

(i) Information about on-going defence plans, operations, and capabilities for the length of time that the information is of operational utility.

Note: The phrase "for the length of time that the information is of operational utility" is meant to require disclosure of information once the information no longer reveals anything that could be used by enemies to understand the state's readiness, capacity, or plans.

(ii) Information about the production, capabilities, or use of weapons systems and other military systems, including communications systems.

Note: Such information includes technological data and inventions, and information about production, capabilities, or use. Information about budget lines concerning weapons and other military systems should be made available to the public. See Principles 10C(3) & 10F. It is good practice for states to maintain and publish a control list of weapons, as encouraged by the Arms Trade Treaty as to conventional weapons. It is also good practice to publish information about weapons, equipment, and troop numbers.

(iii) Information about specific measures to safeguard the territory of the state, critical infrastructure, or critical national institutions (*institutions essentielles*) against threats or use of force or sabotage, the effectiveness of which depend upon secrecy;

Note: "Critical infrastructure" refers to strategic resources, assets, and systems, whether physical or virtual, so vital to the state that destruction or incapacity of such resources, assets, or systems would have a debilitating impact on national security.

(iv) Information pertaining to, or derived from, the operations, sources, and methods of intelligence services, insofar as they concern national security matters; and

(v) Information concerning national security matters that was supplied by a foreign state or inter-governmental body with an express expectation of confidentiality; and other diplomatic communications insofar as they concern national security matters.

Note: It is good practice for such expectations to be recorded in writing.
Note: To the extent that particular information concerning terrorism, and counter-terrorism measures, is covered by one of the above categories, the public's right of access to such information may be subject to restrictions on national security grounds in accordance with this and other provisions of the Principles. At the same time, some information concerning terrorism or counterterrorism measures may be of particularly high public interest: see e.g., Principles 10A, 10B, and 10H(1).

(b) It is good practice for national law to set forth an exclusive list of categories of information that are at least as narrowly drawn as the above categories.

(c) A state may add a category of information to the above list of categories, but only if the category is specifically identified and narrowly defined and preservation of the information's secrecy is necessary to protect a legitimate national security interest that is set forth in law, as suggested in Principle 2(c). In proposing the category, the state should explain how disclosure of information in the category would harm national security.

Principle 10: Categories of Information with a High Presumption or Overriding Interest in Favor of Disclosure

Some categories of information, including those listed below, are of particularly high public interest given their special significance to the process of democratic oversight and the rule of law. Accordingly, there is a very strong presumption, and in some cases an overriding imperative, that such information should be public and proactively disclosed.

Information in the following categories should enjoy at least a high presumption in favor of disclosure, and may be withheld on national security grounds only in the most exceptional circumstances and in a manner consistent with the other principles, only for a strictly limited period of time, only pursuant to law and only if there is no reasonable means by which to limit the harm that would be associated with disclosure. For certain subcategories of information, specified below as inherently subject to an overriding public interest in disclosure, withholding on grounds of national security can never be justified.

A. Violations of International Human Rights and Humanitarian Law

(1) There is an overriding public interest in disclosure of information regarding gross violations of human rights or serious violations of international humanitarian law, including crimes under international law, and systematic or widespread violations of the rights to personal liberty and security. Such information may not be withheld on national security grounds in any circumstances.

(2) Information regarding other violations of human rights or humanitarian law is subject to a high presumption of disclosure, and in any event may not be withheld on national security grounds in a manner that would prevent accountability for the violations or deprive a victim of access to an effective remedy.

(3) When a state is undergoing a process of transitional justice during which the state is especially required to ensure truth, justice, reparation, and guarantees of non-recurrence, there is an overriding public interest in disclosure to society as a whole of information regarding human rights violations committed under the past regime. A successor government should immediately protect and preserve the integrity of, and release without delay, any records that contain such information that were concealed by a prior government.

Note: See Principle 21(c) regarding the duty to search for or reconstruct information about human rights violations.

(4) Where the existence of violations is contested or suspected rather than already established, this Principle applies to information that, taken on its own or in conjunction with other information, would shed light on the truth about the alleged violations.

(5) This Principle applies to information about violations that have occurred or are occurring, and applies regardless of whether the violations were committed by the state that holds the information or others.

(6) Information regarding violations covered by this Principle includes, without limitation, the following:

(a) A full description of, and any records showing, the acts or omissions that constitute the violations, as well as the dates and circumstances in which they occurred, and, where applicable, the location of any missing persons or mortal remains.

(b) The identities of all victims, so long as consistent with the privacy and other rights of the victims, their relatives, and witnesses; and aggregate and otherwise anonymous data concerning their number and characteristics that could be relevant in safeguarding human rights.

Note: The names and other personal data of victims, their relatives and witnesses may be withheld from disclosure to the general public to the extent necessary to prevent further harm to them, if the persons concerned or, in the case of deceased persons, their family members, expressly and voluntarily request withholding, or withholding is otherwise manifestly consistent with the person's own wishes or the particular needs of vulnerable groups. Concerning victims of sexual violence, their express consent to disclosure of their names and other personal data should be required. Child victims (under age 18) should not be identified to the general public. This Principle should be interpreted, however, bearing in mind the reality that various governments have, at various times, shielded human rights violations from public view by invoking the right to privacy, including of the very individuals whose rights are being or have been grossly violated, without regard to the true wishes of the affected individuals. These caveats, however, should not preclude publication of aggregate or otherwise anonymous data.

(c) The names of the agencies and individuals who perpetrated or were otherwise responsible for the violations, and more generally of any security sector units present at the time of, or otherwise implicated in, the violations, as well as their superiors and commanders, and information concerning the extent of their command and control.

(d) Information on the causes of the violations and the failure to prevent them.

B. Safeguards for the Right to Liberty and Security of Person, the Prevention of Torture and Other Ill-treatment, and the Right to Life

Information covered by this Principle includes:

(1) Laws and regulations that authorize the deprivation of life of a person by the state, and laws and regulations concerning deprivation of liberty, including those that address the grounds, procedures, transfers, treatment, or conditions of detention of affected persons, including interrogation methods. There is an overriding public interest in disclosure of such laws and regulations.

Notes: "Laws and regulations," as used throughout Principle 10, include all primary or delegated legislation, statutes, regulations, and ordinances, as well as decrees or executive orders issued by a president, prime minister, minister or other public authority, and judicial orders, that have the force of law. "Laws and regulations" also include any rules or interpretations of law that are regarded as authoritative by executive officials.
Deprivation of liberty includes any form of arrest, detention, imprisonment, or internment.

(2) The location of all places where persons are deprived of their liberty operated by or on behalf of the state as well as the identity of, and charges against, or reasons for the detention of, all persons deprived of their liberty, including during armed conflict.

(3) Information regarding the death in custody of any person, and information regarding any other deprivation of life for which a state is responsible, including the identity of the person or persons killed, the circumstances of their death, and the location of their remains.
Note: In no circumstances may information be withheld on national security grounds that would result in the secret detention of a person, or the establishment and operation of secret places of detention, or secret executions. Nor are there any circumstances in which the fate or whereabouts of anyone deprived of liberty by, or with the authorization, support, or acquiescence of, the state may be concealed from, or otherwise denied to, the person's family members or others with a legitimate interest in the person's welfare.
The names and other personal data of persons who have been deprived of liberty, who have died in custody, or whose deaths have been caused by state agents, may be withheld from disclosure to the general public to the extent necessary to protect the right to privacy if the persons concerned, or their family members in the case of deceased persons, expressly and voluntarily request withholding, and if the withholding is otherwise consistent with human rights. The identities of children who are being deprived of liberty should not be made available to the general public. These caveats, however, should not preclude publication of aggregate or otherwise anonymous data.

C. Structures and Powers of Government
Information covered by this Principle includes, without limitation, the following:

(1) The existence of all military, police, security, and intelligence authorities, and sub-units.

(2) The laws and regulations applicable to those authorities and their oversight bodies and internal accountability mechanisms, and the names of the officials who head such authorities.

(3) Information needed for evaluating and controlling the expenditure of public funds, including the gross overall budgets, major line items, and basic expenditure information for such authorities.

(4) The existence and terms of concluded bilateral and multilateral agreements, and other major international commitments by the state on national security matters.

D. Decisions to Use Military Force or Acquire Weapons of Mass Destruction

(1) Information covered by this Principle includes information relevant to a decision to commit combat troops or take other military action, including confirmation of the fact of taking such action, its general size and scope, and an explanation of the rationale for it, as well as any information that demonstrates that a fact stated as part of the public rationale was mistaken.

Note: The reference to an action's "general" size and scope recognizes that it should generally be possible to satisfy the high public interest in having access to information relevant to the decision to commit combat troops without revealing all of the details of the operational aspects of the military action in question (see Principle 9).

(2) The possession or acquisition of nuclear weapons, or other weapons of mass destruction, by a state, albeit not necessarily details about their manufacture or operational capabilities, is a matter of overriding public interest and should not be kept secret.

Note: This sub-principle should not be read to endorse, in any way, the acquisition of such weapons.

E. Surveillance

(1) The overall legal framework concerning surveillance of all kinds, as well as the procedures to be followed for authorizing surveillance, selecting targets of surveillance, and using, sharing, storing, and destroying intercepted material, should be accessible to the public.

Note: This information includes: (a) the laws governing all forms of surveillance, both covert and overt, including indirect surveillance such as profiling and data-mining, and the types of surveillance measures that may be used; (b) the permissible objectives of surveillance; (c) the threshold of suspicion required to initiate or continue surveillance; (d) limitations on the duration of surveillance measures; (e) procedures for authorizing and reviewing the use of such measures; (f) the types of personal data that may be collected and/or processed for national security purposes; and (g) the criteria that apply to the use, retention, deletion, and transfer of these data.

(2) The public should also have access to information about entities authorized to conduct surveillance, and statistics about the use of such surveillance.
Notes: This information includes the identity of each government entity granted specific authorization to conduct particular surveillance each year; the number of surveillance authorizations granted each year to each such entity; the best information available concerning the number of individuals and the number of communications subject to surveillance each year; and whether any surveillance was conducted without specific authorization and if so, by which government entity.

The right of the public to be informed does not necessarily extend to the fact, or operational details, of surveillance conducted pursuant to law and consistent with human rights obligations. Such information may be withheld from the public and those subject to surveillance at least until the period of surveillance has been concluded.

(3) In addition, the public should be fully informed of the fact of any illegal surveillance. Information about such surveillance should be disclosed to the maximum extent without violating the privacy rights of those who were subject to surveillance.

(4) These Principles address the right of the public to access information and are without prejudice to the additional substantive and procedural rights of individuals who have been, or believe that they may have been, subject to surveillance.

Note: It is good practice for public authorities to be required to notify persons who have been subjected to covert surveillance (providing, at a minimum, information on the type of measure that was used, the dates, and the body responsible for authorizing the surveillance measure) insofar as this can be done without jeopardizing ongoing operations or sources and methods.

(5) The high presumptions in favor of disclosure recognized by this Principle do not apply in respect of information that relates solely to surveillance of the activities of foreign governments.
Note: Information obtained through covert surveillance, including of the activities of foreign governments, should be subject to disclosure in the circumstances identified in Principle 10A.

F. Financial Information
Information covered by this Principle includes information sufficient to enable the public to understand security sector finances, as well as the rules that govern security sector finances. Such information should include but is not limited to:
(1) Departmental and agency budgets with headline items;
(2) End-of-year financial statements with headline items;
(3) Financial management rules and control mechanisms;

(4) Procurement rules; and
(5) Reports made by supreme audit institutions and other bodies responsible for reviewing financial aspects of the security sector, including summaries of any sections of such reports that are classified.

G. Accountability Concerning Constitutional and Statutory Violations and Other Abuses of Power

Information covered by this Principle includes information concerning the existence, character, and scale of constitutional or statutory violations and other abuses of power by public authorities or personnel.

H. Public Health, Public Safety, or the Environment

Information covered by this Principle includes:
(1) In the event of any imminent or actual threat to public health, public safety, or the environment, all information that could enable the public to understand or take measures to prevent or mitigate harm arising from that threat, whether the threat is due to natural causes or human activities, including by actions of the state or by actions of private companies.

(2) Other information, updated regularly, on natural resource exploitation, pollution and emission inventories, environmental impacts of proposed or existing large public works or resource extractions, and risk assessment and management plans for especially hazardous facilities.

(b) information which has been expressly forbidden to be published by any court of law or tribunal or the disclosure of which may constitute contempt of court;

Section 3 of the Contempt of Court Act, 1971 states that publication of information prior to filing of charge-sheet or challan will not constitute criminal contempt of court. A judicial proceeding is deemed pending after a charge-sheet is filed. Any publication which interferes or obstructs the course of justice in connection with a pending judicial proceeding may constitute contempt.

However, the Law Commission of India in its 200th Report *Trial by Media* (August 2006) proposes to shift the starting point to the date of arrest, as from the time of arrest, a person comes within the protection of the Court for he has to be brought before a Court within 24 hours under Article 22(2) of the Constitution of India. If there are prejudicial publications after arrest and before the person is brought before Court or his plea for bail is considered, there are serious risks in his getting released on bail. For the application of the Act, a judicial proceeding need not be 'pending', it is enough if it is 'active'.

Now police officers are able to consider disclosure of information prior to filing of charge sheet not worrying about contempt proceedings, subject, however, to clauses (g),(h) and (j) of sub-section (1) of section 8 of the RTI Act.

If the Parliament accepts the Law Commission's argument and amends the Contempt of Court Act, requesters would have to seek information on 'active' judicial proceedings only from the concerned courts. Then it will be for the courts to decide whether to disclose such information.

'Disclosure of information' and 'consequent publication' of the same are treated equally in this discussion. The relevant parts of the section 3 of the Contempt of Court Act, 1971 reads as follows:

"3. Innocent publication and distribution of matter not contempt.-

(1) A person shall not be guilty of contempt of Court on the ground that he has published (whether by words spoken or written or by signs or by visible representations or otherwise) any matter which interferes or tends to interfere with, or obstructs or tends to obstruct, the course of justice in connection with any civil or criminal proceeding pending at the time of publication, if at that time he had no reasonable grounds for believing that the proceeding was pending.

(2) …publication of any such matter as is mentioned in sub-section (1) in connection with any civil or criminal proceedings which is not pending at the time of publication and shall not be deemed to constitute contempt of Court…

Explanation.- For the purposes of this section, a judicial proceedings-

(a) is said to be *pending* –

(A) in case of a civil proceeding, when it is instituted by the filing of a plaint or otherwise;

(B) in the case of a criminal proceeding under the Code of Criminal Procedure, 1898, or any other law-

(i) where it relates to the commission of an offence, when the charge-sheet or challan is filed , or when the Court issues summons or warrant, as the case may be, against the accused, and [Law Commission suggested that for above clause (B)(i), the following clause (B)(i) shall be substituted:

"(i) where it relates to the commission of an offence, when a person is arrested or when the charge sheet or challan is filed or when the Court issues summons or warrant, as the case may be, against the accused, whichever is earlier, and".]

(ii) in any other case, when the Court takes cognizance of the matter to which the proceeding relates, and in the case of a civil or criminal proceedings, shall be deemed to continue to be pending until it is heard and finally decided, that is to say, in a case where an appeal or revision is competent, until the appeal or revision is heard and finally decided or, where no appeal or revision is preferred, until the period of limitation prescribed for such appeal or revision has expired;

(b) which has been heard and finally decided shall not be deemed to be pending merely by reason of the fact that proceedings for the execution of the decree, order or sentence passed therein are pending."

CIC made following comments on Section 8 (1) (b):

Section 8 (1) (b) therefore, exempts disclosure of information:-
(i) which has been expressly forbidden by any court of law or tribunal; or
(ii) the disclosure of which may constitute contempt of court.

It, therefore, follows that only that information which has been expressly forbidden by any court of law is exempted and mere pendency of a *lis* before a court does not signify its exemption. Thus, an explicit order from any court of law or tribunal forbidding publication of the information asked for is one of the prerequisite for application of Section 8(1) (b).

The RTI Act 2005 does not per-se define as to what may constitute 'contempt of court'. Section 2(a) (b) and (c) of the Contempt of Courts Act, 1971 defines as to what constitutes contempt of court in the following words:

2. Definitions:
In this Act, unless the context otherwise requires: (a) 'Contempt of court' means civil contempt or criminal contempt.
(b) 'Civil contempt' means willful disobedience to any judgment, decree, direction, order, writ or other process of a court or willful breach of an undertaking given to a court.
(c) 'Criminal contempt' means the publication (whether by words, spoken or written, or by signs, or by visible representation, or otherwise) of any matter or the doing of any other act whatsoever which:
(i) Scandalises or tends to scandalise, or lowers or tends to lower the authority of, any court, or (ii) Prejudices, or interferes or tends to interfere with the due course of any judicial proceeding, or (iii) Interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner.
From the above, it is clear that whereas for the civil contempt, there has to be either
(i) willful disobedience of any judgment, decree or order; or other process of the court or
ii) willful breach of an undertaking given to a court;
the sine qua non of criminal contempt is publication of any matter or doing of any act which may either scandalize or lower the authority of any court, or interfere with the due course of any judicial proceedings or otherwise obstruct the administration of justice in any manner."[45]

[45] Appeal No.CIC/WB/A/2007/00292 dated 29.2.2008

Drafts of judgments

The question of whether drafts of judgments can be disclosed was considered by the Full Bench of CIC in *Rakesh Kumar Gupta v Income Tax Appellate Tribunal (ITAT)*[46] :

"[A]ll judicial proceedings are conducted in open and transparency is the hallmark in case of all such proceedings. There is no element of secrecy whatsoever. But at the same time, it has to be borne in mind that the judiciary is independent and all judicial authorities including all courts and tribunals must work independently and without any interference insofar as their judicial work is concerned. The independence of a judicial authority is all pervasive and any amount of interference is neither desirable nor should ever be encouraged in any manner.

44. The appellant in the instant case wanted the minutes of the proceedings maintained by the learned members of the Tribunal which can only be the notes prepared by them while conducting the hearing or otherwise.

45. The respondents have drawn our attention to the following observations made by Hon'ble Justice Vivian Bose in Surendra Singh v State of UP (AIR 1954 Supreme Court 194):

"Judges may, and often do, discuss the matter among themselves and reach a tentative conclusion. That is not their judgment. They may write and exchange drafts. Those are not the judgments either, however heavily and often they may have been signed. The final operative act is that which is formally declared in open court with the intention of making it the operative decision of the court. That is what constitutes the 'judgment'…" 46. Those observations, though made in a different context, highlight the status of the proceedings that take place before the actual delivery of the judgment. If according to the Supreme Court even the draft judgments, though heavily and often signed and exchanged, are not to be considered as final judgments but only tentative views liable to change, the jottings and notes made by the judges while hearing a case can never, and by no stretch of imagination, be treated as final views expressed by them on the case. Such noting cannot therefore be held to be part of a record 'held' by the public authority.

47. Any intrusion in regard to the judicial work even under the Right to Information Act is unnecessary. We are satisfied that at the level of appellate authority the appellant agreed not to press for this request.

[46] CIC/AT/A/2006/00586,18 Sep. 2007

49. It is our conclusion, therefore, that given that a judicial authority must function with total independence and freedom, should it be found that an action initiated under the RTI Act impinges upon the authority of that judicial body, the Commission will not authorize the use of the RTI Act for any such disclosure requirement. Section 8(1) (b) of the RTI Act is quite clear, which gives a total discretion to the court or the tribunal to decide as to what should be published.
An information seeker should, therefore, approach the concerned court or the tribunal if he intends to have some information concerning a judicial proceeding and it is for the concerned court or the tribunal to take a decision in the matter as to whether the information requested is concerning judicial proceedings either pending before it or decided by it can be given or not."

Court records

The information sought relates to certain affidavits filed in connection with a pending case in the Tribunal. Normally, each court has its own rules regarding furnishing of copies of documents connected with a case pending before it, to third parties. If the rules of the Tribunal permit furnishing copies of the affidavits or other documents connected with this pending case, or if the rules are silent on this aspect, the documents sought for be furnished to the appellant within 15 days, free of cost. However, if furnishing of the same is not permitted, the same may be communicated to the appellant quoting the relevant rules.[47]

***Sub-judice* matters**

…there has been a serious error by the respondents in assuming that information in respect of sub-judice matters need not be disclosed. The RTI Act provides no exemption from disclosure requirement for sub-judice matters. The only exemption in sub-judice matter is regarding what has been expressly forbidden from disclosure by a Court or a Tribunal and what may constitute contempt of Court: Section 8(1) (b). The matter in the present appeal does not attract this exemption. Presence of a different provision in the Cantonment Act about supply of documents in sub-judice matters to a requester has had no bearing on the disclosure requirement under the RTI Act. Seen purely from the stand-point of the RTI Act, the right of the appellant to access the information requested by him is unimpeachable.[48]

Matter which is under adjudication by a court of law

The Respondents tried to link this proviso to the conditions of admissibility of questions in Parliament. According to them a question asking for information on a matter which is under adjudication by a Court of Law having jurisdiction in any

[47] 190/ICPB/2006-December 11, 2006.
[48] CIC/AT/A/2006/00193-18.9.2006.

part of India would not be admitted for answer. Since the Appellant has gone to the High Court in his appeal against the judgement of Central Administrative Tribunal (CAT) relating to discharge from service, they argued that information could not be given as the matter is sub-judice. It appears to the Commission that in this case two unrelated matters are being linked artificially: the proviso that extends the scope of disclosure of information and does not restrict it, and the Parliament Rule which circumscribes the scope of questions. Were it the intention of Parliament to restrict the scope of this proviso, it would have stated that information which cannot be asked through a parliament question could not be given to the applicant. So there is no direct link between conditions of admissibility of Questions as prescribed by the Rules of Procedure and Conduct of Business in the Lok Sabha/ Rajya Sabha and the said proviso.

That the proviso is not restrictive but expands the scope of access to information is borne by sub-Section 2 of Section 8 of the Act which makes it abundantly clear that a public authority may allow access to information, if public interest in disclosure outweighs the harm to the protected interests notwithstanding the Officials Secrets Act or any of the exemptions mentioned with sub-section 8(1). That clearly shows that the Act gives paramountcy to the public interest and the exemptions do not constitute a bar to providing information. If it were the intention that no aspect of matters sub-judice can be considered under the Act, this would have been expressly incorporated in clause (b) of sub-Section 1 of Section 8 along with other matters prescribed in this clause… it does not stand to reason that a person who has gone to court against an alleged arbitrary decision of a public authority concerning him should be denied information about himself on the pretext that it is personal information or the matter is sub-judice on a case filed by himself.[49]

(c) information, the disclosure of which would cause a breach of privilege of Parliament or the State Legislature;

The Committee of Privileges (Fourteenth Lok Sabha) commented on this clause as follows:[50]

"The Committee would like to emphasize that it is quite difficult to lay down and visualise all the situations wherein the disclosure of information pertaining to Parliament would cause a breach of privilege of the Parliament. As of now the information, the disclosure of which would constitute a breach of privilege

[49] CIC/OK/C/2006/00010, A/2006/00027 & A/2006/00049-30.8.2006

[50] Twelfth Report of Committee of Privileges (Fourteenth Lok Sabha) on "Requests from Courts of Law and investigating agencies, for documents pertaining to proceedings of House, Parliamentary Committees or which are in the custody of Secretary General, Lok Sabha, for production in Courts of Law and for investigation purposes", 28 April, 2008.

could arise in situations like disclosure of proceedings of secret sittings of the House held in terms of provisions of Rule 248 of the Rules of Procedure and Conduct of Business in Lok Sabha, disclosure of proceedings (including evidence) or Report of a Parliamentary Committee before such proceedings or evidence or documents or Report have been reported to the House."

Whether disclosure of report of a committee appointed by government before presentation to the Parliament constitutes a breach of privilege of the Parliament?

The Commissions of Inquiry Act 1952, section 3 provides for appointment of Commission:

"(1) The appropriate Government may, if it is of opinion that it is necessary so to do, and shall ,if a resolutions is passed by each House of Parliament or, as the case may be, the Legislature of the State by notification in the official Gazette, appoint a Commission of Inquiry for the purpose of making an inquiry into any definite matter of public importance and performing such functions and within such time specified in the notification,…

(4) The appropriate Government shall cause to be laid before each House of Parliament or, as the case may be, the Legislature of the State the report, if any, of the Commission on the inquiry made by the Commission under sub-section (1) together with a Memorandum of the action taken thereon, within a period of six months of the submission of the report by the Commission to the appropriate Government."

A Commission can be appointed if:

- a resolution is passed by Parliament ; or
- the Government is of the opinion that it is necessary;

Parliament would expect reports - submitted by the commissions appointed by Government in pursuance of a resolution and not independently-should be disclosed to itself first.

Reports of Commissions appointed by the Government can be disclosed as there is no obligation on Government to place the same before Parliament. There is no breach of privilege involved in this matter.

Though decided prior to commencement of the Commissions of Inquiry Act, following case illustrates the above principle:

Ganganath Committee was appointed by the Minister of Food and Agriculture to enquire into allegations regarding the import of sugar, the report of which was released to the press by Government. A member sought to raise a question of privilege regarding that action of Government, who contended that the release of the report to the press, before it was laid on the Table of the House, constituted a breach of privilege. On 5 April, 1951, the Deputy Speaker observed as follows:

"…this was not a committee appointed by the House and it had no obligation therefore to submit its report to the House. It is open to the Government to appoint any number of Committees, whether on a statement made in this House or otherwise. But that will not mean that the Committee is appointed by this House. Therefore, I do not find that there is any breach of privilege involved in this matter. No doubt, if any committee is appointed by Government in pursuance of any resolution or otherwise and not independently, while the House is sitting, naturally the House would expect such committee's proceedings should be disclosed to itself first. Subject to this observation, there is no breach of privilege in the present case."[51]

Breach of the privilege of Parliament

..[A]ll submissions made before a Parliamentary Standing Committee by the Departments of the Government are treated as confidential as per parliamentary practice. Documents and other submissions handed over to the Committee become property of the Parliament.

It is not open to a Department to disclose any information in respect of those submissions unless authorized by the Committee. It is, therefore, obvious that the information sought by the appellant, besides being confidential, is also a property of the Parliament.[52]

(d) information including commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party, unless the competent authority is satisfied that larger public interest warrants the disclosure of such information;

India has not enacted law for protection of trade secrets. Australian Information Commissioner offers following guidelines:[53]

The Federal Court has interpreted a trade secret as information possessed by one trader which gives that trader an advantage over its competitors while the information remains generally unknown.[54]

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[51] Privileges Digest,388 LOK SABHA(1951)

[52] CIC/AT/A/2006/00195-25.09.2006

[53] Office of the Australian Information Commissioner, *Exemptions*, Version 1.1, October 2011.

The Federal Court referred to the following test in considering whether information amounts to a trade secret:

- the information is used in a trade or business
- the owner must limit the dissemination of it or at least not encourage or permit widespread publication
- if disclosed to a competitor, the information would be liable to cause real or significant harm to the owner of the secret.[55]

Factors that a decision maker might regard as useful guidance but not an exhaustive list of matters to be considered include:

- the extent to which the information is known outside the business of the owner of that information
- the extent to which the information is known by persons engaged in the owner's business
- measures taken by the owner to guard the secrecy of the information
- the value of the information to the owner and to his or her competitors
- the effort and money spent by the owner in developing the information
- the ease or difficulty with which others might acquire or duplicate the secret.

Information of a non-technical character may also amount to a trade secret. To be a trade secret, information must be capable of being put to advantageous use by someone involved in an identifiable trade.

The US *Crimes and Criminal Procedure*[56]defines "trade secret" as follows:

The term "trade secret" means all forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if–

(A) the owner thereof has taken reasonable measures to keep such information secret; and

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[54] *Department of Employment, Workplace Relations and Small Business v Staff Development and Training Company* (2001) 114 FCR 301.

[55] *Lansing Linde Ltd v Kerr* (1990) 21 IPR 529 per Staughton LJ at 536, cited in *Searle Australia Pty Ltd and Public Interest Advocacy Centre and Department of Community Services and Health* (1992) 108 ALR 163.

[56] U.S.A.TITLE 18 – CRIMES AND CRIMINAL PROCEDURE, PART I - CRIMES, CHAPTER 90 – PROTECTION OF TRADE SECRETS, Sec. 1839.

(B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, the public; and the term "owner", with respect to a trade secret, means person or entity in whom or in which rightful legal or equitable title to, or license in, the trade secret is reposed.

List of bank defaulters

Hon'ble Supreme Court in *Reserve Bank of India Vs. Jayantilal N. Mistry* [57] confirmed 11 CIC Decisions; 10 Decisions pronounced by Sri Shailesh Gandhi, the then Information Commissioner and one Decision pronounced by Sri Satyanand Mishra, the then CIC.

Most important Decision being the one that related to disclosure of the list of Bank defaulters. In T.C.No.94 of 2015, the RTI applicant Mr. P.P. Kapoor had asked about the details of the loans taken by the industrialists that have not been repaid, and he had asked about the names of the top defaulters who have not repaid their loans to public sector banks; details of default in loans taken from public sector banks by industrialists, out of the list of defaulters, top 100 defaulters, names of the businessmen, firm name, principal amount, interest amount, date of default and date of availing the loan etc.

The Respondent further sought following information from the CPIO of RBI: "What is RBI doing about uploading the entire list of Bank defaulters on the bank's website?"

RBI responded as follows:

Pursuant to the then Finance Minister's Budget Speech made in Parliament on 28th February, 1994, in order to alert the banks and FIs and put them on guard against the defaulters to other lending institutions. RBI has put in place scheme to collect details about borrowers of banks and FIs with outstanding aggregating Rs. 1 crore and above which are classified as 'Doubtful' or 'Loss or where suits are filed, as on 31st March and 30th September each year. In February 1999, Reserve Bank of India had also introduced a scheme for collection and dissemination of information on cases of wilful default of borrowers with outstanding balance of Rs. 25 lakh and above. At present, RBI disseminates list of above said non suit filed 'doubtful' and 'loss' borrowed accounts of Rs.1 crore and above on half-yearly basis (i.e. as on March 31 and September 30) to banks and FIs. for their confidential use. The list of non-suit filed accounts of wilful defaulters of Rs. 25 lakh and above is also disseminated on quarterly basis to banks and FIs for their confidential use. Section 45 E of the Reserve Bank of India Act 1934 prohibits the Reserve Bank from disclosing 'credit information' except in the manner provided therein.

[57] Transferred Case (Civil) No. 91-101 of 2015, judgement dt. 16 Dec.2015

However, Banks and FIs were advised on October 1, 2002 to furnish information in respect of suit-filed accounts between Rs. 1 lakh and Rs. 1 crore from the period ended March, 2002 in a phased manner to CIBIL only. CIBIL is placing the list of defaulters (suit filed accounts) of Rs. 1 crore and above and list of willful defaulters (suit filed accounts) of Rs. 25 lakh and above as on March 31, 2003 and onwards on its website (www.cibil.com).

The RBI resisted the disclosure of the information claiming exemption under Section 8(1) (a) and 8(1)(e) of the RTI Act on the ground that disclosure would affect the economic interest of the country, and that the information has been received by the RBI from the banks in fiduciary capacity. The CIC found these arguments made by RBI to be totally misconceived in facts and in law, and held that the disclosure would be in public interest.

The CIC directed the CPIO of the petitioner to provide information as per the records to the Respondent in relation to query Nos. 2(b) and 2(c) before 10.12.2011. The Commission has also directed the Governor RBI to display this information on its website before 31.12.2011, in fulfillment of its obligations under Section 4(1) (b) (xvii) of the Right to Information Act, 2005 and to update it each year.

The Supreme Court held as follows:
"The CIC in the impugned order has *rightly observed* as under:-

"I wish government and its instrumentalities would remember that all information held by them is owned by citizens, who are sovereign. Further, it is often seen that banks and financial institutions continue to provide loans to industrialists despite their default in repayment of an earlier loan."
This Court in *UP Financial Corporation vs. Gem Cap India Pvt. Ltd*., AIR 1993 SC 1435 has noted that:

"Promoting industrialization at the cost of public funds does not serve the public interest, it merely amounts to transferring public money to private account'. Such practices have led citizens to believe that defaulters can get away and play fraud on public funds. There is no doubt that information regarding top industrialists who have defaulted in repayment of loans must be brought to citizens' knowledge; there is certainly a larger public interest that could be served on ….disclosure of the same. In fact, information about industrialists who are loan defaulters of the country may put pressure on such persons to pay their dues. This would have the impact of alerting Citizens about those who are defaulting in payments and could also have some impact in shaming them."

RBI had by its Circular DBOD No. BC/CIS/47/20.16.002/94 dated April 23, 1994 directed all banks to send a report on their defaulters, which it would share with all banks and financial institutions, with the following objectives:

1) To alert banks and financial institutions (FIs) and to put them on guard against borrowers who have defaulted in their dues to lending institutions;

2) To make public the names of the borrowers who have defaulted and against whom suits have been filed by banks/ FIs."

80. At this juncture, we may refer the decision of this Court in *Mardia Chemicals Limited vs. Union of India,* (2004) 4 SCC 311, wherein this court while considering the validity of SARFAESI Act and recovery of non- performing assets by banks and financial institutions in India, held :-

"…….it may be observed that though the transaction may have a character of a private contract yet the question of great importance behind such transactions as a whole having far reaching effect on the economy of the country cannot be ignored, purely restricting it to individual transactions more particularly when financing is through banks and financial institutions utilizing the money of the people in general namely, the depositors in the banks and public money at the disposal of the financial institutions. Therefore, wherever public interest to such a large extent is involved and it may become necessary to achieve an object which serves the public purposes, individual rights may have to give way. Public interest has always been considered to be above the private interest. Interest of an individual may, to some extent, be affected but it cannot have the potential of taking over the public interest having an impact in the socio- economic drive of the country……."

In rest of the cases the CIC has considered elaborately the information sought for and passed orders which in our opinion do not suffer from any error of law, irrationality or arbitrariness.

82. We have, therefore, given our anxious consideration to the matter and came to the conclusion that the Central Information Commissioner has passed the impugned orders giving valid reasons and the said orders, therefore, *need no interference* by this Court."

Contract documents not confidential

Rameshchand applied to NISCAIR (National Institute of Science Communication and Information) seeking information on terms of conditions and their implementation regarding a contract with another firm. CIC held as follows:

A contract with a public authority (P.A.) is not 'confidential' after completion. Quotations, bid, tender, prior to conclusion of a contract can be categorized as trade

secret, but once concluded, the confidentiality of such transactions cannot be claimed. Any P.A claims exemption must be put to strictest proof that exemption is justifiably claimed. P.A was directed to disclose the list of employees.[58]

Whether disclosure of various documents submitted by the bidders is a trade secret or commercial confidence or intellectual property?

A Division Bench of the Jharkhand High Court in *State of Jharkhand & Anr.v. Navin Kumar Sinha & Anr.*[59] held as follows:

"*Prima facia*, we are of the view that once a decision is taken in the matter of grant of tender, there is no justification to keep it secret. People have a right to know the basis on which a decision has been taken. If tenders are invited by the public authority and on the basis tender documents, the eligibility of a tender or a bidder is decided, then those tender documents cannot be kept secret, that too after the tender is decided and work order is issued on the ground that it will amount to disclosure of trade secret or commercial confidence. If the authorities of Government refuse to disclose the document, the very purpose of the Act will be frustrated. Moreover the disclosure … cannot and shall not be a trade secret or commercial confidence; rather disclosure of such information shall be in public interest, inasmuch as it will show the transparency in the activities of Government.

Since the tender process is completed and contract has been awarded, it will not influence the contract. Besides the above, a citizen has a right to know the genuineness of a document submitted by the tenderer in the matter of grant of tender for consultancy work or for any other work…. In our considered opinion a contract entered into by the public authority with a private person cannot be treated as confidential after completion of contract."

Commercial secrets protected by law

A request was received by Chief Commissioner of Customs, for 'names of importer / exporter' in the daily list of import and export which are being published from the custom houses. But a notification No.128/2004 - Cus (NT) dt.19.11.2004 forbids the disclosure of the names requested. CIC held as follows:

The [notification containing] rules are in the nature of subordinate legislation and have the legal force of parliament. Hence exemption from disclosure of information is appropriate under s.8 (1) (d) of the RTIA. [60]

[58] CIC/WB/C/2006/00176-18 April, 2006.

[59] AIR 2008 JHARKHAND 19. (Date of judgment: 8 Aug.2007)

[60] 9/IC (A)/2006- 10 March, 2006.

Contracts and PAN

The Commission hereby directs the Respondents to provide all information regarding the contracts entered into by the Railway during the period asked for by charging the Applicant Rs.2/- per photocopies as prescribed in the Act. However, they may not disclose the Income Tax details like the PAN and TAN numbers of these contractors to the Applicant.[61]

Agreement between a public authority and a third party

Any commercial agreement between a public authority and a third party is a public document available for access to a citizen. No party to an agreement with a public authority could raise any objection for supplying a copy of the agreement, except on the grounds of commercial confidentiality and the like which is specifically exempted in Section 8(1)(d).[62]

Details of security and surety submitted to the bank

The complainant had sought certain information relating to the facility of bank guarantee availed of by an organization, particularly the details of security and surety submitted to the Bank. The CPIO responded and mentioned that "information sought for are queries; the same will not be answered under RTI Act. Bank has also duty to maintain secrecy about the affairs of its constituents under Section 13(1) of Banking Companies (Acquisition & Transfer of Undertakings) Act, which is consistent keeping in view the Right to Privacy under Section 8(1) (j) of RTI Act, 2005."

CIC held: CPIO is … justified in informing the complainant that queries are not to be answered by him. The Bank is also obliged to maintain secrecy of the details of its clients. He could have also informed that information sought relate to third party, the disclosure of which is barred u/s 8(1) (d) of the Act. Moreover, the complainant has not indicated as what is public interest in disclosure of the information sought.[63]

(e) information available to a person in his fiduciary relationship, unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information;

F*iduciary* is a Latin word. (Etymology: Latin *fiduciarius*, from *fiducia means* 'trust'). A *fiduciary* is someone who owes a duty of loyalty to safeguard the interests of another person or entity, such as a trustee of a testamentary trust, a

[61] CIC/OK/A/2006/00284-26.12.2006
[62] 77/ICPB/2006 -August 21, 2006
[63] 218/IC(A)/2006-29.8.2006

guardian of the estate of a minor, a guardian, committee or conservator of the estate of an incompetent person, an executor of a will, an administrator of the estate of a decedent or an advisor or consultant exercising control over a testamentary or express trust.

A *fiduciary* may be an executor, administrator, guardian, conservator, curator, receiver, trustee in bankruptcy, assignee for the benefit of creditors, partner, agent, officer of a corporation, public or private, public officer or any other person acting in a *fiduciary* capacity for any person, trust or estate. *Fiduciaries* may be required to hold funds and assets in a special fiduciary account and file periodic accounts and/or inventories with the court. A fiduciary has a duty not to benefit at the expense of the one they are responsible for. A fiduciary must avoid "self-dealing" or "conflicts of interests" in which the potential benefit to the fiduciary is in conflict with what is best for the person who trusts him or her.[64]

File notings

The Minister of State in the Ministry of Personnel, Public grievances and Pensions, replying to a Question in the Rajya Sabha, stated as follows:[65] The Government vide Department of Personnel and Training Office Memorandum no 1/20/2009-IR dated 23rd June, 2009 has clarified that the file noting can be disclosed except file noting containing information exempt from disclosure under section 8 of the Right to Information Act, 2005.

File notings and fiduciary relationship

File notings are that part of the file in which an officer records his observations and impressions meant for his immediate superior officers. Especially when the file, in which the notings are contained, is classified as confidential, the entrustment of the file note by a junior officer or a subordinate to the next higher or superior officer assumes the character of an information supplied by a third party (in this case, the officer writing the note to the next higher officer). This being so, any decision to disclose this information has to be completed in terms of the provision of Section 11(1) of the RTI Act. When the file notings by one officer meant for the next officer with whom he may be in a hierarchical relationship, is in the nature of a fiduciary entrustment, it should not ordinarily be disclosed and, surely not without the concurrence of the officer preparing that note. When read together, Section 11(1) and Section 8(1) (e), unerringly point to a conclusion that notings of a "confidential" file should be disclosed only after giving opportunity to the third party, viz. the officer / officers writing those notes, to be heard.[66]

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[64] < http://www.uslegalforms.com/legaldefinitions/fiduciary/>

[65] Rajya Sabha Unstarred Question No 73. Answered on 02.07.2009 by the Minister of State in the Ministry of Personnel, Public grievances and Pensions.

[66] CIC/AT/A/2006/00363-3.11.2006

Transparency in a student's life: *Central Board of Secondary Education & Anr. V. Aditya Bandopadhyay & Others*

Supreme Court in *Central Board of Secondary Education & Anr. Vs. Aditya Bandopadhyay & Ors.*[67] held that the examining bodies will have to permit inspection of evaluated answer scripts by the students. The Court observed as follows:

"The right to information is a cherished right. Information and right to information are intended to be formidable tools in the hands of responsible citizens to fight corruption and to bring in transparency and accountability. The provisions of RTI Act should be enforced strictly and all efforts should be made to bring to light the necessary information under clause (b) of section 4(1) of the Act which relates to securing transparency and accountability in the working of public authorities and in discouraging corruption. But in regard to other information,(that is information other than those enumerated in section 4(1)(b) and (c) of the Act), equal importance and emphasis are given to other public interests (like confidentiality of sensitive information, fidelity and fiduciary relationships, efficient operation of governments, etc.). Indiscriminate and impractical demands or directions under RTI Act for disclosure of all and sundry information (unrelated to transparency and accountability in the functioning of public authorities and eradication of corruption) would be counter-productive as it will adversely affect the efficiency of the administration and result in the executive getting bogged down with the non-productive work of collecting and furnishing information. The Act should not be allowed to be misused or abused, to become a tool to obstruct the national development and integration, or to destroy the peace, tranquility and harmony among its citizens. Nor should it be converted into a tool of oppression or intimidation of honest officials striving to do their duty. The nation does not want a scenario where 75% of the staff of public authorities spends 75% of their time in collecting and furnishing information to applicants instead of discharging their regular duties. The threat of penalties under the RTI Act and the pressure of the authorities under the RTI Act should not lead to employees of a public authorities prioritising `information furnishing', at the cost of their normal and regular duties.

.. We, therefore, hold that an examining body does not hold the evaluated answer-books in a fiduciary relationship. Not being information available to an examining body in its fiduciary relationship, the exemption under section 8(1)(e) is not available to the examining bodies with reference to evaluated answer-books. As no other exemption under section 8 is available in respect of evaluated answer books, the examining bodies will have to permit inspection sought by the examinees."

[67] CIVIL APPEAL NO.6454 OF 2011, 9 Aug.2011

Inspection of evaluated answer sheets has been a long pending request of students. Prior to the Supreme Court's judgment, many students fought for the disclosure of evaluated answer sheets before other fora:

CIC had earlier held that the authority conducting the examination and the examiners evaluating the answer papers stand in a fiduciary relationship with each other. Such a relationship warrants maintenance of confidentiality by both of the manner and method of evaluation.[68] However, the Full Bench has reconsidered and overturned this argument on disclosure of answer sheets.

In April 2007, full bench of the CIC decided that evaluated answer sheets of recruitment examinations (by recruitment bodies such as RRB) are disclosable but that of academic examination (by academic bodies such as Universities) are not disclosable, because that will open flood gates.[69]

However, in March 2008, Calcutta High Court, in *Pritam Rooj v. The University of Calcutta & Others*[70] rejected this 'floodgate theory' and held that 'only because there is a possibility of floodgate litigation, a valuable right of a citizen cannot be permitted to be taken away'. The court stated that 'the despair that has driven many a student to take his life in recent times may be addressed if students have access to their evaluated answer scripts'.

A division bench of the Calcutta High Court later upheld the order and directed all concerned to act on all such pending applications and show answer sheets to aggrieved students. Preetam Rooj, a student of Presidency College applied to the Calcutta University seeking copy of his fifth paper as he was not satisfied with the marks obtained even after a review. Later, he moved the High Court seeking to see his answer script under RTI.

In September 2008, a division bench of the Delhi High Court upheld an earlier judgment[71] directing the Union Public Service Commission (UPSC) to disclose the following:[72]

- Marks obtained by the applicants for the Civil Services Preliminary Examination 2006 in General Studies and in Optional Papers.

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[68] ICPB/A-3/CIC/2006 – 10th February, 2006]

[69] Decision No. CIC/WB/C2006/00223, CIC/WB/A/2006/00469 & 00394, CIC/OK/A/2006/00266/00058/00066/00315 dated 23/04/2007 , *Shri Rakesh Kumar Singh, Shri Krishna Kumar Dwivedi & others v. Lok Sabha Secretariat, Delhi Jal Board, Diesel Loco Workshop, Central Board of Secondary Education.*

[70] W.P. No. 22176 (W) of 2007, Judgment date: 28 March 2008.

[71] *Union Public Service Commission v. Central Information Commission and Others*, WP(C) No.17583/2006, 17 April 2007.

[72] *Union Public Service Commission v Shiv Shambhu and Ors,* LPA No. 313 of 2007 and CM APPL. No. 6468/2007, 3 September 2008

- Cut-off mark for the combined total of raw General Studies marks and scaled optional paper marks.
- Model answers.

However, UPSC approached the Supreme Court and filed a Special Leave Petition against the judgment.[73]
On 18 November 2010, the Supreme Court dismissed the petition and made the following Order:
"The Union Public Service Commission has completely changed the pattern of its examination and the next examination for the year 2011 shall be held according to the changed format. In view of this development, there is no need for any adjudication by this Court on this matter."
In another Decision, UPSC was directed by CIC to disclose marked factual summary sheets prepared before personal interview of the civil services (main) examination of 2000.[74]

Consultation between the President and the Supreme Court

The appellant has made a request for some specific information viz. "Copy of Recommendation/Consultation (any one during past ten years) submitted to the President of India under Article 124(2) of the Constitution on appointment of judges of various ranks in Supreme Court and High Courts." This request for information needs to be examined in the context of the provisions of the RTI Act, specially Section 7 (7), Section 11 (1) and Section 8 (e). It is not in dispute that the President of India appoints the judges of the High Courts and the Supreme Court on the advice rendered by the Chief Justice of India as per the 1993 judgement of the Apex Court. The information given by the Chief Justice to the President has been shielded from the public gaze over all these years. Coming into force of the RTI Act has raised a question mark over the confidentiality of the process of consultation between the Supreme Court and the President of India. It is to be examined whether the confidentiality of this process contributes to its integrity, which is sensitive enough to merit "preservation of confidentiality" as stated in the preamble of the RTI Act. Arguably, there is merit in the contention that certain processes are best conducted away from the public gaze, for that is what contributes to sober analysis and mature reflection, unaffected by competing pressures and public scrutiny. If there is one process which needs to be so protected, the process of selecting the judges of the High Courts and the Supreme Court must qualify to be one such.

[73] Special Leave Petition (Civil) 23250 of 2008
[74] CIC/WB/A/2007/01015, 19 March 2009.

In the context of the provisions of the RTI Act, it is instructive to examine the consultation process for the selection of the judges in the light of the provisions of section 11 (1) and section 8 (e) of the RTI Act. In my view, the type of information which is provided by the persons contending to be judges as well as the information collected from various other sources by the Hon'ble Supreme Court in order to equip the Apex Court to discharge its constitutionally ordained role of advising the President of India regarding who to appoint as Judges in the nation's highest judicial bodies, is in the nature of personal information provided by the third party and thus attracts section 11 (1). It also attracts the exemptions under section 8(1)(e) being information given to the charge of the Chief Justice of India by those under consideration for selection as judges, in trust and in confidence. It does create a fiduciary relationship between the Apex Court and those submitting the personal information to its charge. Disclosing any such information will be violative of a fiduciary relationship (section 8(1) (e) RTI Act) as well as the confidence and the trust between the candidates and the Supreme Court. Disclosure of the list of candidates prepared by the Highest Court for the purpose of consultation with the President of India, attracts the exemption of section 8(1)(e) as well as the provision of section 11(1) of the RTI Act. It is my conclusion, therefore, that this entire process of consultation between the President of India and the Supreme Court must be exempted from disclosure. [75]

I.T. Returns

Income Tax Returns filed by an assessee are confidential information which include details of commercial activities and that it relates to third person. These are submitted in fiduciary capacities. There is no public action involved in the matter. Disclosure is exempted under s.8 (1) (j).[76]

Tax evasion petition

An appellant had filed a Tax Evasion Petition (TEP) against Sh. J.P.Gupta and, on the basis of this TEP; investigations were carried out by the Income Tax Department. The proceedings initiated by the income-tax department, in pursuance of the tax evasions petition (TEP), and its outcomes should be disclosed, even without asking for such information by the petitioners.[77]

The High Court of Delhi in *Bhagat Singh v. Chief Information Commissioner and Ors.*[78] partially overturned CIC's Decision by holding that disclosure of investigation report on TEP need not wait till entire process of tax recovery, if any,

[75] CIC/AT/A/2006/00113 – 10 July, 2006.
[76] 22/IC (A)/2006 - 30 March
[77] 174/IC(A)/2006-17th August, 2006
[78] WP(C) No. 3114/2007,Decided On: 03.12.2007

is complete in every respect. However, in this case, subject of the request was: "preliminary reports of investigation pursuant to which notices under Sections 131, 143(2), 148 of the Income Tax have been issued and not as to the outcome of the investigation and reassessment carried on by the Assessing Officer". And the exemption claimed was section 8(1) (h).

Facts:

'The petitioner was married in 2000 to Smt. Saroj Nirmal. In November 2000 she filed a criminal complaint alleging that she had spent/paid as dowry an amount of Rs. Ten Lakhs. Alleging that these claims were false, the Petitioner, with a view to defend the criminal prosecution launched against him, approached the Income Tax Department with a tax evasion petition (TEP) dated 24.09.2003. Thereafter, in 2004 the Income Tax Department summoned the Petitioner's wife to present her case before them. Meanwhile, the Petitioner made repeated requests to the Director of Income Tax (Investigation) to know the status of the hearing and TEP proceedings. On failing to get a response from the second and third Respondents, he moved an application under the Act in November, 2005. He requested for the following information:

(i) Fate of Petitioner's complaint (tax evasion petition) dated 24.09.2003

(ii) What is the other source of income of petitioner's wife Smt. Saroj Nimal than from teaching as a primary teacher in a private school

iii)What action the Department had taken against Smt. Saroj Nimal after issuing a notice u/s 131 of the Income Tax Act, 1961, pursuant to the said Tax Evasion Petition.

The petitioner filed a second Appeal on 1st March, 2006, before the Respondent No. 1, the Central Information Commission (hereafter 'the CIC').[79] The CIC, on 8th May 2006 allowed the second appeal and set aside the rejection of information, and the exemption Clause 8(1) (j) cited by Respondents No. 2and3. The CIC further held that- as the investigation on TEP has been conducted by DIT (Inv), the relevant report is the outcome of public action which needs to be disclosed. This, therefore, cannot be exempted u/s 8(1) (j) as interpreted by the appellate authority. Accordingly, DIT (Inv) is directed to disclose the report as per the provision u/s 10(1) and (2), after the entire process of investigation and tax recovery, if any, is complete in every respect.

[79] CIC') [35/IC(A)/06

The petitioner in this writ petition requests this Court to partially quash the order of the first Respondent dated 8th May 2006 in so far as it directs disclosure after the entire process of investigation and tax recovery is completed;'
Excerpts from the judgment of Justice S. Ravindra Bhat:

"Access to information, under Section 3 of the Act, is the rule and exemptions under Section 8, the exception. Section 8 being a restriction on this fundamental right, must therefore is to be strictly construed. It should not be interpreted in manner as to shadow the very right itself. Under Section 8, exemption from releasing information is granted if it would impede the process of investigation or the prosecution of the offenders. It is apparent that the mere existence of an investigation process cannot be a ground for refusal of the information; the authority withholding information must show satisfactory reasons as to why the release of such information would hamper the investigation process. Such reasons should be germane, and the opinion of the process being hampered should be reasonable and based on some material. Sans this consideration, Section 8(1)(h) and other such provisions would become the haven for dodging demands for information.

A rights based enactment is akin to a welfare measure, like the Act, should receive a liberal interpretation. The contextual background and history of the Act is such that the exemptions, outlined in Section 8, relieving the authorities from the obligation to provide information, constitute restrictions on the exercise of the rights provided by it. Therefore, such exemption provisions have to be construed in their terms; there is some authority supporting this view (See Nathi Devi v. Radha Devi Gupta 2005 (2) SCC 201; B. R. Kapoor v. State of Tamil Nadu 2001 (7) SCC 231 and V. Tulasamma v. Sesha Reddy 1977 (3) SCC 99). Adopting a different approach would result in narrowing the rights and approving a judicially mandated class of restriction on the rights under the Act, which is unwarranted.

..

In the present case, the orders of the three respondents do not reflect any reasons, why the investigation process would be hampered. The direction of the CIC shows is that the information needs to be released only after the investigation and recovery in complete. Facially, the order supports the petitioner's contention that the claim for exemption made by respondent Nos. 2 and 3 are untenable. Section 8(1)(j) relates only to investigation and prosecution and not to recovery. Recovery in tax matters, in the usual circumstances is a time consuming affair, and to withhold information till that eventuality, after the entire proceedings, despite the ruling that investigations are not hampered by information disclosure, is illogical.

As to the issue of whether the investigation has been complete or not, I think that the authorities have not applied their mind about the nature of information sought. As is submitted by the Petitioner, he merely seeks access to the preliminary reports of investigation pursuant to which notices under Sections 131, 143(2), 148 of the Income Tax have been issued and not as to the outcome of the investigation and reassessment carried on by the Assessing Officer. As held in the preceding part of the judgment, without a disclosure as to how the investigation process would be hampered by sharing the materials collected till the notices were issued to the assesse, the respondents could not have rejected the request for granting information. The CIC, even after overruling the objection, should not have imposed the condition that information could be disclosed only after recovery was made.

In view of the foregoing discussion the order of the CIC dated 8th May 2006 in so far as it withholds information until tax recovery orders are made, is set aside. The second and third respondents are directed to release the information sought, on the basis of the materials available and collected with them, within two weeks.

This Court takes a serious note of the two year delay in releasing information, the lack of adequate reasoning in the orders of the Public Information Officer and the Appellate Authority and the lack of application of mind in relation to the nature of information sought. The materials on record clearly show the lackadaisical approach of the second and third respondent in releasing the information sought."

Correspondence exchanged between the President and the Prime Minister

Ramesh submitted an appeal seeking a direction to direct the CPIO of Ministry of Personnel, Public Grievances and Pensions to disclose the contents of the correspondence exchanged between the then President Late Shri K.R. Narayanan and the then Prime Minister Shri A.B. Vajpayee between the period from 28.2.02 and 15.3.02. The Bench took into account the significance of the issues involved and decided to refer it to the full bench.

Issues:

1. Whether the Public Authority's claim of privilege under the Law of Evidence is justifiable under the RTI Act, 2005?
2. Whether the CPIO or Public Authority can claim immunity from disclosure under Article 74(2) of the Constitution?
3. Whether the denial of information to the appellant can be justified in this case under Section 8 (1) (a) or under Section 8(1) (e) of the Right to Information Act, 2005?
4. Whether there is any infirmity in the order passed by the CPIO or by the Appellate Authority denying the requested information to the Appellant?

Decision and Reasons:

The Commission decided to call for the correspondence in question and it will examine as to whether its disclosure will serve or harm the public interest. After examining the documents the Commission will first consider whether it would be in public interest to order disclosure or not, and only then it will issue appropriate directions to the public authority.[80]

Legal opinions

…copy of the legal opinion, as asked for by the appellant, was denied u/s 8(1)(e) of the Act, on the ground that the information was available with the respondent in "fiduciary capacity"… information pertain to a legal opinion obtained from an advocate, the disclosure of which has been justifiably denied u/s 8(1)(d) and (e) of the Act.[81]

(f) information received in confidence from Foreign Government;

(g) information, the disclosure of which would endanger the life or physical safety of any person or identity the source of information or assistance given in confidence for law enforcement or security purposes;

Names and addresses of the members of the interview board

Supreme Court, in *Bihar Public Service Commission v. Saiyed Hussain Abbas Rizwi & Anr.*[82] held as follows:

> "The disclosure of names and addresses of the members of the Interview Board would *ex facie* endanger their lives or physical safety".

Physical safety of a person

If the information about who visits a police officer, specially police officers dealing with crimes, is allowed to be disclosed, it will inevitably lead to serious consequences for crime prevention and law-and-order administration. While every visitor to a police officer dealing with crimes may not be carrying information or offering his assistance for law enforcement, it would be extremely difficult, even impossible, to isolate such persons from the long list of daily visitors to the police crime offices. If the Visitor's Register of police officers dealing with crime is allowed to become openly accessible, the information therein may not only compromise the sources of information to the law enforcement officers, it may even lead to the visitors' life being

[80] CIC/MA/A/2006/00121-8 Aug, 2006.

[81] 463/IC(A)/2006,Dated, the 20thDecember, 2006

[82] Civil Appeal No. 9052 of 2012 (Arising out of SLP(C) No. 20217 of 2011), Judgment date: 13 Dec 2012

endangered by criminal elements. Non-disclosure of the information about who visited whom as contained in the visitor's register at the police officer's office premises is, therefore, an imperative which is fully covered by the exemption under Section 8 (1)(g).[83]

Identity of a confidential source of information

In Australia, an applicant sought access to the identity of a person who complained to the respondent about the applicant's unregistered dog. (The dog was of a breed not allowed to be kept on the Gold Coast and was subsequently removed from the applicant's home.) The applicant stated during the course of the review that she did not want to pursue access to the identity of any genuine complainant. However, she maintained that the respondent was concealing the identity of an officer of the respondent who had visited the applicant's home, and whom the applicant believed was the real source of the complaint. AC Barker decided that the matter in issue, comprising the name and the initials of the complainant, was exempt matter under s.42 (1) (b) of the FOI Act. The name and initials were not those of any officer of the respondent who investigated the complaint or ordered the removal of the dog.[84]

Who participated in seizure of smuggled goods?

The information sought relate to the names of officials who participated in seizure of smuggled goods, name and address of informers, file notings of officers on the COFEPOSA proposal and letters written to various authorities. CIC held:

The purpose of COFEPOSA is to check the violation of Foreign Exchange Regulation & Smuggling Activities. Therefore, the disclosure of the proposal containing all the relevant details for the smuggling activities would be detrimental to economic interest of the State. Hence, the exemption claimed u/s 8(1) (a) and (g) of the Act is justified.

Moreover, the proceedings for prosecution against the above named persons are under progress in the Court of law and as such disclosure of the information sought would impede the process of prosecution of the case. Hence, the exemption u/s 8(1) (h) from disclosure of information has been correctly applied.[85]

(h) Information which would impede the process of investigation or apprehension or prosecution of offenders;

First Information Report

The Supreme Court in *Youth Bar Association of India Versus Union of India and Others* (Writ Petition (Crl.) No.68 of 2016, 7 Sep.2016) held the First Information Reports to be uploaded on the Internet except in a few sensitive cases:

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[83] CIC/AT/A/2005/0003-12 July, 2006.

[84] *Tanner and Gold Coast City Council* (231/04, 30 June 2004); Office of the Information Commissioner (Queensland) Informal Decision Summaries 2005/2006.

[85] 298/IC(A)/2006-21.9.2006

"(a) An accused is entitled to get a copy of the First Information Report at an earlier stage than as prescribed under Section 207 of the Cr.P.C.
(b) An accused who has reasons to suspect that he has been roped in a criminal case and his name may be finding place in a First Information Report can submit an application through his representative/agent/parokar for grant of a certified copy before the concerned police officer or to the Superintendent of Police on payment of such fee which is payable for obtaining such a copy from the Court. On such application being made, the copy shall be supplied within twenty-four hours.
(c) Once the First Information Report is forwarded by the police station to the concerned Magistrate or any Special Judge, on an application being filed for certified copy on behalf of the accused, the same shall be given by the Court concerned within two working days.

The aforesaid direction has nothing to do with the statutory mandate inhered under Section 207 of the Cr.P.C.

(d) The copies of the FIRs, unless the offence is sensitive in nature, like sexual offences, offences pertaining to insurgency, terrorism and of that category,
offences under POCSO Act and such other offences, should be uploaded on the police website, and if there is no such website, on the official website of the State Government, within twenty-four hours of the registration of the First Information Report so that the accused or any person connected with the same can download the FIR and file appropriate application before the Court as per law for redressal of his grievances. It may be clarified here that in case there is connectivity problems due to geographical location or there is some other unavoidable difficulty, the time can be extended up to forty-eight hours. The said 48 hours can be extended maximum up to 72 hours and it is only relatable to connectivity problems due to geographical location.

(e) The decision not to upload the copy of the FIR on the website shall not be taken by an officer below the rank of Deputy Superintendent of Police or any person holding equivalent post. In case, the States where District Magistrate has a role, he may also assume the said authority. A decision taken by the concerned police officer or the District Magistrate shall be duly communicated to the concerned jurisdictional Magistrate.

(f) The word 'sensitive' apart from the other aspects which may be thought of being sensitive by the competent authority as stated hereinbefore would also include concept of privacy regard being had to the nature of the FIR. The examples given with regard to the sensitive cases are absolutely illustrative and are not exhaustive.

(g) If an FIR is not uploaded, needless to say, it shall not ensure per se a ground to obtain the benefit under Section 438 of the Cr.P.C.

(h) In case a copy of the FIR is not provided on the ground of sensitive nature of the case, a person grieved by the said action, after disclosing his identity, can submit a representation to the Superintendent of Police or any person holding the equivalent post in the State.

The Superintendent of Police shall constitute a committee of three officers which shall deal with the said grievance. As far as the Metropolitan cities are concerned, where Commissioner is there, if a representation is submitted to the Commissioner of Police who shall constitute a committee of three officers. The committee so constituted shall deal with the grievance within three days from the date of receipt of the representation and communicate it to the grieved person.

(i) The competent authority referred to hereinabove shall constitute the committee, as directed herein-above,within eight weeks from today.

(j) In cases wherein decisions have been taken not to give copies of the FIR regard being had to the sensitive nature of the case, it will be open to the accused/his authorized representative/parokar to file an application for grant of certified copy before the Court to which the FIR has been sent and the same shall be provided in quite promptitude by the concerned Court not beyond three days of the submission of the application.

(k) The directions for uploading of FIR in the website of all the States shall be given effect from 15th Nov 2016."

Investigation in cases of vigilance related inquiries and disciplinary matters

High Court of Delhi in Amit Kumar Shrivastava Vs Central Information Commission on 05.02.2021 W.P.(C) 3701/2018 held as follows:

"[W]here a public authority takes recourse to Section 8 (1) (h) of the RTI Act to withhold information, the burden is on the public authority to show that in what manner disclosure of such information could impede the investigation. The word 'impede' would mean anything that would hamper or interfere with the investigation or prosecution of the offender.

It [CIC Order] notes that in criminal law, an investigation is completed with the filing of the charge sheet in an appropriate court by an investigating agency but in cases of vigilance related inquiries and disciplinary matters, the word 'investigation' used in Section 8 (1) (h) of the Act should be construed rather broadly and should include all enquiries, verification of records, and assessments. In all such cases, the enquiry or the investigation should be taken as completed only after the competent authority makes a prima facie determination about presence or absence of guilt on receipt of the investigation/enquiry report from the

investigating/enquiry officer. Based on the said position, the impugned order has accepted the plea of the respondent and disallowed the information under Section 8

(1) (h) of the RTI Act.

[C]ogent reasons have to be given by the public authority as to how and why the investigation or prosecution will get impaired or hampered by giving the information in question. In the impugned order, there is no attempt made whatsoever to show as to how giving the information sought for would hamper the investigation and the on-going disciplinary proceedings. The impugned order concludes that a charge sheet has been filed in the criminal case by the CBI but in the disciplinary proceedings the matter is still pending. Based on this fact simplicitor the impugned order accepts the plea of the respondent and holds that the Section 8 (1) (h) is attracted and the respondents are justified in not giving information to the petitioner. No reasons are spelt out as to how the investigation or prosecution will be hampered."

Investigation in Criminal cases

High Court of Delhi in **Director of Income Tax (Investigation) and Ors. vs. Bhagat Singh & Ors.** MANU/DE/9178/2007 held as follows:

"Under Section 8(1)(h) information can be withheld if it would impede investigation, apprehension or prosecution of offenders. It is for the appellant to show how and why investigation will be impeded by disclosing information to the appellant. General statements are not enough. Apprehension should be based on some ground or reason."

High Court of Delhi in **Additional Commissioner of Police (Crime) v. CIC** W.P.(C) No. 7930 of 2009 held as follows:

Interpretation placed by the Delhi High Court in W.P.(**C) No. 7930 of 2009 [Additional Commissioner of Police (Crime) v. CIC**, decision dated 30th November 2009] that the word "impede" would "mean anything which would hamper and interfere with the procedure followed in the investigation and have the effect to hold back the progress of investigation", it has still to be demonstrated by the public authority that the information if disclosed would indeed "hamper" or "interfere" with the investigation.

However, disclosure of post mortem reports at this stage when investigation is in progress even without names of the doctors falls in a different category. It has been explained that post mortem reports contains various details with regard to nature and type of injuries/wounds, time of death, nature of weapons used, etc. Furnishing of these details when investigation is still in progress is likely to impede investigation and also prosecution of offenders. It is the case of the petitioners that enquiries/investigation are in progress and further arrests can be made. Furnishing

of post mortem report at this stage would jeopardize and create hurdles in apprehension and prosecution of offenders who may once information is made available take steps which may make it difficult and prevent the State from effective and proper investigation and prosecution.

Process of investigation

…the Department cannot take a plea of continuing investigation when the charge sheet has been served on the appellant.[86]

Process of investigation

Delhi Police received a request for:

- result / Status of a particular case
- date wise details of each and every investigational steps taken to solve the case

CIC accepted the merit of the police authority's contention:

An open ended order by CIC to disclose any information pertaining to details of investigation into a crime will have serious implications for law enforcement and will have potentiality for misuse by criminal elements.

Each case will have to be examined independently on the basis of facts specific to that case. In RTI requests pertaining to the law enforcement authorities, it becomes necessary to strike a fine balance between the imperatives of the confidentiality of the sources of information witness protection and so on, with the right of the citizen to get information.[87]

Report of the board of enquiry

CIC held that the relationship between the Enquiry Officer and the authority ordering enquiry was one of trust and confidence and thus being fiduciary where disclosure of information is exempt. CIC observed as follows:

"It is a matter of fact that the report was submitted by Shri S.K. Nafri [who headed the Board of Enquiry] as a confidential document to the OFB [Ordnance Factory Board]. Insofar as Shri Nafri's report was submitted in the belief that it would be treated by the OFB as a confidential document, the AA was right in holding that the relationship between the Enquiry Officer and the authority ordering enquiry was one of trust and confidence and thus being fiduciary would attract the exemption under Section 8(1)(e).

[86] CIC/MA/C/2005/2006-4 July, 2006.

[87] CICAT/A/2006/00071 - 11 May, 2006.

Apart from the above, it is also to be noted that Shri Nafri, as the head of the Board of Enquiry, had examined several witnesses who had given their statements to him in the strictest confidence, in the belief that these would not be made public. In case, the enquiry report is divulged, it would not be possible to keep secret the names of the deponents who, besides being deeply embarrassed, could also face intimidation and threats to their personal safety. Disclosure of the entire report would also have the impact of interfering with the investigation which the public authority may consider launching. … It is held that there is no obligation on the part of the PIO to disclose the entire Shri S.K. Nafri's BOE report dated 15.10.2005. However, only the conclusions part of the report, after deleting any names that might appear there, may be disclosed to the appellant.[88]

Enquiry

…[I]f a complaint is under enquiry, information/documents connected with the enquiry could be withheld till the enquiry is completed in term of Section 8(1)(h).[89]

… [W]hatever enquiry had been conducted on the basis of the complaints of the appellant, copies of the enquiry reports, if action has been completed on them, to be given to the appellant.[90]

Law enforcement records

U.S. Supreme Court opined that records compiled for law enforcement purposes do not lose their exempt status when they are incorporated into records compiled for purposes other than law enforcement.[91]

Terrorism and FOI

Utah District Court (US) upheld withholding of inundation maps of Hoover and Glen Canyon Dam:

Since FOIA does not have a "terrorism" exemption per se, the government has cobbled together several different exemptions, particularly Exemption 2, which can be used to withhold information where disclosure would allow for circumvention of a law or regulation, and several subsections of Exemption 7, particularly 7(E), protecting information pertaining to investigative methods and techniques, and 7(F), which allows an agency to withhold records where disclosure could endanger the safety of an individual. The judge in Los Angeles accepted Customs' speculation, upholding its claims under both 7(E) and Exemption 2.

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[88] CIC/AT/A/2006/00314--9.10.2006

[89] 127/ICPB/2006-17.10.2006

[90] PBA/06/108--9.10.2006

[91] U.S. Supreme Court *in FBI v. Abrabson*, 456 U.S.615 (1982)

Living Rivers involved a request by a local environmental group for flood inundation maps for Hoover and Glen Canyon Dams, showing the potential consequences if either dam failed.

The Bureau of Land Reclamation provided an affidavit from its Director of Security, Safety and Law Enforcement (a position created after Sept. 11), in which he referred to a dam failure as a "weapon of mass destruction." The judge accepted Exemption 7(F), noting that the agency's "statements concerning risk assessment by terrorists demonstrate that release of the maps could increase the risk of an attack on the dams."[92]

Investigation

An applicant in Australia, sought access to a "running sheet" that was prepared by the respondent during its investigation into the death of the applicant's wife (the applicant was convicted of the murder of his wife and was serving a term of imprisonment). The matter in issue related mainly to persons whom the respondent had contacted, or obtained information from, in the course of its investigation. Applying the principles stated in *Re Pearce and Queensland Rural Adjustment Authority* (1999) 5 QAR 242 and *Re Stewart and Department of Transport* (1993) 1 QAR 237, AC Moss was satisfied that the matter in issue was properly to be characterised as information concerning the personal affairs of the relevant persons, and was *prima facie* exempt from disclosure under s.44 (1) of the FOI Act. AC Moss then considered the public interest arguments raised by the applicant in favour of disclosure of the matter in issue and decided that disclosure would not, on balance, be in the public interest.[93]

Documents relating to an investigation

An applicant in Australia sought access to documents relating to an investigation by the respondent into allegations of official misconduct. The documents in issue comprised an investigation report, correspondence, and tape-recorded interviews and written summaries of interviews prepared during the investigation. With respect to matter in issue that would identify persons who had made complaints to the respondent, or who had provided the respondent with information during the course of its investigation, AC Moss decided that such matter concerned the personal affairs of those persons and therefore was *prima facie* exempt from disclosure under s.44 (1) of the FOI Act, subject to the application of the public interest balancing test incorporated within s.44 (1).

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[92] *Living Rivers v United States Bureau of Reclamation*, 272F. supp. 2d1313(D.utah 2003)

[93] 'RCH' and Queensland Police Service (451/03, 31 May 2004); Office of the Information Commissioner (Queensland) Informal Decision Summaries 2005/2006.

AC Moss considered that the public interest in protecting the privacy of the persons concerned, together with the strong public interest in protecting the continued flow of information to law enforcement agencies from concerned members of the community regarding allegations of possible wrongdoing, outweighed any public interest considerations weighing in favour of disclosure to the applicant of the matter in issue. AC Moss therefore decided that disclosure of the matter in issue would not, on balance, be in the public interest and that it therefore qualified for exemption under s.44(1) of the FOI Act.[94]

CIC on investigation

According to the appellant, relying on Cr.P.C., the term "investigation" would mean criminal investigation which may result in apprehension or prosecution of offenders… and departmental proceedings cannot be considered to be investigation to deny documents sought for by him applying the provisions of Section 8(1)(h) of the Act.

It is true that the term "investigation" has not been defined in the RTI Act. When a statute does not define a term, it is permissible to adopt the definition given in some other statute. If different definitions are given in different statutes for a particular term, then the one which could be more relevantly adoptable should be adopted taking into account the object and purpose of the Statute in which the definition is not available…the term "investigation" in respect of government officials could mean both investigation by the CBI, which could be termed as criminal investigation as well as investigation by the Department. the Division Bench decision of this Commission in *Shri Gobind Jha Vs Army Hqrs.* [95]In that case, the appellant sought for various information including a copy of the report of investigation carried out on the basis of his complaint. The CPIO and AA declined to furnish a copy of the report applying the provisions of Section 8(1) (h) of the Act. Examining the provisions of Section 8(1) (h) of the Act, the Division Bench observed

"While in criminal law, an investigation can be said to be completed with the filing of charge sheet in the appropriate court by an investigating agency, in cases of vigilance related inquiries, misconduct and disciplinary matters, the investigation can be said to be over only when the competent authority makes a determination about the culpability or otherwise of the person or persons investigated against. In that sense, the word 'investigation' used in Section 8(1)(h) should be construed rather broadly and should include all inquiries, verification of records,

[94] (411/03, 2 June 2004); Office of the Information Commissioner (Queensland) Informal Decision Summaries 2005/2006.

[95] (CIC/80/2006/ 00039 dated 1.6.2006).

assessments and so on which may be ordered in specific cases. In all such matters, the inquiry or investigation should be taken as completed only after the competent authority makes a prima facie determination about the presence or absence of guilt on receipt of the investigation/inquiry report from the investigation/inquiry officer".

Thus, from this decision, it is apparent that this Commission has not viewed the term 'investigation' as used in Section 8(1)(h) to apply exclusively to criminal investigation as propounded by the appellant in the present case. Therefore, the contention of the appellant that only when criminal investigation is pending, the provisions of Section 8(1)(j) could be applied, has to fail.

In *Shri D.L.Chandhok Vs. Central Wharehousing Corporation (Appeal No.)*[96], this Commission has held that - "*the term 'investigation' would include inquiries/search/scrutiny which would be either departmental or criminal and therefore when a departmental inquiry is on, the information sought in relation to such an inquiry can be denied in terms of Section 8(1)(h) of the Act".*[97]

Investigations in vigilance related cases

While in criminal law, an investigation can be said to be completed with the filing of the charge sheet in an appropriate court by an investigating agency, in cases of vigilance related enquiries, misconduct and disciplinary matters, the investigation can be said to be over only when the competent authority makes a determination about the culpability or otherwise of the person or persons investigated against. In that sense, the word investigation used in Section 8(1)(h) of the Act should be construed rather broadly and should include all enquiries, verification of records, assessments and so on which may be ordered in specific cases. In all such matters, the enquiry or the investigation should be taken as completed only after the competent authority makes a prima-facie determination about presence or absence of guilt on receipt of the investigation/enquiry report, from the investigation/enquiry officer.

There is another aspect to this matter. If for the sake of argument, it is agreed that the report of investigation in any matter can be disclosed immediately after the officer investigating the cases concludes his investigation and prepares the report which, let us assume, impeaches the conduct of a given officer. In case the competent disciplinary authority agrees with the findings of the investigating officer, disclosure of the report even before a final decision by the competent authority would be inconsequential. There shall be problem, however, if the disciplinary/appointing authority chooses to disagree with the findings of the

[96] 121/ICPP/ 2006 dated 9.10.06

[97] 243,244/ICPB/2006-December 27,2006

investigating officer. Early disclosure of the investigation report in such a case, besides being against the norms of equity, would have caused irretrievable injury to the officer/person's (who would have been the subject of investigation) standing and reputation. His demoralisation would be thorough.

In exempting from disclosure matters pertaining to an on-going investigation (Section 8 (1) (h)), the RTI Act besides other reasons, also caters to the possible impact of the disclosure of such information on the public servants' morale and their self-esteem. There are, thus, weighty reasons for such a provision in the exemption clauses of the RTI Act.

We are keenly aware that one of the purposes of the enactment of the RTI Act is to combat corruption by improving transparency in administration. This objective should be achieved without impairing the interest of the honest employee. Premature disclosure of investigation-related information has the potentiality to tar the employee's reputation, permanently, which cannot be undone even by his eventual exoneration. The balance of advantage thus, lies in exempting investigations/enquiries in vigilance, misconduct or disciplinary cases, etc. from disclosure requirements under the Act, till a decision in a given case is reached by the competent authority. This also conforms to the letter and the spirit of Section 8 (1) (h) of the RTI Act.

There is one other factor that also needs some reflection. Disclosure of an investigation/enquiry report (as demanded in this case by the appellant) even before its acceptance/rejection by a given competent authority will expose that authority to competing pressures which may hamper cool reflection on the report and compromise objectivity of decision-making.…in investigations in vigilance related cases by CVOs or by departmental officers, as well as in all cases of misconduct, misdemeanour,etc., there should be an assumption of continuing investigation till, based on the findings of the report, a decision about the presence of a prima-facie case, is reached by a competent authority. This will, thus, bar any premature disclosure, including disclosure of the report prepared by the investigating officer, as in this case.[98]

Statement made to CBI

CIC held that the requester can approach the court for any documents/information required by her for the purpose of defense in a pending trial. CIC observed as follows:

"…appellant has largely asked for copies of the recorded statement made [to CBI] by different persons, which in any case cannot be given unless their concurrence is

[98] CIC/AT/A/2006/00039-1.6.2006

obtained, as such statements are made in fiduciary capacity. As the matter is pending before the trial court for adjudication, the appellant would surely get an opportunity to defend herself and she would be provided with all the required documents for her effective defense. The appellate authority has rightly observed that she can approach the court for any documents/information required by her for the purpose of defense. Thus, the CPIO and the appellate authority have correctly applied exemption u/s 8(1)(h) for disclosure of the information sought for by the appellant."[99]

(i) cabinet papers including records of deliberations of the Council of Ministers, Secretaries and other officers:
Provided that the decisions of Council of Ministers, the reasons thereof, and the material on the basis of which the decisions were taken shall be made public after the decision has been taken, and the matter is complete, or over:
Provided further that those matters which come under the exemptions specified in this section shall not be disclosed;

Cabinet papers

The CIC in *Ujwala Kokde VS. CPIO, Ministry of Home Affairs, Judicial Division, Delhi* (CIC/MHOME/A/2017/609431; 12 Jun, 2019) held as follows:

"The appellant filed an application under the Right to Information Act, 2005 (RTI Act) before the Central Public Information Officer (CPIO), Judicial Division, Ministry of Home Affairs, New Delhi seeking information on seven points pertaining to mercy petition of her son Pradeep Yeshwanth Kokde who is a death row convict lodged at Yerwada Central Jail, including, inter-alia (i) copy of any memo/note/ comment made in relation to the mercy petition filed by Pradeep Yeshwanth Kokde, (ii) copy of the entire mercy petition file of Pradeep Yeshwanth Kokde, and (iii) copy of the file notings pertaining to the file of the mercy petition filed by Pradeep Yeshwanth Kokde.

The appellant filed a second appeal on the ground that the CPIO denied the information under Article 74(2) of Constitution of India and that the FAA did not respond to her appeal. The appellant stated that what is protected against disclosure under clause (2) of Article 74 of the Constitution is only the advice tendered by the Council of Ministers and that the information sought by her does not pertain to Ministerial Advice which is protected under Article 74(2) of the Constitution. Decision

[99] 250/IC(A)/2006-7.9.2006

The Commission, after hearing the submissions of both the parties and perusing the records, notes that Article 74(2) of the Constitution of India reads as under:

"74. Council of Ministers to aid and advise President.-(1) There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President who shall, in the exercise of his functions, act in accordance with such advice.

Provided that the President may require the Council of Ministers to reconsider such advice, either generally or otherwise, and the President shall act in accordance with the advice tendered after such reconsideration.

The question whether any, and if so what, advice was tendered by Ministers to the President shall not be inquired into in any court."

The Hon'ble Supreme Court in S.R. Bommai vs Union Of India : 1994 AIR 1918 on 11 March, 1994 had observed:

"33. Before I deal with the said issue I may dispose of the question whether the provision of Article 74(2) of the Constitution permits withholding of the reasons and material forming the basis for the ministerial advice tendered to the President. … Article 74(2) then provides that "the question whether any, and if so what, advice was tendered to the President shall not be inquired into in any Court". What this clause bars from being inquired into is "whether any, and if so what, advice was tendered" and nothing beyond that. This question has been elaborately discussed by my learned colleagues who have examined in detail its pros and cons in their judgments and, therefore, I do not consider it necessary to traverse the same path. It would suffice to say that since reasons would form part of the advice, the Court would be precluded from calling for their disclosure but I agree that Article 74(2) is no bar to the production of all the material on which the ministerial advice was based. Of course the privilege available under the Evidence Act, Sections 123 and 124, would stand on a different footing and can be claimed dehors Article 74(2) of the Constitution."

Further, Seven Judges of the Supreme Court in S.P. Gupta and Ors. v. President of India and Ors. : AIR 1982 SC 149 have examined and interpreted Article 74(2) of the Constitution of India. The Apex Court has lucidly explained in para 60 of the judgment as under:

"60....But the material on which the reasoning of the Council of Ministers is based and the advice is given cannot be said to form the part of advice. The point we are making may be illustrated by taking the analogy of a judgment given by a Court of Law. The judgment would undoubtedly be based on the evidence led before the Court and it would refer to such evidence and discuss it but, on that account, can it be said that the evidence forms part of the Judgment? The judgment would consist only of the decision and the reasons in support of it and the evidence on which the reasoning and the decision are based would not be part of the judgment. Similarly

the material on which the advice tendered by the Council of Ministers is based cannot be said to be part of the advice and the correspondence exchanged between the Law Minister, the Chief Justice of Delhi and the Chief Justice of India which constituted the material forming the basis of the decision of the Central Government must accordingly he held to be outside the exclusionary rule enacted in Clause (2) of Article 74."

Moreover, regarding the documents/material which do not form a part of the advice and the consequent disclosure of the same in the interest of justice, the Hon'ble Delhi High Court in Union of India vs. P.D. Khandelwal case [W.P. (C) 8396 of 2009, judgment dated 30.11.2009] had also held:

"34. Possibly the only class of documents which are granted immunity from disclosure is those mentioned under Article 74(2) of the Constitution. These are documents or information which are granted immunity from disclosure not because of their contents but because of the class to which they belong. Other documents and information which do not fall under Article 74(2) of the Constitution cannot be held back on the ground that they belong to a particular class which is granted absolute protection against disclosure. All other documents/information is not granted absolute or total immunity. Protection from disclosure is decided by balancing the two competing aspects of public interest i.e. when disclosure would cause injury or unwarranted invasion of privacy and on the other hand if non-disclosure would throttle the administration of justice or in this case, the public interest in disclosure of information. In such cases, the Court/CIC has to decide, which of the two public interests pre-dominates."

The Commission in the case of Shri Subhash Chandra Agrawal Vs. Ministry of Home Affairs, New Delhi (Appeal No. CIC/SS/A/2012/000051, dated 12.04.2012) has held:

"15. The Commission is of the view that the ratio of its earlier decision in Mayilsamy K (supra) squarely applies to the facts of the present case. File notings and correspondence in relation to mercy petitions, as sought by the Appellant, reflect the material on the basis of which advice and recommendations are made by the MHA to the President of India and thus, fall under the category of information which is not barred by Article 74(2) of the Constitution of India. Information comprising of file notings and correspondences, as exchanged between MHA and President's Secretariat in relation to mercy petitions, has to be tested on the touchstone of Section 8 of the RTI Act and it has to be assessed whether the disclosure of such information is exempted under any of the clauses of Section 8 of the RTI Act."

In view of the above, the Commission notes that the file noting and correspondence received or sent by the Ministry of Home Affairs pertaining to the appellant's mercy petition which is not a part of the Ministerial advice to the President as well as the file noting relating to the file of the mercy petition file by Shri Pradeep Yeshwanth Kokde as sought by the appellant can be provided to the appellant. The Commission, however, observes that the file noting and the correspondence could contain the names of the officials recording the same, the disclosure of which would endanger the life or physical safety of these officials and hence its disclosure is exempted under Section 8(1)(g) of the RTI Act. In view of this, the Commission directs the respondent to provide the information sought for, after severing all the names and other references which could reveal the identities of the public officials concerned, to the appellant within a period of four weeks from the date of receipt of a copy of this order under intimation to the Commission."

Cabinet papers

CIC in *Venkatesh Nayak v. Dep't of Personnel & Training (DOPT)*[100] held as follows:

It is only when proposals formulated are actually taken up for consideration by the Cabinet that they become so exempt. In other words, when a Cabinet Note is finally approved for submission to the Cabinet through the Cabinet Secretariat Sec 8 (1) (i) will apply … exemption u/s 8 (1) (i) will apply only when a Note is submitted by the Ministry that has formulated it to the Cabinet Secretariat for placing this before the Cabinet.

Arvind Kejriwal, as a social activist, sought from the Ministry of Commerce & Industry, information in respect of the policy for allowing FDI in retail sector. CIC held:

In terms of Section 8(1)((i), Cabinet decisions, the reasons thereof and the material on which the decisions were taken shall be made public after the decision is taken and the matter is complete except those covered under any of the exemptions in Section 8. Since in the present case, decision on FDI in Single Brand Retailing has been taken and also notified and no exemption is sought under Section 8, the CPIO or the AA could have furnished that portion of the Cabinet note relating to this matter and also the decision of the Cabinet on the same, by applying the principle of severability as provided in Section 10(1). Therefore I direct the CPIO to provide, within 15 days, that portion of the Cabinet note dealing with FDI in Single Brand Retailing along with a copy of the file noting on the basis of which the same was included in the Cabinet note and the related decision of the Cabinet.

[100] Adjunct to Complaint No. CIC/WB/C/2010/000120, Decision on 30 Aug. 2010.

In so far as the information relating to FDI in retailing is concerned, as agreed to by the CPIO during the hearing, the appellant be given inspection of the relevant file/files at a mutually agreed time, with the liberty to the appellant to take copies on payment of usual fees.[101]

Cabinet papers

Section 8(1)(i) of the RTI Act is under the heading "exemptions" and makes interesting reading. This sub-section provides for exemption to cabinet papers "including records of deliberations of the Council of Ministers, Secretaries and other officers". Here the term "including", may be construed to mean that the deliberations (a) of the Council of Ministers, (b) of the Secretaries and (c) of other officers are all exempted from disclosure-requirement, independent of each other, that is to say that not only the deliberations of the Secretaries and other officers pertaining to cabinet papers, but also their deliberations unconnected with the cabinet papers are exempted. Thus this exemption extends to (i) cabinet papers (ii) deliberations of (a) Council of Ministers (b) Secretaries and (c) other officers. This would effectively mean that all decisions of the Council of Ministers and the material related thereto shall be disclosed after the decision under the first proviso of this sub-section. But, the wordings of the first proviso makes no such disclosure stipulation for the deliberations of the Secretaries and other officers, whether connected or unconnected with the cabinet papers, or the decisions of the Council of Ministers.

A Public Authority shall be, arguably, within its right to take a view that all deliberations of Secretaries and other officers shall be barred from disclosure under this sub-section. The 'material' connected with the Council of Ministers' decision shall be disclosed but the deliberations of the officers, Secretaries etc. shall not be disclosed unless they answer affirmatively to the query "Are these material connected with a cabinet decision?"

The other interpretation is that this sub-section and the provisos deal only with the decisions of the Council of Ministers, cabinet papers and all official deliberations connected with the decisions of the Council of Ministers. Therefore, this sub-section cannot be invoked for exemption of official deliberations unconnected with cabinet papers or the decisions of the Council of Ministers. [102]

[101] 132/ICPB/2006-19.10.2006

[102] CIC/AT/A/2006/00145-13 July, 2006.

Cabinet papers

"On the question of disclosure of cabinet papers, particularly when the action has been taken and the matter is over, the contention of the CPIO and appellate authority that section 8(1) (i) of the Act is applicable as the matter is sub judice, is not tenable. The Act is clear on this issue, which states that:

"The material on the basis of which the decisions were taken shall be made public after the decision has been taken, and the matter is complete or over".

In so far as action taken by the DOT, DOPT and ACC on the appointment of Shri Sinha [as the Chairman-cum-Managing Director of MTNL], the matter is complete and over, the information sought may therefore be disclosed." [103]

"If the relevant records and papers are available and the matter was dealt with by the Cabinet in 1991-92, it ought to be treated as the decision has been taken and the matter is complete, in which case all the relevant papers should be disclosed. Thus, the exemption u/s 8(1) (i) would not be applicable."[104]

(j) information which relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the Central Public Information Officer or the State Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information:

Provided that the information, which cannot be denied to the Parliament or a State Legislature shall not be denied to any person.

'Colon'ial legacy:

There has been a concern whether the proviso, "Provided that the information, which cannot be denied to the Parliament or a State Legislature shall not be denied to any person.", at the end of sub-section (1) of section 8 applies to all the clauses (a) to (j) or just clause (j).

The Right to Information Bill, 2004 (Bill No. 107 of 2004), as introduced in the Lok Sabha, on 23 December 2004, had an additional sub-clause (2). Thus Clause 8,in the Bill, contained four sub-clauses:

(*j*) information which relates to personal information, the disclosure of which has no relationship to any public activity or interest or which would cause unwarranted invasion of the privacy of the individual:

Provided that such information may be disclosed, if the Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information.

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[103] 76/IC(A)/2006-3 July,2006.

[104] 72 /IC(A)/2006-26 June,2006.

(*2*) Information which cannot be denied to Parliament or Legislature of a State, as the case may be, shall not be denied to any person.

The Minister of State in the Ministry of Personnel, Public Grievances and Pensions, moving the RTI Bill in the Lok Sabha on 10 May 2005, stated as follows:

"The Bill was referred to the Departmentally-related Parliamentary Standing Committee, and its Report was laid on the Table of this House on 21 March 2005. Besides, the Committee, which made certain key recommendations, the Government also received valuable suggestions from the National Advisory Council, headed by Shrimati Sonia Gandhi. The Government has been greatly benefited by these proposals. In our sincere endeavour to provide the ordinary citizen with an easy and effective access to public information, the Government has accepted a majority of these suggestions.

The notice for official amendments has been circulated to all Hon. Members, and they would agree with me that the amendments go a long way in strengthening the information regime, and in making the Right to Information substantive, and meaningful."

The Minister stated that "the amendments go a long way in strengthening the information regime, and in making the Right to Information substantive, and meaningful". But one of the amendments proposed by the Government i.e. Amendment No.44, the intention of which was not easily noticeable, was targeted to weaken the strongest provision of the Bill introduced in the Parliament. In that amendment, a 'colon' was cleverly inserted between two separate sentences which would otherwise raise the power of a common person to ask questions to the level of an M.P.

As per the statement by the Minister, the Government accepted suggestions for amendments from two known quarters:

- National Advisory Council (NAC)
- Parliamentary Standing Committee

Surprisingly, neither of them recommended the disputed 'colon'. Then who recommended it? All the communications sent by the NAC are in public domain, accessed at <http://pmindia.nic.in/nac/correspondence2.htm> and draft of amendments proposed by the NAC is available at <http://pmindia.nic.in/nac/communication/draft_rti.pdf>, in which there was a period at the end of clause (j). Nowhere did the NAC propose the insertion of the colon instead of a full stop at the end of clause (j):

(j) information which relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the Information Officer or the

appellate authority, as the case might be, is satisfied that the larger public interest justifies the disclosure of such information.

Provided that the information, which cannot be denied to the Parliament or a State Legislature, shall not be denied to any person.

Notwithstanding anything in the Official Secrets Act 1923 nor any of the exemptions permissible in accordance with section 8 (1), a public authority may allow access to information, if public interest in disclosure outweighs the harm to the protected interests.

Department Related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice's third Report on the Right to Information Bill, 2004 along with the Right to Information Bill, 2004 (As amended by the Standing Committee) was tabled in the Lok Sabha on 21 March 2005. The Bill has a separate sub-clause (2):

> (*f*) information not related to operations of appropriate Government or its instrumentalities and disclosure of which would constitute a clear unwarranted invasion of privacy of an individual.

(*2*) Information which cannot be denied to Parliament or Legislature of a State, as the case may be, shall not be denied to any person.

Let us see what happened on 11 May,2005, in the Lok Sabha:

MR. SPEAKER : The House will now take up clause-by-clause consideration of the Bill.

SHRI SURESH PACHAURI : Sir, I beg to move:

44. Page 6, *for* lines 12 to 48, *substitute-*

"8. (1) Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen,—

(j)information which relates to personal information the disclosure of which has not relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the Central Public Information Officer or the State Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information:

Provided that the information, which cannot be denied to the Parliament or a State Legislature shall not be denied to any person.

(2) Notwithstanding anything in the Official Secrets Act, 1923 nor any of the exemptions permissible in accordance with sub-section (1), a public authority may allow access to information, if public interest in disclosure outweighs the harm to the protected interests.

MR. SPEAKER : Now, I shall put amendment No. 44 moved by Shri Suresh Pachauri to clause 8, to the vote of the House.

The question is :

44. Page 6, *for* lines 12 to 48, *substitute*—

"8. (1) Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen,—

(j)information which relates to personal information the disclosure of which has not relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the Central Public Information Officer or the State Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information:

Provided that the information, which cannot be denied to the Parliament or a State Legislature shall not be denied to any person.

(2) Notwithstanding anything in the Official Secrets Act, 1923 nor any of the exemptions permissible in accordance with sub-section (1), a public authority may allow access to information, if public interest in disclosure outweighs the harm to the protected interests.

The motion was adopted.

Does it really matter?

What information can be denied to the Parliament? Members of the Parliament seek information through Questions. Let us have glance at the following Rules of Procedure and Conduct of Business in Lok Sabha:

Admissibility of questions

41. (1) Subject to the provisions of sub-rule (2), a question may be asked for the purpose of obtaining information on a matter of public importance within the special cognizance of the Minister to whom it is addressed.

(2) *The right to ask a question* is governed by the following conditions, namely:–

(vi) it *shall not ask* as to the character or conduct of any person except in his official or public capacity;

(x) it *shall not reflect* on the character or conduct of any person whose conduct can only be challenged on a substantive motion;

(xi) it *shall not* make or imply a charge of a personal character;

Rules to be observed while speaking

352. A member while speaking shall not-

(v)reflect upon the conduct of persons in high authority unless the discussion is based on a substantive motion drawn in proper terms;

Explanation:-The words 'persons in high authority' mean persons whose conduct can only be discussed on a substantive motion drawn in proper terms under the Constitution or such other persons whose conduct, in the opinion of the Speaker, should be discussed on a substantive motion drawn up in terms to be approved by him;

(x) refer to Government officials by name; and

Procedure regarding allegation against any person

353. No allegation of a defamatory or incriminatory nature shall be made by a member against any person unless the member has given adequate advance notice to the Speaker and also to the Minister concerned so that the Minister may be able to make an investigation into the matter for the purpose of a reply:

Provided that the Speaker may at any time prohibit any member from making any such allegation if he is of opinion that such allegation is derogatory to the dignity of the House or that no public interest is served by making such allegation.

The Rules of Procedure and Conduct of Business in the Council of States (Rajya Sabha) impose similar restrictions on M.P.'s right to ask questions.

From the above Rules, it is clear that even the M.P.s cannot seek personal information in the Parliament. Clause (j) of sub-section (1) of Section 8 of the RTI Act states that there is no obligation to give any citizen personal information. So there is no need of the sentence, "Provided that the information, which cannot be denied to the Parliament or a State Legislature shall not be denied to any person", at the end of clause (j). Hence it can be interpreted that the sentence should apply to the whole sub-section (1) of Section 8.

Many requesters have strongly put forward the argument before the CIC that the information which cannot be denied to the Parliament shall not be denied to them. CIC, in a Decision, observed as follows:[105]

"He [appellant] further said that the following information cannot be denied to the public-

(i) information which can be given to Parliament;
(ii) information which are not covered under exemption clauses of Section 8;
(iii) information in larger public interest;"

The CIC never rejected the argument explicitly. Justice S. Ravindra Bhat aptly commented as follows:[106]

"A rights based enactment is akin to a welfare measure, like the Act [the Right to Information Act], should receive a liberal interpretation. …Adopting a different approach would result in narrowing the rights and approving a judicially mandated class of restriction on the rights under the Act, which is unwarranted."

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[105] CIC/AT/A/2006/00586. 18 Sep. 2007.

[106] The High Court of Delhi in *Bhagat Singh* v. *Chief Information Commissioner and Ors.*, WP(C) No. 3114/2007, Decided on: 3 Dec. 2007.

Parliament's right to know: what information can be denied to the Parliament?

S. 8(1) states that "information which cannot be denied to the Parliament or State Legislature shall not be denied to any person." What is that information that can be denied to the Parliament? Members of the Parliament seek information through Questions. Relevant Rules of Procedure and Conduct of Business in Lok Sabha are as follows:

Admissibility of questions

41. (1) Subject to the provisions of sub-rule (2), a question may be asked for the purpose of obtaining information on a matter of public importance within the special cognizance of the Minister to whom it is addressed.

(2) *The right to ask a question* is governed by the following conditions, namely:–

(v) it *shall not ask* for an expression of opinion or the solution of an abstract legal question or of a hypothetical proposition;

(vi) it *shall not ask* as to the character or conduct of any person except in his official or public capacity;

(viii) it *shall not* relate to a matter which is not primarily the concern of the Government of India;

(ix) it *shall not ask* about proceedings in the Committee which have not been placed before the House by a report from the Committee.

(x) it *shall not reflect* on the character or conduct of any person whose conduct can only be challenged on a substantive motion;

(xi) it *shall not* make or imply a charge of a personal character;

(xii) it *shall not raise* questions of policy too large to be dealt with within the limits of an answer to a question;

(xiii) it *shall not* repeat in substance questions already answered or to which an answer has been refused;

(xiv) it *shall not ask* for information on trivial matters;

(xv) it *shall not ordinarily ask* for information on matters of past history;

(xvi) it *shall not ask* for information set forth in accessible documents or in ordinary works of reference;

(xvii) it *shall not* raise matters under the control of bodies or persons not primarily responsible to the Government of India;

(xviii) it *shall not ask* for information on matter which is under adjudication by a court of law having jurisdiction in any part of India;

(xix) it *shall not* relate to a matter with which a Minister is not officially concerned;

(xx) it *shall not* refer discourteously to a friendly foreign country;

(xxi) it *shall not* seek information about matters which are in their nature secret, such as composition of Cabinet Committees, Cabinet discussions, or advice given to the President in relation to any matter in respect of which there is a constitutional, statutory or conventional obligation not to disclose information;
(xxii) it *shall not* ordinarily ask for information on matters which are under consideration of a Parliamentary Committee; and

(xxiii) it *shall not* ordinarily ask about matters pending before any statutory tribunal or statutory authority performing any judicial or quasi judicial functions or any commission or court of enquiry appointed to enquire into, or investigate, any matter but may refer to matters concerned with procedure or subject or stage of enquiry, if it is not likely to prejudice the consideration of the matter by the tribunal or commission or court of enquiry.

Questions on matters of correspondence between Government of India and State Governments

In matters which are or have been the subject of correspondence between the Government of India and the Government of a State, no question shall be asked except as to matters of fact, and the answer shall be confined to a statement of fact.

Availability of report to Government before presentation
A Committee may, if it thinks fit, make available to Government any completed part of its report before presentation to the House. Such reports shall be treated as *confidential* until presented to the House.

Printing, publication or circulation of report before presentation
The Speaker may, on a request being made to him and when the House is not in session, order the printing, publication or circulation of a report of a Committee although it has not been presented to the House. In that case the report shall be presented to the House during its next session at the first convenient opportunity.

PAPERS TO BE LAID ON THE TABLE
Papers quoted to be laid
If a Minister quotes in the House a despatch or other State paper which has not been presented to the House, he shall lay the relevant paper on the Table:
Provided that this rule shall not apply to any documents which are stated by the Minister to be of such a nature that their production would be inconsistent with public interest:
Provided further that where a Minister gives in his own words a summary or gist of such despatch or State paper it shall not be necessary to lay the relevant papers on the Table.

Authentication and treatment of papers laid

(1) A paper or document to be laid on the Table shall be duly authenticated by the member presenting it.

(2) All papers and documents laid on the Table shall be considered public.

Document containing advice or opinion disclosed to be laid

If, in answer to a question or during debate, a Minister discloses the advice or opinion given to him by any officer of the Government or by any other person or authority, he shall ordinarily lay the relevant document or parts of document containing that opinion or advice, or a summary thereof on the Table.[107]

Indian Data Protection Law

Clause (j) can be called Indian Data Protection law. Data Protection laws prevent unnecessary disclosure of personal information to others. In the US, Privacy Act is used to obtain personal information and Freedom of Information Act is used for obtaining other information. Similarly in the UK, Data Protection Act is used to obtain personal information and Freedom of Information Act is used for obtaining other information.

Separate Data Protection or Privacy law is necessary to obtain personal information related to the requester herself and at the same time to protect unnecessary disclosure to others. Individuals have a right of access to the information held about them. But when persons other than the individual whom it is about, seek such information, this sub-clause comes into play.

This is a qualified exemption. The PIO or the appellate authority can disclose information if they are satisfied that the larger public interest justifies such disclosure. But there are some restrictions on disclosure of information regarding victims of sexual offences and juveniles. Section 228A of the Indian Penal Code strictly prohibits disclosure of identity of a victim of sexual offence. It even imposes imprisonment up to two years.

Similarly, Section 74 of Juvenile Justice (Care and Protection of Children) Act, 2015 prohibits disclosure of identity of a juvenile. The name, address or school or any other particular, which may lead to the
identification of a child in conflict with law or a child in need of care and protection or a child victim or witness of a crime, involved in such matter, shall not be disclosed. "Child" means a person who has not completed eighteen years of age.

It is submitted that the RTI Act should have provided absolute exemption (without giving discretionary power to PIO to disclose information subject to public interest test) from disclosure of such information. Though the RTI Act has overriding effect

[107] <http://parliamentofindia.nic.in/ls/rules/rulep26.html>

on 'inconsistent' provisions of any other law (see section 22), s228A of the IPC and s.74 of the Juvenile Justice (Care and Protection of Children) Act, 2015 still prevail as they are consistent with s 8(1)(j). PIOs need not consider public interest test when they receive requests for such information.

Kerala High Court in November, 2006 directed the state government and the Director General of Prosecution to direct police officials to see that juvenile delinquents were not exposed to the media and warned that erring officials in this regard might face disciplinary proceedings apart from the provisions of [Section 74] of the Act.[108]

Section 228A of the IPC reads as follows:
"Section 228A. Disclosure of identity of the victim of certain offences etc [inserted by the Act 43 of 1983, sec. 2 (entered into force on 25 Dec.1983)]
(1) Whoever prints or publishers the name or any matter which may make known the identity of any person against whom an offence under section 376, section 376A, section 376B, section 376C, or section 376D is alleged or found to have been committed (hereafter in this section referred to as the victim) shall be punished with imprisonment of either description for a term which may extend to two years and shall also be liable to fine.

(2) Nothing in sub-section (1) extends to any printing or publication of the name or any matter which may make known the identity of the victim if such printing or publication is:-
(a) By or under the order in writing of the officer-in-charge of the police station or the police officer making the investigation into such offence acting in good faith for the purposes of such investigation; or

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[108] Kerala High Court directed the State Government to ensure that juveniles in conflict with the law should not be exposed to the public and said "media trial is more painful than judicial trial." While considering a suo motu petition, the division bench comprising Justice K S Radhakrishnan and Justice M N Krishnan directed the state government and the Director General of Prosecution to direct police officials to see that juvenile delinquents were not exposed to the media.

The court also warned that erring officials in this regard might face disciplinary proceedings apart from the provisions of [Section 74] of the Juvenile Justice Act. The court also directed District Collectors to give directions to district probationary officer to inform the press about the section 36 of the Act, while dealing with the Juvenile cases. The court said electronic and print media had given much publicity relating to a juvenile delinquent, who was charge sheeted for an offence under Section 302 IPC.

Following media reports, the Child Welfare Committee Chairman George Pulikuthiyil wrote a letter to the Chief Justice of Kerala seeking his intervention. On this basis, the court took the case suo motu. The court observed that exposure of both the accused and victim in the media during investigation was an agonising experience to the child and family members. [UNI, 29Nov.2006,<www.indlaw.com>]

(b) By, or with authorization in writing of, the victim; or
(c) Where the victim is dead or minor or of unsound mind, by, or with the authorization in writing of, the next of kin of the victim:
Provided that no such authorization shall be given by the next of kin to anybody other than the chairman or the secretary, by whatever name called, of any recognized welfare institution or organization.

Explanation: - For the purpose of this section, "recognized welfare institution or organization" means a social welfare institution or organization recognized in this behalf by the Central or State Government.

(3) Whoever prints or publishes any matter in relation to any proceeding before a court with respect to an offence referred to in sub-section (1) without the previous permission of such court shall be punished with imprisonment of either description for a term which may extend to two years and shall also be liable to fine.
Explanation: - The printing or publication of the judgment of any High Court or the Supreme Court does not amount to an offence within the meaning of this section."

Section 74 of the Juvenile Justice (Care and Protection of Children) Act, 2015 reads as follows:

"74. Prohibition on disclosure of identity of children.
(1) No report in any newspaper, magazine, news-sheet or audio-visual media or other forms of communication regarding any inquiry or investigation or judicial procedure, shall disclose the name, address or school or any other particular, which may lead to the identification of a child in conflict with law or a child in need of care and protection or a child victim or witness of a crime, involved in such matter, under any other law for the time being in force, nor shall the picture of any such child be published:

Provided that for reasons to be recorded in writing, the Board or Committee, as the case may be, holding the inquiry may permit such disclosure, if in its opinion such disclosure is in the best interest of the child.

(2) The Police shall not disclose any record of the child for the purpose of character certificate or otherwise in cases where the case has been closed or disposed of.

(3) Any person contravening the provisions of sub-section (1) shall be punishable with imprisonment for a term which may extend to six months or fine which may extend to two lakh rupees or both."

Personal information

The CIC Full Bench in *G.R. Rawal v Director General of Income Tax (Investigation)*[109] provided following guidelines on what constitutes 'personal information':

"In common parlance, the expression "personal information" is normally used for name, address, occupation, physical and mental status, including medical status, as for instance, whether a person is suffering from disease like diabetes, blood pressure, asthma, TB, Cancer etc. including the financial status of the person, as for instance, his income or assets and liabilities of self and other members of the family. The expression shall also be used with respect to one's hobbies like painting, music, sports etc. Most of these mentioned above are information personal to one and one may not like to share this with outsider. In this sense of the term, such information may be treated as confidential since one would not like to share it with any other person. However, there are circumstances when it becomes necessary to disclose some of this information if it is in larger public interest. Thus, for example, if there is a doubt about the integrity of any person occupying a public office, it may become necessary to know about one's financial status and the details of his assets and liabilities not only of the person himself but also of other close members of the family as well. Similarly, if there is an allegation about the appointment of a person to a public office where there are certain rules with regard to qualification and experience of the person who has already been appointed in competition with others, it may become necessary to make inquiries about the person's qualification and experience and these things may not be kept confidential as such.

It may not be possible to lay down exactly the circumstances in which personal information of an individual may be disclosed to others. This will depend on the facts of each case. No hard and fast rule can be laid down for this purpose. A case recently decided on 23.3.2007 by the Bombay High Court where the prisoner had to be admitted to Sir J.J. Hospital, Mumbai on the ground that he was suffering from diabetes and blood pressure may be referred to in this regard. The PIO did not order disclosure of his medical problem to those who thought that his admission into the air-conditioned rooms of the hospital, as against the tough conditions prevailing in the jail, was unjustified, and there was public outcry, including in the media against his admission in an air-conditioned hospital. PIO had refused information u/s 8(1) (j) of the RTI Act and under Regulations of the Medical Council of India. However, the High Court did not accede to this viewpoint. The

[109] CIC/AT/A/2007/00490, Decision dated 5 March 2008.

court ordered that the information relating to the convict patient be given after following procedure under Section 11 of the RTI Act.

The US Restatement of the Law, Second, Torts, § 652 define the intrusion into Privacy in the following manner:

"One, who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person."

The Law of Privacy although, not defined is, however, well recognized under the Indian legal system and it has all along been treated as a sacred right not to be violated unless there are good and sufficient reasons. Even under RTI, the normal rule should be of "non-disclosure of any information concerning one's private life" and disclosure should be ordered only when there is overriding public interest and in that case too, the procedure laid down under section 11 of the Act should be followed as held by the Bombay High Court in the above cited case.

Because we have no specific law on the subject, in such cases we have been guided by the UK Data Protection Act 1998 Sec 2 of which titled Sensitive Personal Data reads as follows:

In this Act "sensitive personal data" means personal data consisting of information as to:

a)The racial or ethnic origin of the data subject

b)His political opinions

c)His religious beliefs or other beliefs of a similar nature

d)Whether he is a member of a Trade Union

e)His physical or mental health or condition

f)His sexual life

g)The commission or alleged commission by him of any offence

h) Any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings.

If we were to construe privacy to mean protection of personal data, this would be a suitable reference point to help define the concept. In this context, as may be seen the information sought by appellant may fall within the definition of personal data as described in g) and h) above.

The interpretation of Section 8(1) (j) has been the subject of debate. The Section deals with excluding from the purview of the RTI Act (a) information of a personal nature which have had no relationship to a public activity or interest and (b) whose disclosure would lead to unwarranted invasion of the privacy.

In so far as (b) is concerned, there is very little doubt that there could be a set of information which may be said to belong to the exclusive private domain and hence not be liable to be disclosed. This variety of information can also be included as "sensitive and personal" information as in the U.K. Data Protection Act, 1998.

Broadly speaking, these may include religious and ideological ideas, personal preferences, tastes, political beliefs, physical and mental health, family details and so on.

But when the matter is about personal information unrelated to public activity, laying down absolute normative standards as touchstones will be difficult. This is also so because the personal domain of an individual or a group of individuals is never absolute and can be widely divergent given the circumstances. It is not possible to define "personal information" as a category which could be positively delineated; nevertheless it should be possible to define this category of information negatively by describing all information relating to or originating in a person as "personal" when it has such information has no public interface. That is to say, in case the information relates to a person which in ordinary circumstances would never be disclosed to anyone else; such information may acquire a public face due to circumstances specific to that information and thereby cease to be personal. It is safer that what is personal information should be determined by testing such information against the touchstones of public purpose. All information which is unrelated to a public activity or interest and, under Section 8(1) (j), if that information be related to or originated in person, such information should qualify to be personal information under Section 8(1) (j)."

Justice K.S. Puttaswamy (Retd.) v. Union of India

The RTI Act does not define the concept of "Personal Information". Majority of appeals filed before the Information Commissions revolve around the exemption on Personal Information. Decision makers have been facing difficulty in interpreting exemption under Section 8 (1)(j) in the absence of definition or explanation of personal information.

The Supreme Court in *Justice K.S. Puttaswamy (Retd.)* v. *Union of India*[110] held that "Privacy is a constitutionally protected right which emerges primarily from the guarantee of life and personal liberty in Article 21 of the Constitution" and "Informational privacy is a facet of the right to privacy."

The Supreme Court finally "commend[ed] to the Union Government the need to examine and put into place a robust regime for data protection." A nine-judge bench of the Supreme Court pronounced the judgment.

Committee of Experts under the Chairmanship of Justice B.N. Srikrishna drafted the Personal Data Protection Bill, 2018.

The Personal Data Protection Bill, 2019 has been introduced in the Loksabha. The Bill defines a few key terms, as follows:

[110] Writ Petition (Civil) No 494 of 2012 on 24 Aug.2017

"Personal data" means data about or relating to a natural person who is directly or indirectly identifiable, having regard to any characteristic, trait, attribute or any other feature of the identity of such natural person, whether online or offline, or any combination of such features with any other information, and shall include any inference drawn from such data for the purpose of profiling;

"sensitive personal data" means such personal data, which may, reveal, be related to, or constitute— (i) financial data; (ii) health data; (iii) official identifier; (iv) sex life; (v) sexual orientation; (vi) biometric data; (vii) genetic data; (viii) transgender status; (ix) intersex status; (x) caste or tribe; (xi) religious or political belief or affiliation; or (xii) any other data categorised as sensitive personal data under section 15.

"health data" means the data related to the state of physical or mental health of the data principal and includes records regarding the past, present or future state of the health of such data principal, data collected in the course of registration for, or provision of health services, data associating the data principal to the provision of specific health services;

Girish Ramchandra Deshpande Vs Central Information Commissioner and Ors.

The Supreme Court of India in *Girish Ramchandra Deshpande v. Central Information Commissioner and Ors.* (SLP (Civil) No. 27734 of 2012; judgement dated 3 October, 2012) held that Income Tax returns of an employee are personal information and exempt from disclosure. The Court observed as follows:

"We are in agreement with the CIC and the courts below that the details called for by the petitioner i.e. copies of all memos issued to the third respondent, show cause notices and orders of censure/punishment etc. are qualified to be personal information as defined in clause (j) of Section 8(1) of the RTI Act.

The performance of an employee/officer in an organization is primarily a matter between the employee and the employer and normally those aspects are governed by the service rules which fall under the expression "personal information", the disclosure of which has no relationship to any public activity or public interest. On the other hand, the disclosure of which would cause unwarranted invasion of privacy of that individual. Of course, in a given case, if the Central Public Information Officer or the State Public Information Officer of the Appellate Authority is satisfied that the larger public interest justifies the disclosure of such information, appropriate orders could be passed but the petitioner cannot claim those details as a matter of right."

The Supreme Court further held that such information could be disclosed only if it would serve a larger public interest.

Selection process

The selection to any post in the public authority which involves thousands of candidates for written test and interview is certainly a matter larger public interest as the lives of thousands of candidates is at stake therefore the Commission is of view that such matters are of larger public interest.

If the public authorities deny furnishing information with regard to the selection process to any Govt. post it would certainly result in great injustice and frustration among the millions of jobless youth of this country. The amount of information sought in 6 (1) application under RTI Act, 2005 of the appellant is not voluminous as he is seeking marks obtained by himself and by the selected candidates that being so there should not be any difficulty in furnishing such information.[111]

DPC proposals

Attested copies of DPC proposals submitted to the Government for promotion of 4th Level Gazetted Posts as per … It may be mentioned here that the object of RTI Act, 2005 is to ensure transparency in the working of every public authority. Though in the instant case the 6(1) application under RTI Act, 2005 does not disclose that the information sought is in larger public interest. The Commission is of the considered view that the Public Information Officer ought to have followed the procedure under Sec. 11 of RTI Act, since the information relates to the third party and thereafter the Public Information Officer should have applied the procedure provided under Sec. 10 of The RTI Act, 2005 by furnishing the entire DPC proceedings proforma information used by the DPC. However the ACRs of the individuals involved in the above DPC shall not be furnished.[112]

Caste status

The Complainant wants to know the caste and religion of a certain doctor, who retired from the service, from the records, if available at the public authority.

Since the doctor retired about 15 years ago, his service register is not available with the public authority. However, after making a thorough search, on the insistence of the Commission, the PIO could produce an old record (register) which contains the doctor's caste status as 'XX' category.

Now the question to be decided is whether the caste of a person can be disclosed routinely?

Unfortunately, India is yet to enact a law on privacy. Privacy is yet to be recognized as a right in India, except a few judgments by the Supreme Court interpreting Article 21 of the constitution to be inclusive of 'right to privacy.'

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[111] APIC-Appeal No.6134/SIC-MR/2011, dated 03-05-2013

[112] APIC-Appeal No.9313/SIC-MR/2011, dated 20-04-2013

International experience on privacy law does not offer any help in this case, because 'caste' is not practised in any other country, except India. However information related to one's race, health, financial status and so on are treated as personal information.

We are aware of many news reports about suicides committed by students of top universities as a result of the humiliation allegedly faced by them merely because of their 'caste' status. On contrast, persons of the so called 'higher caste' deliberately let others know their caste to enjoy that status.

The Commission is of the view that 'caste' status of a person can be treated as personal information and exempt U/s 8(1)(j) unless the person herself is willing to disclose it to the world.

However, in the present case, the doctor used his 'caste' status for his initial appointment and got appointment under the quota reserved for that category. In such case the 'caste' 'status' enters into public domain.

U/s 4(1)(b), "even public authority, among other things, shall publish the following:

(xii) the manner of execution of subsidy programmes, including the amounts allocated and the details of beneficiaries of such programmes;

(xiii) Particulars of recipients of concessions, permits or authorizations granted by it;

Next question is whether the religions status of a person can be disclosed? In the present case, available records do not contain any information on this issue. Even then, the Commission opines that religious status of a person is personal information which need not be disclosed routinely. Therefore, the Commission directs the PIO to provide information related to caste status of the doctor as per the available records to the complainant.[113]

Medical records

The Appellant seeks medical records of a woman. Medical records fall under the category of "personal information" which is exempt from the disclosure under Section 8(1)(j), unless larger public interest justifies the disclosure of such information. The appellant is unnecessarily probing a teacher who availed maternity leave based on her medical reports. The Commission advises the appellant not to harass the teacher using Right to Information as a tool which was enacted to empower the common people.[114]

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[113] Complaint No. 11256/SIC-MVN/2012 Order dated 20-01-2014 (APIC)
[114] Appeal No. 5444/SIC-MVN/2012 Order dated: 24-02-2014 (APIC)

Meta request

The Appellant filed a meta request i.e. requesting information on earlier RTI requests filed by other citizens, such information (i.e. names & addresses of RTI applicants) falls under 'personal information' category and exempted from disclosure U/s 8(1)(j) of the RTI Act.

However, number of RTI application received by the public authority can be disclosed.[115]

Marks scored by selected candidates

The selection to any post in the public authority which involves thousands of candidates for written test and interview is certainly a matter larger public interest as the lives of thousands of candidates is at stake therefore the Commission is of view that such matters are of larger public interest. If the public authorities deny furnishing information with regard to the selection process to any Govt. post it would certainly result in great injustice and frustration among the millions of jobless youth of this country. The amount of information sought in 6 (1) application under RTI Act, 2005 of the appellant is not voluminous as he is seeking marks obtained by himself and by the selected candidates that being so there should not be any difficulty in furnishing such information. In the result the Commission directs the Public Information Officer to furnish the information sought by the appellant herein within 30 days from the date of receipt of this orders.[116]

Personal information

"Personal information" does not mean information relating to the information seeker, but about a third party. That is why, in the Section, it is stated "*unwarranted invasion of the privacy of the individual"*. If one were to seek information about himself or his own case, the question of invasion of privacy of his own self does not arise. If one were to ask information about a third party and if it were to invade the privacy of the individual, the information seeker can be denied the information on the ground that disclosure would invade the privacy of a third party. Therefore, when a citizen seeks information about his own case and as long as the information sought is not exempt in terms of other provisions of Section 8 of RTI Act, this section cannot be applied to deny the information."[117]

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[115] Appeal No. 15076/SIC-MVN/2012 Order dated 15-04-2014 (APIC)
[116] Appeal No.6134/SIC-MR/2011, dated 03-05-2013 (APIC)
[117] 80/ICPB/2006-28.8.2006

Whether employees are entitled to have access to their Annual Confidential Reports?

Yes.[118] The Supreme Court in *Dev Dutt v. Union of India and others,*[119] a case filed before the advent of the RTI Act, held as follows:

"We do not agree [with the submission of the learned counsel, that "a 'good' entry is not an adverse entry and it is only an adverse entry which has to be communicated to an employee."]. In our opinion every entry must be communicated to the employee concerned, so that he may have an opportunity of making a representation against it if he is aggrieved.

Learned counsel for the respondent submitted that under the Office Memorandum 21011/4/87 [Estt.'A'] issued by the Ministry of Personnel/Public Grievance and Pensions dated 10/11.09.1987, only an adverse entry is to be communicated to the concerned employee. It is well settled that no rule or government instruction can violate Article 14 or any other provision of the Constitution, as the Constitution is the highest law of the land. The aforesaid Office Memorandum, if it is

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[118] CIC had earlier decided in favor of non-disclosure of ACRs: In regard to the annual confidential report of any officer, it is our view that what is contained therein is undoubtedly 'personal information' about that employee. The ACRs are protected from disclosure because arguably such disclosure seriously harm interpersonal relationship in a given organization. Further, the ACR notings represent an interaction based on trust and confidence between the officers involved in initiating, reviewing or accepting the ACRs. These officers could be seriously embarrassed and even compromised if their notings are made public. There are, thus, reasonable grounds to protect all such information through a proper classification under the Official Secrets Act.

No public purpose is going to be served by disclosing this information. On the contrary it may lead to harming public interest in terms of compromising objectivity of assessment – which is the core and the substance of the ACR, which may result from the uneasiness of the Reporting, Reviewing and the Accepting officers from the knowledge that their comments were no longer confidential. These ACRs are used by the public authorities for promotions, placement and grading etc. of the officers, which are strictly house-keeping and man management functions of any organization. A certain amount of confidentiality insulates these actions from competing pressures and thereby promotes objectivity.

We, therefore, are of the view that apart from being personal information, ACRs of officers and employees need not be disclosed because they do not contribute to any public interest. It is also possible that many officers may not like their assessment by their superiors to go into the hands of all and sundry. If the reports are good, these may attract envy and if these are bad, ridicule and derision. Either way it affects the employee as well as the organization he works for. On balance, therefore, confidentiality of this information serves a larger purpose, which far out-strips the argument for its disclosure. (CIC/AT/A/2006/00069-13 July,2006).

[119] Civil Appeal No. 7631 of 2002, decided on 12.5.2008

interpreted to mean that only adverse entries are to be communicated to the concerned employee and not other entries, would in our opinion become arbitrary and hence illegal being violative of Article 14. All similar Rules/Government Orders/Office Memoranda, in respect of all services under the State, whether civil, judicial, police, or other service (except the military), will hence also be illegal and are therefore liable to be ignored.

It has been held in Maneka Gandhi vs. Union of India & Anr. AIR 1978 SC 597 that arbitrariness violates Article 14 of the Constitution. In our opinion, the non-communication of an entry in the A.C.R. of a public servant is arbitrary because it deprives the concerned employee from making a representation against it and praying for its up-gradation. In our opinion, every entry in the Annual Confidential Report of every employee under the State, whether he is in civil, judicial, police or other service (except the military) must be communicated to him, so as to enable him to make a representation against it, because non-communication deprives the employee of the opportunity of making a representation against it which may affect his chances of being promoted (or get some other benefits).

Moreover, the object of writing the confidential report and making entries in them is to give an opportunity to a public servant to improve his performance, vide State of U.P. vs. Yamuna Shankar Misra 1997 (4) SCC.

Hence such non-communication is, in our opinion, arbitrary and hence violative of Article 14 of the Constitution.

In our opinion, every entry (and not merely a poor or adverse entry) relating to an employee under the State or an instrumentality of the State, whether in civil, judicial, police or other service (except the military) must be communicated to him, within a reasonable period, and it makes no difference whether there is a bench mark or not. Even if there is no bench mark, non-communication of an entry may adversely affect the employee's chances of promotion (or getting some other benefit), because when comparative merit is being considered for promotion (or some other benefit) a person having a `good' or `average' or `fair' entry certainly has less chances of being selected than a person having a `very good' or `outstanding' entry."

Following week, the High Court of Punjab and Haryana in *State of Punjab and others v State Information Commission, Punjab and another*[120] followed the Supreme Court's judgment while deciding on a petition filed under Article 226 of the Constitution of India challenging order dated 5.11.2007 (P-1), passed by the State Information Commission, Punjab holding that Shri Faquir Chand Sharma-respondent No. 2 is entitled to the information sought by him (copies of his ACRs for the period from 1.4.2000 to 31.3.2006). The court held as follows:

[120] C.W.P. No. 8396 of 2008,Decided on May 19, 2008.

"The ACRs of a public servant are not private in character. In any case, when an employee asks for disclosure of his own ACR the demand cannot be declined because now all ACRs are required to be communicated to a public servant, whether adverse, good, very good etc. In paras 19 and 20 of the judgment rendered in the case of *Dev Dutt v. Union of India and others* (Civil Appeal No. 7631 of 2002, decided on 12.5.2008), Hon'ble the Supreme Court has observed as under:-

"19. In our opinion, every entry in the A.C.R. of a public servant must be communicated to him within a reasonable period, whether it is a poor, fair, average, good or very good entry. This is because non communication of such an entry may adversely affect the employee in two ways: (1) Had the entry been communicated to him he would know about the assessment of his work and conduct by his superiors, which would enable him to improve his work in future (2) He would have an opportunity of making a representation against the entry if he feels it is unjustified, and pray for its upgradation. Hence noncommunication of an entry is arbitrary, and it has been held by the Constitution Bench decision of this Court in Maneka Gandhi vs. Union of India [AIR 1978 SC 597] (supra) that arbitrariness violates Article 14 of the Constitution.

20. Thus it is not only when there is a bench mark but in all cases that an entry (whether it is poor, fair, average, good or very good) must be communicated to a public servant, otherwise there is violation of the principle of fairness, which is the soul of natural justice. Even an outstanding entry should be communicated since that would boost the morale of the employee and make him work harder."

In the light of the aforesaid view of Hon'ble the Supreme Court, it has now become obligatory to even communicate good or better reports to a public service or an employee of the Corporation, Board or judiciary. Therefore, the controversy has been settled by Hon'ble the Supreme Court."

Grading of officers basing on ACRs

A Bench consisting of Information Commissioners, Professor M.M. Ansari, Dr. O.P. Kejariwal and Ms. Padma Balasubramaniam in *Shri Arvind Kejriwal v. Department of Personnel & Training* held that the chart which contained the grading of the officers and not their detailed ACRs can be disclosed.[121]

UK Information Commissioner had earlier pronounced a similar Decision:

London Borough of Southwark was asked for information about criteria used to determine staff grades within the Hay job evaluation scheme. The council refused the request on the grounds that it would prejudice the commercial interests of Hay Group. The Commissioner decided that the council had incorrectly withheld the information and that it should therefore be released.[122]

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[121] .[CIC/MA/A/2006/00204, 207 & 208,12 June,2008]

[122] Case Ref: FS50078603,Date: 05/06/2007 ,Public authority: London Borough of Southwark

Information on Assets of judges

The Supreme Court in the landmark case of *Central Public Information Officer, Supreme Court Of India Vs. Subhash Chandra Agarwal* [Supreme Court, Civil Appeal No. 10044 of 2010] held that information on judges who declared their assets is not personal information. The Court observed as follows:

"In view of the aforesaid discussion, we dismiss Civil Appeal No.2683 of 2010 and uphold the judgment dated 12th January, 2010 of the Delhi High Court in LPA No. 501 of 2009 which had upheld the order passed by the CIC directing the CPIO, Supreme Court of India to furnish information on the judges of the Supreme Court who had declared their assets. Such disclosure would not, in any way, impinge upon the personal information and right to privacy of the judges. The fiduciary relationship rule in terms of clause (e) to Section 8(1) of the RTI Act is inapplicable.

It would not affect the right to confidentiality of the judges and their right to protect personal information and privacy, which would be the case where details and contents of personal assets in the declaration are called for and sought, in which event the public interest test as applicable vide Section 8(1)(j) and proviso to Section 11 (1) of the RTI Act would come into operation.

As far as Civil Appeal Nos. 10045 of 2010 and 10044 of 2010 are concerned, they are to be partly allowed with an order of remit to the CPIO, Supreme Court of India to re-examine the matter after following the procedure under Section 11(1) of the RTI Act as the information relates to third parties. Before a final order is passed, the concerned third parties are required to be issued notice and heard as they are not a party before us. While deciding the question of disclosure on remit, the CPIO, Supreme Court of India would follow the observations made in the present judgment by keeping in view the objections raised, if any, by the third parties. We have refrained from making specific findings in the absence of third parties, who have rights under Section 11(1) and their views and opinions are unknown." (*Sanjiv Khanna, J. writing the majority opinion)*

Decisions on Annual property returns

There were four important Decisions on this topic, which gradually evolved the principle that Annual property returns can be disclosed. The Decisions are as follows:

"The information in the annual property returns is retained by the public authority in sealed covers / or in some other mode under proper "secrecy" classification and used only when the public servant, whose return it may be, faces a charge or an enquiry. It is not held as a public information, but rather a safety valve – a deterrent to public servants that investments or transactions etc. In properties should not be done without the knowledge of the public authority.

While there may be an arguable case for disclosing all such information furnished to the various Public Authorities by the public servants, till such time the nature of this information remains a confidential entrustment by the public servant to the Public Authority, it shall be covered by section 8 (1) (j) and cannot be routinely disclosed. It will also attract the exemption under Section 8 (1) (e) and in certain cases the provisions of Section 11 (1), being an information entrusted to the public authority by a third person, i.e. the public servant filing property return. On the whole, property returns of public servants, which are required to be compulsorily filed by a set date annually by all public servants with their respective public authorities, being an information to be used exceptionally, must be held to serve no general public purpose whose disclosure the RTI Act must compel.

However, all public authorities are urged that in order to open the property returns of all public servants to public scrutiny, the public authorities may contemplate a new and open system of filing and retention of such returns. The public servants may be advised in advance that their property returns shall be open and no more confidential. The property return forms may be so designed as to give only such transactions and assets related details, which may not violate civil servants' right to privacy. These steps may bring the curtain down on the rather vexed question of how private is the information given in "property returns" or that it is a public information, which is not private at all." [123]

In a case involving Kendriya Vidyalaya Sanghathan, CIC ruled:

"This Bench, however, holds that Annual Property Returns by government employees are in the public domain and hence there seems to be no reason why they should not be freely disclosed. This should also be considered as a step to contain corruption in government offices since such disclosures may reveal instances where property has been acquired which is disproportionate to known sources of income. The Commission, therefore, directs the Respondents to provide copies of property returns asked for by the Appellant.[124]

In a recent case, CIC held as follows:

In Writ Petition (Civil) 294/2001 Union of India vs. Association for Democratic Reforms, the Apex Court has in its judgment of 2nd May, 2002 dealt

[123] CIC/AT/A/2006/00134-10 July, 2006.

[124] CIC/OK/A/2007/01493 &CIC/OK/A/2008/00027,Dated: 20 March 2008

primarily with the jurisdiction of the Election Commission wherein the requirement of a public servant to provide declaration of moveable and immovable property under Rule 16 of All India Service (Conduct) Rules, 1967 is also discussed. In *Peoples Union of Civil Liberties v. Union of India*, however, in his judgment of 13.2.2003 Shri P.V. Reddy J. has ruled as follows:

"When there is a competition between the right to privacy of an individual and the right to information of the citizens, the former right has to be subordinated to the latter right as it serves larger public interest. The right to know about the candidate who intends to become a public figure and a representative of the people would not be effective and real if only truncated information of the assets and liabilities is given."

The judgment goes on to dwell at length not only with the requirement of disclosure of the property of candidates for elections but to conclude that "It cannot be denied that the family relationship and social order in our country is such that the husband and wife look to the properties held by them as belonging to the family for all practical purposes, though in the eye of law the properties may distinctly belong to each of them. By and large, there exists a sort of unity of interest in the properties held by spouses. The property being kept in the name of the spouse benami is not unknown in our country. In this situation, it could be said that a countervailing or paramount interest is involved in requiring a candidate who chooses to subject himself/herself to public gaze and scrutiny to furnish the details of assets and liabilities of the spouse as well."

Appellant Shri Upadhyaya has argued that when such rigorous norms are fixed for candidates for elections, who are in service for only the limited term of their office, the government servants, engaged in lifelong service cannot be exempt. We moreover find that this Commission has, in *Shri Roshan Lal v.Kendriya Vidyalaya Sanghathan*[125] also ruled on the question of disclosure of property returns wherein respondents had denied disclosure on the ground of Sec. 8(1)(j). In these cases Information Commissioner Dr. O.P.Kejariwal has held as below:

"The Bench, however, holds that Annual Property Returns by government employees are in the public domain and hence there seems to be no reason why they should not be freely disclosed. This should also be considered as a step to contain corruption in government offices since such disclosures may reveal instances where property has been acquired, which is disproportionate to known sources of income. The Commission, therefore, directs the Respondents to provide copies of property returns asked for by the Appellant to him by 10th April, 2008."

[125] CIC/OK/A/2007/01493 & CIC/OK/A/2008/00027 dated 20th March, 2008

Under the circumstances, we see no reason to uphold exemption from disclosure sought by Shri R. K. Jha Section Officer (PR) and PIO u/s 8(1)(j) of the RTI Act. However, since the information held is without doubt of concern to a third party in this case Shri Shiva Basanth, a 1976 batch IAS Officer, CPIO,

Ministry of Personnel, Public Grievances & Pensions shall within five days from the receipt of this order give a written notice to Shri Basanth of the request, and of the fact that under the directions of this Commission he intends to disclose the information, and to invite the third party to make a submission in writing or orally regarding whether the information should be disclosed. CPIO will keep in view such submission in disclosing the information sought. Including the period required for the exchanges described above, the information sought will be provided within twenty working days of the date of issue of this Decision Notice.[126]

Investigating officer and privacy

A citizen had requested from RBI for certain information relating to the findings of an inspection of Memon Co-operative Bank Ltd, Mumbai, which was conducted on the basis of a complaint filed by him and a copy of the inspection report along with the name(s) of investigating officers.

CIC directed RBI to furnish a copy of the inspection report after due application of section 10(1) of the Act. Alternatively, the appellant should be provided a substantive response, incorporating the major findings of the inspection report and indicating the action taken on the findings of the report. The name of the investigating officer may not be revealed as it would not serve any public interest. [127]

Information regarding LTC disbursals and privacy

The plea of such information [information regarding LTC disbursals] being entirely barred under Section 8(1) (j) should, therefore, fail. However, I do agree with the contention of the third party, …, that parts of this information are personal information, and should not be disclosed. It is necessary, therefore, to sift the disclosable part of the information from its non-disclosable personal part. The details about the amounts claimed by Shri A. Roychoudhary as LTC, the block years for which the claim was made, number of persons for whom claim made, dates of filing the claim and disbursal, advance taken and adjustment if any, and the sanction for using the LTC should be disclosed to the appellant. However, other personal details such as the names of the family members of Shri A. Roychoudhary, their age, etc. which are personal in nature should be barred from disclosure. The PIO can use the provision of the Section 10 of the RTI Act to separate the information to be disclosed from that which is not to be disclosed.[128]

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[126] [CIC/WB/A/2007/00189 dated 14.5.2008]
[127] 177/IC(A)/2006 - 17th August, 2006.
[128] CIC/AT/A/2006/00317-10.10.2006

Commission paid to an LIC agent

The appellant, an LIC agent, had asked for month-wise and policy-wise details of agency commission paid to her from 1995 to 28.2.2006. She has complained that she has not been paid her commission by the LIC.

CIC held: The information sought relate to the commission paid to the appellant herself, as per her entitlement in accordance with the norms and guidelines of the LIC. The information about her own entitlements cannot be treated as confidential.[129]

Privacy

"A request was received by the Department of Posts for addresses, amount of pension paid of postal pensioners from post offices under Gaziabad H.P.O., which was rejected. CIC held that the P.I.O. has rightly applied s.8 (1)(j)."[130]

"An Australian applicant sought access to documents held by the Queensland Police Service relating to a complaint of assault made against him. The matter in issue contained the age, date of Birth, home and mobile telephone numbers and signature of the complainant, as well as the signature of the reporting officer.

The applicant asserted that when the alleged assault took place, the complainant was trespassing on the applicant's property and unlawfully entered his house, while serving court documents. The applicant said that the actions of the complainant outweighed any public interest in protecting the complainant's privacy, and the matter in issue should be released so that he could pursue any avenues of legal redress that might be available.

Assistant Commissioner (AC) Rangihaeata found that all of the matter in issue was properly characterized as the personal affairs of the complainant. She also found that the balance of the public interest was in favour of non-disclosure, as refusing the applicant access to the matter in issue would not prevent him from pursuing any legal remedy."[131]

"An Australian applicant sought access to the medical records of her maternal grandfather. The documents in issue were two folios of medical records relating to her grandfather, who had died in 1924. The applicant is researching her family history and also plans to produce a documentary which would focus, in part, on the life of her grandfather as an Aboriginal person in the early 1900's.

AC Barker determined that the matter in issue was properly characterized as concerning the personal affairs of the applicant's grandfather. AC Barker discussed the public interest considerations raised by the applicant, and accepted that a public interest consideration exists in making accurate historical and cultural research

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[129] CIC/MA/A/2006/00505-6.10.2006

[130] ICPB/A-18/CIC/2006- 10 May, 2006.

[131] *"RC " and Queensland Police Service* (316/05, 12 January 2006); Office of the Information Commissioner (Queensland) Informal Decision Summaries 2005/2006.

available to the public. However, AC Barker found that the documents in issue were not of a type that would assist the applicant's research and forthcoming documentary. AC Barker found that there were not sufficient public interest considerations to favour disclosure of the matter in issue, and that it qualified for exemption under s.44(1) of the FOI Act."[132]

Traveling expenses

"The traveling expenses were charged to the public account, disclosure if the information cannot be denied on the grounds of 'personal information',' not a public activity' and 'no public interest' etc. Travel had been performed as a part and in discharge of official duties and the records related the same are public records and therefore, a citizen has the right to seek disclosure of the same."[133]

"Information relating to the tour programmes and travel expenses of a public servant cannot be treated as personal information."[134]

Leave records and privacy

CIC pronounced following interesting decisions on disclosure of leave records:

- A request for supply of the leave record of Dr. Vidya Sinha, Reader in Hindi Department since July 2004 was received by Delhi University. CIC felt that it was purely a personal matter with no public interest involved. Hence, the information need not be disclosed. However, if the Appellant could prove to the satisfaction of the Commission that public interest was involved in the matter, then the Commission could re-examine the matter.[135]
- The Commission felt that it was purely a personal matter with no public interest involved. Hence, the information [leave record] need not be disclosed. However, if the Appellant could prove to the satisfaction of the Commission that public interest was involved in the matter, then the Commission could re-examine the matter.[136]
- …the leave records of an official is a personal information, the disclosure of which has no public interest…In the absence of any material other than the bald allegation …, it is not possible to determine whether the disclosure of the information is in public interest or not;[137]

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[132] *McGrath and West Moreton Health Service District* (453/05, 28 February 2006). Office of the Information Commissioner (Queensland) Informal Decision Summaries 2005/2006.

[133] 63/ICPB/2006- 4 August,2006

[134] 07/IC(A)/CIC/2006/00011 - 3 January 2006

[135] CIC/OK/A/2006/00189-3 November, 2006

[136] CIC/OK/A/2006/00187-190 & 329-3.11.2006

[137] 170/ICPB/2006-4.12.2006

Leave records without names

CIC held that information relating to personal affairs of officials, need not be disclosed. By an application dated 19.7.2006, the appellant had sought for the following information:

i. The list of employees who were granted leave after 1.5.2006 (their names, number of days of leave, dates of submission of leave applications)
ii. Pendency left out against the receipt, while proceeding on leave
iii. The cases where the leave has been recommended by the Head of the Department and not permitted to avail the leave.
iv. Names of staff members who have been permitted to visit abroad (presently out of India), actual number of days of leave applied at the first instance, extension requested and the stand of office for such cases.
v. Names of employees who opted for voluntary retirement and allowed to withdraw the same and what action proposed for such cases.

CIC held as follows:

While I agree with the CPIO and the AA, that personal information, unconnected with the government affairs of an official, i.e., information relating to personal affairs of officials, need not be disclosed, however, information, which is purely official could be disclosed to the appellant. Therefore, in respect of serial No 1 above, the CPIO will furnish only the number of officials who had been granted leave without names etc; information sought in serial No2, being general in nature, need not be furnished; regarding serial Nos. 3, 4, and 5 the number of such cases, if any, be given without names; [138]

Employee's personal information

CIC held that information relating to personal affairs of officials such as family members listed on the CGHS Card, the name of the Dispensary, whether that employee is married, the name of his wife, need not be disclosed.

The information requested by the appellant from the PIO concerned a third person, Shri Arun Mishra, LDC, QMG's Branch, and include

1.Date of his appointment
2.His Address (Permanent)
3.His Address (Local) (If there is any change in the address the periods with addresses must be indicated)
4.The name of his family members in CGHS Card and the name of Dispensary.
5. Whether he is married? And if married what is the name of his wife as per the records and the date on which he informed about his marriage.
6.What is the name of his nominee in the GPF, CGEIS and other documents with the dates on which the forms have been filled.
7.Basic Pay
8.Whether any disciplinary action is pending against him

[138] 174/ICPB/2006-4.12.2006

CIC held as follows:

The information which the appellant has solicited in respect of a third party, Shri Arun Mishra, is clearly of a very personal nature in regard to items 4, 5, 6 and 8. There is no reason why any person should get information about a Government employee in respect of the family members listed on the CGHS Card, the name of the Dispensary, whether that employee is married, the name of his wife, the date of his informing the public authority about his marriage, the names of his nominees for the GPF and CGEIS and other documents, the dates on which the forms have been filled, and whether any disciplinary action is pending against him. Apart from being personal information, disclosure of such information serves no public purpose. It is quite possible that disclosure of such information may lead to unwarranted harassment and intimidation of the employee by other parties. The Commission has to exercise utmost caution in authorizing disclosure of personal information of employees of public authorities. Except when dictated by overwhelming public purpose, such information is better left undisclosed under the provision of exemption Section 8(1) (j) of the Act. Information at items 1, 2, 3 and 7 (at Para 3 above) can be disclosed after the third party is duly heard by the Appellate Authority.[139]

Section 8(2): A legal revolution that confers upon the citizens a priceless right

(2) Notwithstanding anything in the Official Secrets Act, 1923 (19 of 1923) nor any of the exemptions permissible in accordance with sub-section (1), a public authority may allow access to information, if public interests in disclosure outweighs the harm to the protected interests.

Decision makers under the RTI Act often fail to appreciate the intricacies of Section 8 (2) of the Act such as public interest test and how the test can be used to override the set of exemptions listed out under sub-section (1).

The Supreme Court in *Yashwant Sinha & Ors. v. Central Bureau of Investigation & Anr* (Review Petition (Criminal) No. 46 of 2019 in Writ Petition (Criminal) No. 298 of 2018, Date of Judgement: 10 April 2019) provided an in-depth analysis on Section 8 (2).

Justice K.M. Joseph in his concurring judgment recognized Section 8(2) of the Act "a legal revolution" that none of the exemptions declared under sub-section (1) of Section 8 or the Official Secrets Act, 1923 can stand in the way of the access to information if the public interest in disclosure overshadows, the harm to the protected interests.

[139] CIC/AT/A/2006/00311-3.11.2006.

Justice K.M. Joseph further observed that the RTI Act through Section 8(2) has conferred upon the citizens a priceless right by clothing them with the right to demand information even in respect of such matters covered by the exemptions under Section 8 (1).[140]

The Bench led by Chief Justice of India (CJI) Ranjan Gogoi held as follows:
1"Section 8(2) of the Right to Information Act (already extracted) contemplates that notwithstanding anything in the Official Secrets Act and the exemptions permissible under subsection (1) of Section 8, a public authority would be justified in allowing access to information, if on proper balancing, public interest in disclosure outweighs the harm sought to be protected. When the documents in question are already in the public domain, we do not see how the protection under Section 8(1)(a) of the Act would serve public interest."

Justice K.M. Joseph in his concurring judgment observed as follows:

"Reverting back to Section (8) it is clear that Parliament has indeed intended to strengthen democracy and has sought to introduce the highest levels of transparency and openness. With the passing of the Right to Information Act, the citizens fundamental right of expression under Article 19(1) (a) of the Constitution of India, which itself has been recognised as encompassing, a basket of rights has been given fruitful meaning. Section 8(2) of the Act manifests a legal revolution that has been introduced in that, none of the exemptions declared under sub-section(1) of Section 8 or the Official Secrets Act, 1923 can stand in the way of the access to information if the public interest in disclosure overshadows, the harm to the protected interests.

What interestingly Section 8(2) recognises is that there cannot be absolutism even in the matter of certain values which were formerly considered to provide unquestionable foundations for the power to withhold information. Most significantly, Parliament has appreciated that it may be necessary to pit one interest against another and to compare the relative harm and then decide either to disclose or to decline information. It is not as if there would be no harm.

If, for instance, the information falling under clause (a) say for instance the security of the nations or relationship with a foreign state is revealed and is likely to be harmful, under the Act if higher public interest is established, then it is the will of Parliament that the greater good should prevail though at the cost of lesser harm being still occasioned. I indeed would be failing to recognize the radical departure in the law which has been articulated in Section 8(2)…

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[140] The Supreme Court in *Yashwant Sinha & Ors. v. Central Bureau of Investigation & Anr* (Review Petition (Criminal) No. 46 of 2019 in Writ Petition (Criminal) No. 298 of 2018, Date of Judgement: 10 April 2019)

The RTI Act through Section 8(2) has conferred upon the citizens a priceless right by clothing them with the right to demand information even in respect of such matters as security of the country and matters relating to relation with foreign state. No doubt, information is not be given for the mere asking. The applicant must establish that withholding of such information produces greater harm than disclosing it.

It is pertinent to note that an officer of the department is permitted under the RTI Act to allow access to information under the Act in respect of matters falling even under Section 8(1)(a) if a case is made out under Section 8(2). If an officer does not accede to the request, a citizen can pursue remedies before higher authorities and finally the courts."

Public Interest

The Supreme Court in *Bihar Public Service Commission v. Saiyed Hussain Abbas Rizwi* [(2012) 13 SCC 61] while explaining the term "Public Interest" held:

"The expression "public interest" has to be understood in its true connotation so as to give complete meaning to the relevant provisions of the Act. The expression "public interest" must be viewed in its strict sense with all its exceptions so as to justify denial of a statutory exemption in terms of the Act. In its common parlance, the expression "public interest", like "public purpose", is not capable of any precise definition. It does not have a rigid meaning, is elastic and takes its colour from the statute in which it occurs, the concept varying with time and state of society and its needs (State of Bihar v. Kameshwar Singh([AIR 1952 SC 252]). It also means the general welfare of the public that warrants recognition and protection; something in which the public as a whole has a stake [Black's Law Dictionary (8th Edn.)]."

The Hon'ble Supreme Court in the matter of *Ashok Kumar Pandey vs The State Of West Bengal* (decided on 18 November, 2003Writ Petition (crl.) 199 of 2003) had made reference to the following texts for defining the meaning of "public interest', which is stated as under:

"Strouds Judicial Dictionary, Volume 4 (IV Edition),'Public Interest' is defined thus: "Public Interest (1) a matter of public or general interest does not mean that which is interesting as gratifying curiosity or a love of information or amusement but that in which a class of the community have a pecuniary interest, or some interest by which their legal rights or liabilities are affected."

In Black's Law Dictionary (Sixth Edition), "public interest" is defined as follows : Public Interest something in which the public, or some interest by which their legal rights or liabilities are affected. It does not mean anything the particular localities, which may be affected by the matters in question. Interest shared by national government...."

In *Mardia Chemical Limited v. Union of India* (2004) 4 SCC 311, the Hon'ble Supreme Court of India while considering the validity of SARFAESI Act and recovery of non-performing assets by banks and financial institutions in India, recognised the significance of Public Interest and had held as under : ".....Public interest has always been considered to be above the private interest. Interest of an individual may, to some extent, be affected but it cannot have the potential of taking over the public interest having an impact in the socio-economic drive of the country....."

Classified records

The Public Records Rules, 1997 define `classified records` as `the files relating to the public records classified as top-secret, confidential and restricted in accordance with the procedure laid down in the Manual of Departmental Security Instruction circulated by the Ministry of Home affairs from time to time`. However, the Manual of Departmental Security Instruction is not in public domain.

Classification

…The appellate Authority has held that the matter has been classified "confidential" under the Official Secrets Act, 1923. However, in view of the provisions of the Section 22 of the Act *"The provision of this Act shall have effect notwithstanding anything inconsistent therewith contained in the Official Secrets Act, 1923, and any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act*", the provisions of Official Secrets Act stands over-ridden.

Section 8(2) enables the public authority to disclose information notwithstanding anything in the Official Secrets Act, 1923 or any of the exemptions permissible under Section 8(1), if the public interest in disclosure outweighs the harm to the protected interests. Sec. 8(2) is, therefore, not a ground distinct and separate from what has been specified explicitly under Section 8(1) of the Act for withholding information by the public authority.

The Appellate Authority, therefore, cannot withhold this information either on the ground that the information is classified as "confidential" under the Official Secrets Act or under Section 8(2) alone. However, Sec 22 as described above only overrides anything inconsistent with the Right to Information Act, 2005. The Official Secrets Act, 1923 stands neither rescinded nor abrogated. While a public authority may only withhold such information as could be brought within any of the clauses of Section 8(1), it is open to that authority to classify any of these items of information as "Confidential", thus limiting the discretion of any other authority in respect to these.[141]

[141] CIC/WB/A/2006/00274-22.9.2006

Sub-section (3) of Section 8

(3) Subject to the provisions of clauses (a), (c) and (i) of sub-section (1), any information relating to any occurrence, event or matter which has taken place, occurred or happened twenty years before the date on which any request is made under Section 6 shall be provided to any person making a request under that section:

Provided that where any question arises as to the date from which the said period of twenty years has to be computed, the decision of the Central Government shall be final, subject to the usual appeals provided for in this Act.

Records more than 20 years old

Section 8(3) is part of Section 8, which deals with 'exemption from disclosure of information". Section 8(1) specifies classes of information which are exempt from disclosure. What Section 8(3) stipulates is that the exemption under section 8(1) cannot be applied if the information sought related to a period prior to 20 years except those covered in Section clauses (a), (c) and (i) of sub-section 8(1). In other words, even if the information sought is exempt in terms of other sub-section (1) of Section 8, and if the same relates to a period 20 years prior to the date of application, then the same shall be provided.[142]

Infringement of copyright

9. Grounds for rejection to access in certain cases

Without prejudice to the provisions of Section 8, a Central Public Information Officer or a State Public Information Officer, as the case may be, may reject a request for information where such a request for providing access would involve an infringement of copyright subsisting in a person other than the State.

This is the only absolute exemption from disclosure of information in the RTI Act. Absolute exemption is an exemption which is not subject to public interest test. Here the PIO need not conduct the public interest weighing test.

The Institute of Chartered Accountants of India Vs. Shaunak H Sayta & Ors
[Supreme Court of India Civil Appeal No. 7571 of 2011 on 2 Sep. 2011]

"13. Section 9 of the RTI Act provides that a Central or State Public Information Officer may reject a request for information where providing access to such information would involve an infringement of copyright subsisting in a person other than the State. The word `State' used in section 9 of RTI Act refers to the Central or State Government, Parliament or Legislature of a State, or any local or other authorities as described under Article 12 of the Constitution. The reason for using the word `State' and not `public authority' in section 9 of RTI Act is

[142] 37/ICPB/2006 - 26 June 2006

apparently because the definition of `public authority' in the Act is wider than the definition of `State' in Article 12, and includes even non-government organizations financed directly or indirectly by funds provided by the appropriate government. Be that as it may. An application for information would be rejected under section 9 of RTI Act, only if information sought involves an infringement of copyright subsisting in a person other than the State. ICAI being a statutory body created by the Chartered Accountants Act, 1948 is `State'. The information sought is a material in which ICAI claims a copyright. It is not the case of ICAI that anyone else has a copyright in such material. In fact it has specifically pleaded that even if the question papers, solutions/model answers, or other instructions are prepared by any third party for ICAI, the copyright therein is assigned in favour of ICAI. Providing access to information in respect of which ICAI holds a copyright, does not involve infringement of a copyright subsisting in a person other than the State. Therefore ICAI is not entitled to claim protection against disclosure under section 9 of the RTI Act.

14. There is yet another reason why section 9 of RTI Act will be inapplicable. The words `infringement of copyright' have a specific connotation. Section 51 of the Copyright Act, 1957 provides when a copyright in a work shall be deemed to be infringed. Section 52 of the Act enumerates the acts which are not infringement of a copyright. A combined reading of sections 51 and 52(1)(a) of Copyright Act shows that furnishing of information by an examining body, in response to a query under the RTI Act may not be termed as an infringement of copyright. Be that as it may."

Ferani Hotels Pvt. Ltd. Vs. The State Information Commissioner Greater Mumbai & Ors.

[Supreme Court in Civil Appeal Nos.9064-9065 of 2018, 27 Sep. 2018]

Nusli Neville Wadia had filed an RTI application seeking details about plans submitted by Ferani Hotels Pvt Ltd for the development of three plots in Malad. Late Shri E F Dinshaw was the owner of these three plots at Malad and Wadia was the sole administrator of the estate. Wadia had entered into a development agreement in 1995 with Ferani that was coupled with the Power of Attorney. However, due to some dispute, both the agreements were terminated by Wadia, in May 2008. Wadia then filed an RTI application with the Brihanmumbai Municipal Corporation.

Wadia had sought details of certified copies of submitted PR cards, certified copies of all plans, amendments, layouts, all development schemes from time to time by Ferani or his architect, and reports submitted to municipal commissioner for approvals under RTI. The public information officer (PIO) turned down his application after Ferani objected. Ferani stated that giving such information would

compromise its competitiveness, affect copyright, would infringe trade rights and stated that sharing information did not serve any public interest and that it was exempted under various sections of RTI Act.

When the matter was heard at the state information commission (SIC), it ruled that the information be provided to Wadia as details sought were "public records".

The Supreme Court, while dismissing the appeal filed by Ferani Hotels Pvt Ltd has upheld the order passed by Maharashtra State Information Commission; the order had directed that such information be provided to Nusli Wadia, chairman of the Wadia group, who had sought the same through an RTI.

Upholding the SIC order, the SC bench in its order said: "It cannot be said that it has no relation to public activity or interest, or that it is unwarranted, or there is an invasion of privacy. These are documents filed before public authorites, required to be put in public domain by the provisions of Maharashtra Act (Maharashtra Ownership Flats Regulation of Promotion of Construction, Sale, Management and Transfer Act, 1963) and the RERA (Real Estate Regulation and Development Act, 2016) and involves public element of making builders accountable to one and all." The SC order went on to state that such information be put in public domain as per RERA Act provisions too.

The Court further directed to proactively disclose information as follows:

"34. In the end, we would like to say that keeping in mind the provisions of RERA and their objective, the developer should mandatorily display at the site the sanction plan. The provision of sub-section (3) of Section 11 of the RERA require the sanction plan/layout plans along with specifications, approved by the competent authority, to be displayed at the site or such other places, as may be specified by the Regulations made by the Authority. In our view, keeping in mind the ground reality of rampant violations and the consequences thereof, it is advisable to issue directions for display of such sanction plan/layout plans at the site, apart from any other manner provided by the Regulations made by the Authority. This aspect should be given appropriate publicity as part of enforcement of RERA."

Speaking orders while applying exemptions

Section 7 (8) of the RTI Act provides as follows:

(8) Where a request has been rejected under sub-section (1), the Central Public Information Officer or State Public Information Officer, as the case may be, shall communicate to the person making the request,–

(i) the reasons for such rejection;

(ii) the period within which an appeal against such rejection may be preferred; and

(iii) the particulars of the appellate authority.

Exemption from Disclosure of Information under the RTI Act

Under the RTI Act, when withholding information:

- PIO has to communicate the reasons for rejection of a request for information to the requester.
- PIO can only reject a request under Sections 8 and 9 of the Act.
- Reasons should include justification for applying an exemption.

If the PIO rejects a request for any of the reasons specified in Section 8 and 9, the PIO should, under Section 7 (8), communicate to the requester:

- the period within which an appeal against such rejection may be preferred
- the particulars of the appellate authority
- the reasons for such rejection

The phrase `Reasons for rejection` has two components: First, the provision under which information is exempt and secondly, reasons justifying for applying such exemption.

Sometimes information may fall under an exemption under section 8, but still the PIO may disclose it, 'if public interest in disclosure outweighs the harm to the protected interests'.

In such case the PIO may record:

- factors favoring public interest in disclosure.
- factors favoring non-disclosure.
- how and why the former are more important than the later - or the other way around, if the PIO decides to withhold the information.

The nodal agency responsible for implementation of the RTI Act, Department of Personnel and Training (DOPT) under the Ministry of Personnel, Public Grievances and Pensions, issued an Office Memorandum on 6 October 2015 on "Format for giving information to the applicants under RTI Act", as follows:

"It has been observed that different public authorities provide information to RTI applicants in different formats. Though there cannot be a standard format for providing information, the reply should however essentially contain the following information:

(i) RTI application number, date and date of its receipt in the public authority.

(ii) The name, designation, official telephone number and email ID of the CPIO.

(iii) In case the information requested for is denied, detailed reasons for denial quoting the relevant sections of the RTI Act should be clearly mentioned.

(iv) In case the information pertains to other public authority and the application is transferred under section 6(3) of the RTI Act, details of the public authority to whom the application is transferred should be given.

(v) In the concluding para of the reply, it should be clearly mentioned that the First Appeal, if any, against the reply of the CPIO may be made to the First Appellate Authority within 30 days of receipt of reply of CPIO.

(vi) The name, designation, address, official telephone number and e-mail ID of the First Appellate Authority should also be clearly mentioned."

The appellant submitted that for item No.1, the PIO has not mentioned the section and clause under which the item is denied. The respondent in the reply dated 09.11.2009 for point No.1 has mentioned that the case is still under investigation and hence giving information would impede the process of investigation or prosecution of offenders.

If the PIO is rejecting any information invoking Sec.8, the clause and section under which the request is being rejected should invariably be mentioned. The respondent has failed to do so in this regard. He is directed to strictly follow the procedure in future while accepting the contention of the appellant, the Commission directs to mention the provision of the Act, whenever the request is rejected.[143]

"Through this Order the Commission now wants to send the message loud and clear that quoting provisions of Section 8 of the RTI Act *ad libitum* to deny the information requested for, by CPIOs/Appellate Authorities without giving any *justification* or grounds as to how these provisions are applicable is simply unacceptable and clearly amounts to malafide denial of legitimate information attracting penalties under section 20(1) of the Act."[144]

"The PIO has to give the reasons for rejection of the request for information as required under Section 7(8) (i). Merely quoting the bare clause of the Act does not imply that the reasons have been given. The PIO should have intimated as to how he had come to the conclusion that rule 8(1) (j) was applicable in this case.[145]

- PIO has to give the reasons for rejection of the request for information as required under Section 7(8) (i). Merely quoting the bare clause of the Act does not imply that the reasons have been given. The PIO should have intimated as to how he had come to the conclusion that rule 8(1)(j) was applicable in this case[146]

[143] APIC-Order in Appeal No.50/CIC/2010 dated 30.07.2011
[144] CIC/OK/A/2006/00163 – 7 July, 2006.
[145] CIC/OK/C/2006/00010 – 7 July, 2006.
[146] CIC/OK/C/2006/00010 – 7 July, 2006.

- PIO should indicate clearly the grounds of seeking exemptions from disclosure of information while rejecting a request.[147]
- PIO should give his own name, name of appellate officer in his communications.[148]
- The requester should be entitled to receive clear-cut replies to all his queries."[149]

Delhi High Court pronounced a few significant judgements on the role of the PIO in decision making:

Rakesh Kumar Gupta (Erstwhile CPIO) Union Bank Of India & Ors. Vs Central Information Commission & Anr **[**Date of Decision: 22nd January, 2021, W.P. (C) 900/2021 and CM APPL. 2395/2021**]:**

i) CPIO/PIOs cannot withhold information without reasonable cause;

ii) A PIO/CPIO cannot be held responsible if they have genuinely rejected the information sought on valid grounds permissible under the Act. Mere difference of opinion on the part of CIC cannot lead to an imposition of penalty under section 20 of the RTI Act;

iii) Government departments ought not to be permitted to evade disclosure of information. Diligence has to be exercised by the said departments, by conducting a thorough search and enquiry, before concluding that the information is not available or traceable;

iv) Every effort should be made to locate information, and the fear of disciplinary action would work as a deterrent against suppression of information for vested interests;

v) PIO/CPIO cannot function merely as "post offices" but instead are responsible to ensure that the information sought under the RTI Act is provided;

vi) A PIO/CPIO has to apply their mind, analyze the material, and then direct disclosure or give reasons for non-disclosure. The PIO cannot rely upon subordinate officers;

[147] 27/IC (A)/06 - 10 April. 2006
[148] CIC/OK/A/2006/00016 - 15 June 2006.
[149] CIC/AT/A/2006/00144 – 14 July, 2006.

vii) Duty of compliance lies upon the PIO/CPIO. The exercise of power by the PIO/CPIO has to be with objectivity and seriousness the PIO/CPIO cannot be casual in their approach.

viii) Information cannot be refused without reasonable cause.

Registrar of Companies v. Dharmendra Kumar Garg (WP(C) 11271/2009, decided on 1st June, 2012).
Delhi High Court held that penalty can be imposed only in cases of malafides or unreasonable conduct, i.e., where the PIO, without reasonable cause refuses to receive the application, or provide the information, or knowingly gives incorrect, incomplete or misleading information or destroys the information.
The court has held that:

"Merely because the CIC eventually finds that the view taken by the PIO was not correct, it cannot automatically lead to issuance of a show-cause notice under Section 20 of the RTI Act and the imposition of penalty. The legislature has cautiously provided that only in cases of malafides or unreasonable conduct, i.e., where the PIO, without reasonable cause refuses to receive the application, or provide the information, or knowingly gives incorrect, incomplete or misleading information or destroys the information, that the personal penalty on the PIO can be imposed.

..If the CIC starts imposing penalty on the PIOs in every other case, without any justification, it would instill a sense of constant apprehension in those functioning as PIOs in the public authorities, and would put undue pressure on them. They would not be able to fulfill their statutory duties under the RTI Act with an independent mind and with objectivity.

J.P. Agrawal v. Union of India [(WP(C) 7232/2009, decided on 4th August, 2011)**]**
Delhi High Court held that PIOs are not merely "post offices" and their duties include everything right from receipt of the application till the issue of decision thereon. The Court observed as follows:

"[T]he request for information and to "render reasonable assistance" to the information seekers, cannot be said to have intended the PIOs to be merely Post Offices as the Petitioner would contend. The expression "deal with", in Karen Lambert v. London Borough of Southwark (2003) EWHC 2121 (Admin) was held to include everything right from receipt of the application till the issue of decision thereon. Under Section 6(1) and 7(1) of the RTI Act, it is the PIO to whom the application is submitted, and it is he who is responsible for ensuring that the information as sought is provided to the applicant within the statutory requirements of the Act. Section 5(4) is simply to strengthen the authority of the PIO within the department; if the PIO finds a default by those from whom he has sought information, the PIO is expected to recommend a remedial action to be taken. The RTI Act makes the PIO the pivot for enforcing the implementation of the Act.

8. Even otherwise, the very requirement of designation of a PIO entails vesting the responsibility for providing information on the said PIO. As has been noticed above penalty has been imposed on the Petitioner not for the reason of delay which the Petitioner is attributing to Respondent No. 4 but for the reason of the Petitioner having acted merely as a Post Office, pushing the application for information received, to the Respondent No. 4 and forwarding the reply received from the Respondent No. 4 to the information seeker, without himself "dealing" with the application and/or "rendering any assistance" to the information seeker.

The CIC has found that the information furnished by the Respondent No. 4 and/or his department and/or his administrative unit was not what was sought and that the Petitioner as PIO, without applying his mind merely forwarded the same to the information seeker.

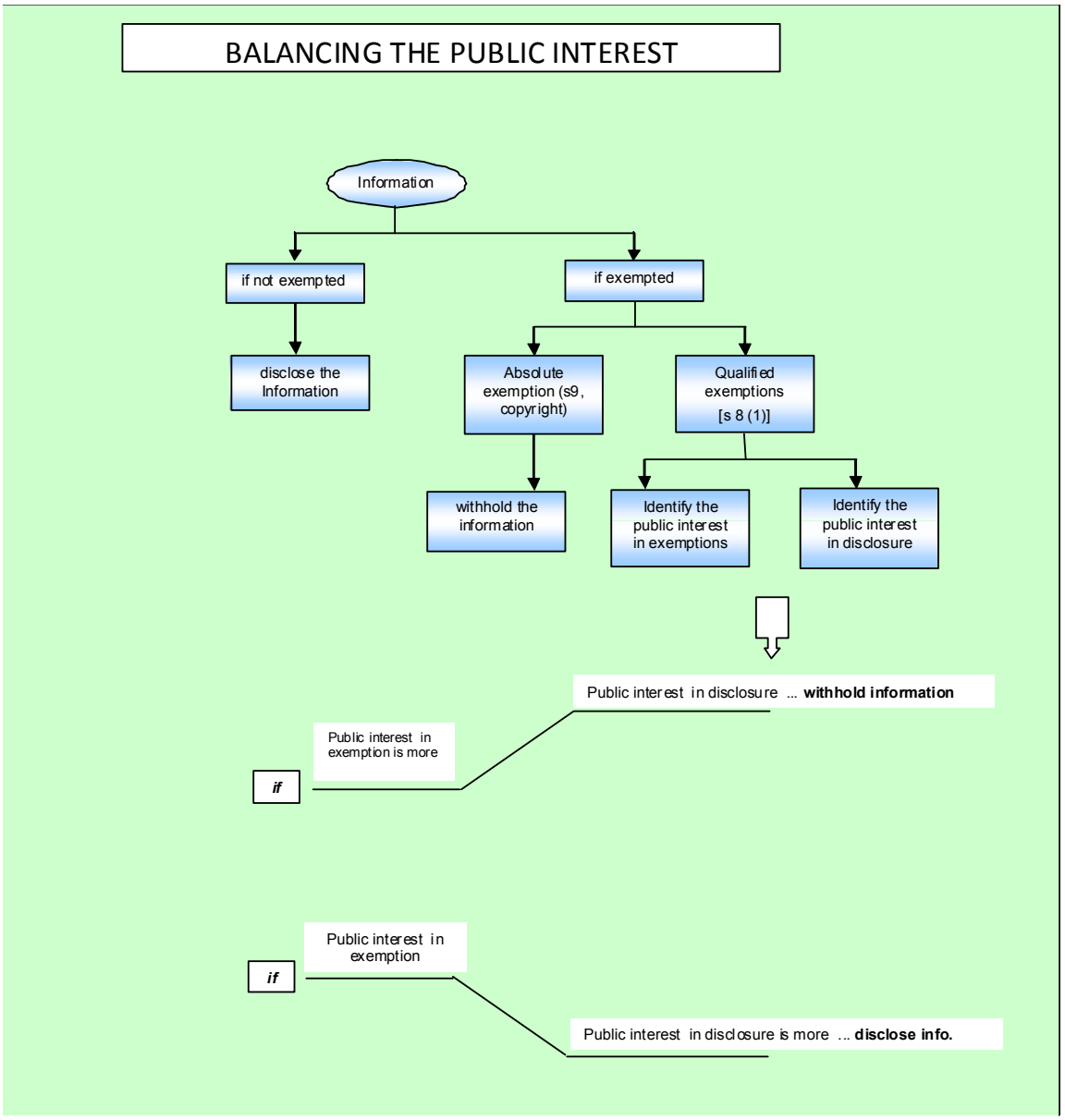
Again, as aforesaid the Petitioner has not been able to urge any ground on this aspect. The PIO is expected to apply his / her mind, duly analyze the material before him / her and then either disclose the information sought or give grounds for non-disclosure. A responsible officer cannot escape his responsibility by saying that he depends on the work of his subordinates.

The PIO has to apply his own mind independently and take the appropriate decision and cannot blindly approve / forward what his subordinates have done.

9. This Court in Mujibur Rehman v. Central Information Commission held that information seekers are to be furnished what they ask for and are not to be driven away through filibustering tactics and it is to ensure a culture of information disclosure that penalty provisions have been provided in the RTI Act. The Act has conferred the duty to ensure compliance on the PIO. This Court in Vivek Mittal v. B.P. Srivastava 2009 held that a PIO cannot escape his obligations and duties by stating that persons appointed under him had failed to collect documents and information; that the Act as framed casts obligation upon the PIO to ensure that the provisions of the Act are fully complied.

Even otherwise, the settled position in law is that an officer entrusted with the duty is not to act mechanically. The Supreme Court as far back as in Secretary, Haila Kandi Bar Association v. State of Assam 1995 Supp. (3) SCC 736 reminded the highranking officers generally, not to mechanically forward the information collected through subordinates. The RTI Act has placed confidence in the objectivity of a person appointed as the PIO and when the PIO mechanically forwards the report of his subordinates, he betrays a casual approach shaking the confidence placed in him and duties the probative value of his position and the report."

PUBLIC INTEREST TEST: A FLOW CHART



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