

# OPEN DECISIONS

## THE RIGHT TO INFORMATION ACT 2005

### LANDMARK DECISIONS OF THE CENTRAL INFORMATION COMMISSION AND STATE INFORMATION COMMISSIONS AND JUDGMENTS OF THE COURTS

*Decisions that provide guidance on future similar cases and reduce the need of appeals*

## DECISIONS FOR THE COMMON PERSON

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## DECISIONS FOR THE COMMON PERSON

### How to use RTI as a grievance redressal mechanism

Shri P.L. Kanaujia of Srinivaspuri, New Delhi, on 13.7.06 filed an RTI request to the PIO, Office of Delhi Jal Board seeking the following information on action taken on an application filed by him for redressal of his grievance regarding insufficient water supply:

1. Please indicate the daily progress made on my application so far i.e. when did my application reach which officer, for how long did it stay with that officer and what did he/she do during that period?
2. Please give the names and designations of the officials who were supposed to take action on my application and who have not done so?
3. What action would be taken against these officials for not doing their work and for causing harassment to the public? By when would that action be taken?
4. By when would my work be done now?"

..

To this he received a reply from Shri S. N. Srivastava, PIO with the point wise response as follows:

S. N o.	Question	Answer
1.	Please indicate the daily progress made on my application so far, i.e. when did my application reach which officer, for how long did it stay with that officer and what did he/ she do during that period?	The application was received in the office of SE (South) vide diary no. 1108 dated 7.12.2005. It was further forwarded to EE (South)-II vide diary No. 5583 dated 7.12.2005 and then to ZE-II vide Dy. No. 11287 dated 9.12.2005. The complaint was sent to Shri Arif J. E (C) on dated 13.12.05 for checking of the site. As the connection was technically in order and hence no action was required.

2.	Please give the names and designations of the officials who were supposed to take action on my application and who have not done	The field officers: Z.E-III: Shri V. P. Yadav J.E.(C ):Sh. Arif Hussain
3.	What action would be taken against these officials for not doing their work and for causing harassment to the public” By when would that action be taken?	No action is required
4.	By when would my work be done now?	The connection in the main line is in order technically.
5.	Please give me a list of all the applications/ returns/ received after my application/ petition/ grievances was received. The list should contain the following information:  a) Name of application.  b) Receipt No.  c) Date of application.  d) Date of disposal.	No other application was received with respect to the subject mentioned above.
6.	Please give copy or print out of those portions of records, which contain details of receipt of the above applications.	As above.
7.	Please give reasons for out of turn disposal of the application/ petition/ grievances if any which were received after me.	As above.
8.	By when would vigilance enquiries be initiated in the above matter of our of turn disposal of applications, if any?	As above.

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**Are you victimized for using RTI? CIC stands up for you!**

- Shri Dhanajay Tripathi applied to the P.I.O., B.H.U., on 11th

November 2005 under the RTI Act for access to Prof. Harikesh Singh Inquiry Report into the incident[ relating to the inquiry into various aspects of incidents on 11-12 January 2005 when Shri Yogesh Roy, a student of the Banaras Hindu University, died at Sir Sunder Lal Hospital attached to the University] Registrar, BHU, is both In-charge of administration and Appellate Authority under the RTI Act, overruled the submissions of the PIO and thus became deemed PIO under Sub-Section 5 of Section 5 of the RTI Act 2005.

Reply was sent to the Requester on 31.01.2006 under instruction from the Registrar denying him the information, thus, disposing of both, Appellant's application dated 11.11.2005 and his first Appeal dated 26.12.2005; CIC in exercise of powers conferred by Section 20(1) of the RTI Act 2005, the Commission imposes a penalty of Rs.25, 000/- (Rupees twenty five thousand only) on Shri N. Sundaram, Registrar, Banaras Hindu University, Varanasi for denial of information despite the Commission's clear directions.<sup>2</sup>

- CIC raised with the Vice Chancellor [of BHU] the issue of alleged victimisation of the [RTI]Appellant who had not been given admission to the post graduate course against seats reserved for students of the University. CIC directed that the Assistant Registrar,

Shri Pankaj Shreyaskar, would visit the University to inspect the documents for satisfying the Commission that the non-admission of the Appellant was not in any way linked to the case before the Commission. the Commission directed the Vice Chancellor to release the compensation amount to the Appellant for three journeys to Delhi and back as directed in its previous order dated 17.7.2006, as required under Section 19(8)(b).<sup>3</sup>

- In exercise of powers conferred by Section 19(8)(b) of RTI Act –

2005, CIC directed the BHU authorities to... admit Shri Dhananjay Tripathi in the M.P.E. course for the year 2006-07 with immediate effect and grant him a grace period up to the date of admission for the purpose of attendance and to ensure that an applicant

<sup>1</sup> [Appeal No.CIC/WB/A/2007/00240,28 Jan.2008]

<sup>2</sup> CIC/OK/A/ 2006/00163-19.10.2006.

<sup>3</sup> CIC/OK/A/ 2006/00163-6.09.2006

seeking information from the University under the RTI Act - 2005 is not victimized in future.<sup>4</sup>

***"Lodge FIR to initiate criminal action against those responsible for theft/loss of records"- CIC directs the Ministry***

Ms. Misha Singh applied to the Ministry of Environment & Forests seeking information regarding environmental clearance and other parameters of the Maheshwar Hydro Electric Project, Madhya Pradesh in reference to the 1994 environmental clearance given to the NDVA and its follow up-- the reason for not providing information was that it could not be located.

On the basis of the above, CIC had directed Additional Registrar Shri L.C.Singhi of this Commission to visit the Office of the Ministry and investigate the matter of non-location of files. Accordingly, the Additional Registrar visited the office. His report is as follows: -... the misplacement of the file is a fact. It is also a fact that the records are neither cataloged nor indexed. The department does not know how many files are untraceable. It is really strange as to how one full almirah could get misplaced and becomes "untraceable". However, prima facie there are no malafides. "

**DECISION NOTICE**

As reported by the Investigating Officer the concerned files and indeed a whole almirah are untraceable, CPIO cannot be held responsible for any malafide in the non-supply of information to applicant Ms Misha Singh and this would amount to a reasonable cause for the delay/failure to supply.

... a number of documents, which are held in public trust by the Department, have been admitted to have been mislaid. Simply stating that these are untraceable is not adequate excuse. If indeed, as suspected by the complainant, the files have actually been purloined this will amount to serious criminal act and its non-recovery a breach of trust on the part of the public authority. The Ministry of Environment & Forests will, therefore, immediately lodge a First Information Report (FIR) with the nearest Police Station to initiate criminal action against those responsible for this theft/loss.

Appeal No.<sup>5</sup>

**Missing files**

The Public Information Officer ...is, therefore, directed to make a renewed bid to trace the missing file with the full support of Member Secretary, NSES. A further period of 15 working days from the date of issue of this order is given as an opportunity for tracing the original file failing which a criminal case of theft will require to be registered with the police for further police investigation in this matter.<sup>6</sup>

<sup>4</sup> CIC/OK/A/ 2006/00163-9.11.2006.

<sup>5</sup> CIC/WB/C/2006/00102 -16 October, 2006

<sup>6</sup> CIC/WB/A/2006/00536 & 540-30.10.2006

### **MOU and confidentiality**

The copy of the MOU between the IOC and M/s Garima Gas Service has... been withheld on the ground that the document is confidential

The MoUs signed between the partner institutions contain details of cooperation mechanisms for promoting mutually beneficial activities for specific duration. Such documents should fall under the public domain. However, in case of conduct of commercial business and transaction, a clause on confidentiality of certain dealings is generally incorporated. In the instant case, such a clause is not inserted in the document under question for disclosure.

Therefore, the CPIO is directed to furnish the copy of distributorship agreement,..., after due application of section 8(1) and 10(1) of the Act.<sup>7</sup>

### **Grievances redressal mechanisms**

All appellants who have certain grievances relating to their service matters are therefore advised to take advantage of grievances redressal mechanisms already available to them under the relevant Government Rules. The public authorities are also required to make such mechanisms effective so that the increase in frivolous applications under RTI Act could be combined.<sup>8</sup>

### **Ninety year old lady knocks the door of CIC for extension of passport**

...[H]ere is a case of a 90-year old lady [Smt. Krishna Devi Jhalani] who has asked for an extension of her Passport (not for a new one). Not getting any response for three months, she approaches the Information Commission. The PIO, who is also the Regional Passport Officer, neither cares to respond to the Commission's letter asking for her comments nor does she appear in the hearing fixed by the Commission. Could there be a more callous and apathetic attitude of a government servant towards not only a member of the public but also a statutory body like the Information Commission? It is such officers who bring a bad name to the entire bureaucracy and tarnish its image. In fact, the Commission feels that a penalty for which a show cause notice is being issued is too small a punishment for a member of the bureaucracy such as this one. The concerned authorities are, therefore, hereby directed to take the strictest action against the Regional Passport Officer, who is also the PIO. No.<sup>9</sup>

### **Action taken report on complaint**

An appellant had asked for information about action taken report on the complaint filed by him before the Vigilance Officer, HPCL, Lucknow. He is an aggrieved person in the matter of allotment of petrol pump.

<sup>7</sup> 311/IC(A)/2006-3.10.2006.

<sup>8</sup> CIC/MA/A/2006/00161 – 6 July, 2006

<sup>9</sup> CIC/OK/C/2006/00147- 8 November, 2006

The process of selection of dealership for retail outlets is conducted as per the guidelines prepared by the Government. There is no reason as to why such procedures should not be made transparent to the full satisfaction of all the competitors.

In view of this, CPIO is directed to furnish the information sought, except the documents submitted by the other applicants. The action taken report, on his complaint to the Vigilance Officer, should also be provided.<sup>10</sup>

**Officials who are responsible for delay in processing the files**

[Applicant wanted to know]...the names and the designations of the officials through whom the pension restoration file... passed and the time taken for processing at each such stage. The respondents are directed to furnish this information to the appellant... in the tabular form as indicated by the appellant.

I. Name of the applicant(s)

II. When application(s) reached CAO, E&S other officers in the hierarchy of the organization PI indicate name and designation of each and every official(s) through which application(s) passes through (from CAO to concerned diarist/dealing hand in the section in which it was dealt with or supposed to be dealt with.)

III. For how long applications stayed with that officer / official as indicated in Col.2.

IV. What action officials, as in Col.no.II, took to process / dispose of the applicant(s) and when

V. Present status of application and the date

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<sup>10</sup> 176 /IC(A)/2006 - 17th August, 2006

on which latest action  
taken;<sup>11</sup>

### **Survey Report**

Copy of the Survey Report when it was last mutated - A survey report is a public document as agreed by representatives of M.C.D. present. The act of mutation is also a legal action in the public domain....

Copy of all documents submitted for the mutation of the property. Such copy of all documents submitted for the mutation of the property will inevitably involve such documents as could fall under the mischief of sec. 8(1)(j) or claim to have been provided in confidence u/s 11. While the act of mutation itself is a public act, every document submitted in helping a public authority to arrive at a decision in the matter need not be so held. ...Even if the property is involved in a legal dispute, such information as is also open to disclosure to the public may, therefore, be provided.No.<sup>12</sup>

### **Industrial license**

This is a simple matter in which **a citizen has asked for information on what grounds a party has been granted an industrial license in a particular area.** It is not understood how the grant of an Industrial License which is the legal authorisation for starting any industry can be deemed to be “confidential” or why the ground for providing a license should be withheld from disclosure. It is understood that the manner of running the business can fall under the category of a trade secret or commercial confidence and therefore invite the mischief of Sec 8(d). However, a license only establishes whether an industry is authorized or not and enables a citizen to monitor whether an industrial unit is functioning in accordance with the law. Recent instances of widespread misuse of authority specifically in areas under MCD for permitting businesses in areas where they were not authorized to run businesses should induce us to follow an open policy in this regard, an inducement which is now mandated by the RTI Act<sup>13</sup>

### **Bank account of the deceased persons**

There is an established procedure to decide as to who would be the claimant of the money in the bank account of the deceased persons. Accordingly, the CPIO is directed to allow [ requester] access to the bank account of her deceased brother and furnish the information sought by her provided that she is able to prove and produce the certificate to the effect that she is the legal heir of her deceased brother.<sup>14</sup>

<sup>11</sup> CIC/AT/A/2006/00439-20.12.2006

<sup>12</sup> CIC/WB/A/2006/00348 dated 14.12.2006

<sup>13</sup> CIC/WB/A/2006/00328-11.12.2006

### **Information relating to allotment of petrol pump**

The complainant mentioned that he had sought certain information relating to allotment of petrol pump [from Bharat Petroleum Corporation Ltd.]

CIC held: ...it was agreed that the following documents should be furnished to the complainant:

- i) Site plan of the land submitted by the selected candidate;
- ii) Copy of the sale deed/ownership papers of the land; and
- iii) Letter of intent issued by the respondent.<sup>15</sup>

### **Information relating to allotment of petrol pump**

The entire process of allotment of retail outlets (ROs) and the procedure followed for preparation of merit list should fall under public domain. Accordingly, the information sought should be furnished to the appellant. Even the preparation of documents like sales officer's report, which is a part of the process of allotment of ROs, should also be disclosed.<sup>16</sup>

### **Tenders**

The appellant had sought the following information:

*"Copies of the note sheets leading to the issue of first tender, its cancellation, 2nd tender and 'award of job to the contractor' and his financial standing to execute the job of construction of 'Desulphurisation Plant'"*.

The CPIO mentioned that the information sought could not be provided because the process of finalisation of tender in question was not finalized.

Hence, the information sought was denied. The CPIO mentioned that now since the matter has been finalized, the information sought could be given.

The CPIO is accordingly directed to furnish the information sought.<sup>17</sup>

### **Consumer issues**

The Appellant, ..., while travelling from Hyderabad to New Delhi in AC Coach by train, found the air conditioning in the AC coach not functioning properly. The coach was so cold that many of the passengers were almost shivering. ...After coming back, Shri Agarwal sought from the PIO, Railway Board, information on various issues connected with air conditioning in Railway coaches...

The Commission felt that as for the issue of compensation to Shri Agarwal, the Consumer Forum was the more appropriate agency.

<sup>14</sup> 443/IC (A)/2006-12.12.2006

<sup>15</sup> 376/IC (A)/2006-23.11.2006

<sup>16</sup> 281/IC (A)/2006-18.9.2006

<sup>17</sup> 370/IC (A)/2006-22.11.2006

However, since as the complaint was genuine, the Commission directed the Railway authorities to consider measures whereby the AC system could be substantially improved. The Railways should examine this entire matter and inform the Commission of the steps they intend to take to remove such complaints in future by February end.<sup>18</sup>

### **EWS QUOTA- non compliance by private schools**

...we regret to note that the information given amounts to admission that no action has been taken by the Education Department, NCT, Delhi on the applications of 25.11.05 which had brought within the notice of the Department the non compliance by private schools of the NCT Govt.'s orders regarding reservation for EWS in schools. Therefore, although no penalty is proposed under the RTI Act, a copy of this decision notice will be endorsed to Hon'ble Chief Minister, NCT Delhi to bring to her notice the fact of non enforcement of the orders of NCT Delhi in ensuring reservation for EWS in Schools in this Union Territory, with the advice that Govt. may consider suitable action against those responsible for this default.

35 Appeal Nos.<sup>19</sup>

### **A success story**

Appellant Shri Surendra Kumar of Pitampura, Delhi made an application to PIO, DDA Shri OP Mishra, OSD (Land), seeking information on five points concerning land allotment on licence basis to Parasu Ram Dangal Society, Kashmiri Gate, Delhi. The public authority persisted in pursuing the complaint on encroachment and, issuing notice to the alleged encroacher, conduct a joint verification of the site on 3/4/'06 in response to the original application.

So in the hearing PIO Mishra reported that despite resistance by the society in question, which delayed the verification, this was conducted on 14/6/'06, a large portion of unauthorized occupation identified and a demolition programme fixed for July 5, '06. A complete report would be submitted to the Commission on completion of demolition. Both appellant and respondent deserve commendation for having worked together to identify unauthorized encroachment.<sup>20</sup>

### **Who is using the Act?**

Combating corruption is one of the avowed objectives of the RTI Act. It would not be a happy development if the message these appeals give is that the RTI Act which promotes transparency is, quite paradoxically, also susceptible, through clever machinations, to being used to weaken, or at-least to complicate, the campaign against

<sup>18</sup> CIC/OK/A/2006/00432-16.11.2006

<sup>19</sup> CIC/WB/A/2006/00221-32, 00233-46 & 00247-55--5.9.2006

<sup>20</sup> CIC/WB/A/2006/00177 -12 July,2006.

corruption by public authorities engaged in this task. Vigilance against these maneuverings is thus of utmost importance.<sup>21</sup>

### **Bank documents**

The documents sought for under point (a) above are those submitted by the appellant's son and these are not created by the Bank. The Bank is, therefore, not obliged to share or disclose to the public. However, in the instant case, the documents are required by the legal heir of the Bank's employee, who had submitted them. The documents in question should therefore be disclosed to the legal heir.

Likewise, the policy guidelines for appointments on compassionate grounds and the manner in which it has been implemented in the recent five cases of appointment, should also be furnished to the appellant.<sup>22</sup>

### **Removal of encroachment**

Ajay Kumar Geol. filed a RTI a request regarding. action taken against the police officers who allegedly failed to take action on his earlier petition about the removal of encroachment on the road in the Pandav Nagar area of New Delhi. He filed an appeal with CIC where, during discussions, the A.O agreed to supply the requisite information to the requester.<sup>23</sup>

<sup>21</sup> CIC/AT/A/2006/00379-27.11.2006

<sup>22</sup> 245 /IC (A)/2006-6.9.2006

<sup>23</sup> [CIC/AT/A/2006/00051-26 May, 2006]

## RTI AND BUREAUCRACY

### CIC pats P.I.O.s on their back

He/she[P.I.O.] is rendering an extra service along with his/her normal duties and that too without any extra remuneration. The Applicants are, therefore, required to be moderate in their behaviour and language towards the representatives of the Respondents.<sup>24</sup>

### Culture of secrecy

...PIOs of several public authorities invoke exemptions under Section 8 of the RTI Act without adequate appreciation of the evidence before them. The tendency is to apply the exemption and then leave the matter to be decided by the Commission.... they want to play safe lest their superior authorities hold it against them for disclosing information.

The AA and the PIO seem to be constantly looking over their shoulders and are driven by a safety-first approach, viz. take the safest decision (read: apply exemption) and disclose information only when so directed by the Commission. Presumably, this saves them from the ire of their superiors. Passing the buck is a safer bet, but, sadly enough, it is not conducive to

accelerating decision-making or to building of popular trust in the Department's commitment to transparency.

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<sup>24</sup> CIC/OK/C/2006/00121-16.11.2006

The Commission expects the AAs and the PIOs to apply their minds, duly analyze the material before them, and then draw a conclusion about disclosure or non-disclosure based upon a cogent and objective analysis of evidence. Any other approach will not be in the interest of removing the veil of mistrust which hangs between Governments and their peoples.<sup>25</sup>

### **Video conferencing**

CIC used video conferencing with Allahabad to hear an appeal, where the PIO is present.<sup>26</sup>

### **Exemption from appearance for a PIO**

Paramveer singh has appeared for a driving test and interview for the post of Driver in response to a Punjab University's notification. He requested the registrar (P.U.):

1. Merit List of candidates who appeared in the driving test and results of the interview.
2. Copy of appointment letters issued to the successful candidates and criteria adopted.

Not satisfied with the PIO's / A.O's reply paramveer Appealed to CIC.

PIO sought exemption from appearance at the hearing before CIC and did not come to CIC.

CIC directed the PIO : to supply the requested information and held that PIO should give his own Name and the Name of the A.O. in his communications to the CIC He should not seek exemption from appearance before CIC on flimsy grounds.<sup>27</sup>

### **Who should sign what?**

Considering the fact, that CPIO is punishable under Section 20 of the Act with fine, it is necessary that the decision taken by the CPIO is communicated under his signature.

Likewise, while disposing of an appeal, the appellate authority discharges a quasi judicial function and as such his decisions must bear his signature to indicate that he has applied his mind in taking the decision. The usual office procedure has no place in the matters of RTI Act.<sup>28</sup>

<sup>25</sup> CIC/AT/A/2006/00195-25.09.2006

<sup>26</sup> CIC/WB/C/2006/00082- 17 July, 2006

<sup>27</sup> CIC/OK/A/2006/00016 & C/00068-15 June,2006.

<sup>28</sup> 42/ICPB/2006 – 3 July, 2006.

### **PIO should sign all the communications**

In terms of RTI Act, it is the responsibility of the designated PIO/CPIO to deal with applications under the Act and any decision on the same has to be taken by the said CPIO. In terms of Section 20(1), he can also be penalized for knowingly furnishing incorrect, incomplete, misleading information etc., and therefore, every decision has to be conveyed under the signature of the designated CPIO. Likewise, comments on the appeal also has to be sent under his signature as he has to justify the decision taken by him. Therefore, all the CPIOs ... to ensure that all the RTI applications are disposed of under their own signatures and that normal office procedure to convey decisions, is not applicable in communicating decisions under the RTI Act.<sup>29</sup>

### **Who should appear -PIO/AA?**

The appellant challenged Shri Samant[PIO]'s competence to represent the respondents [public authority]. After hearing both the appellant and Shri N.S. Samant, it was

decided that Shri Samant shall be allowed to represent the respondents as the incumbent PIO. The Commission decided to accept Shri N.S. Samant's oral submission that he was now the PIO. It has been in practice in the Commission to allow the PIO to represent the AA. The Commission does not follow a highly strict regime about the appearance of the AAs, specially so, when the Commission separately obtains the AA's comments and thus has a chance to study the AA's contention.<sup>30</sup>

### **If you Fax it, you cannot claim secrecy**

The communication between the State Government of West Bengal and the Home Ministry, Government of India about entrustment of the case to the CBI.

The mere fact that the Special Secretary, Ministry of Home Affairs chose to send his communication to the State Government of West Bengal through an open fax proves the point that the communication was not treated as 'sensitive' by the sender. The notification of the West Bengal Government was also an open notification.

The information which is handled through open channels is potentially disclosable, and the public authorities ought to know this fact.<sup>31</sup>

<sup>29</sup> 182/ICPB/2006-7.12.2006

<sup>30</sup> CIC/AT/A/2006/00195-25.9.2006.

<sup>31</sup> CIC/AT/A/2006/00195-25.09.2006

## Other judgments

### **Right to Privacy fades out in front of the Right to Information Act and larger public interest: Madras High Court**

The Madras High Court has held that banks have a right to publish the photographs of defaulters in newspapers and that such publication will not amount to invasion into the privacy of the individual.

Justice V Ramasubramanian, who dismissed a writ petition by a defaulting borrower from State Bank of India, K J Doraisamy, said publishing the photographs of defaulters would not be 'breach of duty of secrecy and confidentiality' on the banks' part.

The State Bank of India, Erode branch, issued a notice on May 22 to Doraisamy, warning him that it will publish his photograph as well as the surety in newspapers, if the loan was not repaid.

The borrower challenged the notice on the ground that the publication of the photographs would bring down his reputation and would be violative of Article 21 of the Constitution guaranteeing Right to Privacy.

The judge held that with the advent of the Right to Information Act, 2005, the banks had a duty to inform the public and that would not amount to violation of the Right to Privacy and dignity of the borrower.

He said "the duty of the bank to disclose information to the public or the interest of the bank requiring disclosure supersedes its duty to maintain secrecy and confidentiality".

"Right to Privacy fades out in front of the Right to Information Act and larger public interest. If borrowers can find newer and newer methods to avoid repayment of loans, the banks are also entitled to invent novel methods to recover their dues", he added.

-THE HINDU, Nov.24, 2006 (PTI),

### **Patna HC issues notice to Bihar govt on information officers**

The Patna High court has directed the Bihar government to file a reply, within six months, stating reasons why Information Officers were not appointed in various departments as required under the Right to Information Act, during hearing of a public interest litigation petition filed by state Congress chief spokesman Prem Chandra Mishra in this connection. The counsel for the petitioner informed the court that the state Information Commission had not been provided with required infrastructure and staff, although it had been constituted about two months back. (UNI) 2 November, 2006

### **High Court Directs to Implement the Right to Information Act in Bihar**

The Patna High Court today directed the Bihar government to implement the right to Information Act immediately in the interest of the people of the state.

While hearing a PIL filed by the Bihar Pradesh Congress Committee Chief Spokesperson Prem Chandra Mishra, a division bench of the court comprising Chief Justice J.N.Bhatt and Justice Shivkirti Singh asked the state government to implement the Act in Bihar at the earliest as it had already been enforced in other states.

Advocate General P K Shahi informed the court that the state government had convened a meeting on July 21 in this connection.

-13/7/2006(UNI)

## ANNEXURE

### Correspondence exchanged between the President and the Prime Minister

- Shri. C. 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 former President Late Shri K.R. Narayanan and the former 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**.
- In view of the fact that the appellant is a resident of Vellore it was decided to arrange the hearing through **video conferencing**.
- The Appellant himself argued his case through video conferencing and was also **assisted** by Sri Prashant Bhushan, Senior Advocate, Smt. Aruna Roy, and Prof. Shekhar Singh who were authorized by him.
- Both the appellant and the CPIO have earlier filed **written submissions**.

### **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 first question that needs to be determined in this case is as to whether the provisions of the Indian Evidence Act stands over-riden by the Right to Information Act, 2005? In this connection it is pertinent to refer to provisions of Section 22 of the Act, which reads as under: “The provisions 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.” A plain reading of Section 22 makes it clear that it not only over-rides the Official Secrets Act, but also all other laws and that ipso facto include the Indian Evidence Act. In view of this no public authority can claim to deny any information on the ground that it happens to be a “privileged” one under the Indian Evidence Act. Section 3 of the Right to Information Act confers a right on all citizens to obtain information and it casts an obligation on all public authorities to provide the information so demanded. The right thus conferred is only subject to the other provisions of the Act and to no other law.

The second question that needs to be determined is as to whether the Government or for that matter a public authority can deny or refuse to give an information to a citizen on the ground that the information so demanded is covered by Article 74 (2), 78 or Article 361 of the Constitution of India and as such it cannot be furnished. In this case the CPIO and the Appellate Authority have argued that the Right to Information Act does not and cannot override the Constitutional provisions.

On the other hand the Appellant has submitted that there is no repugnancy between the Right to Information conferred by the Act and the constitutional provisions taken recourse to by the CPIO and by the Appellate Authority for denying the requested information. The Appellant has submitted that none of these Articles anywhere state that the information/correspondence between the President and the Prime Minister should not be disclosed. As observed by the Hon’ble Apex Court in *Bommai’s* case, Article 361 is the manifestation of the theory prevalent in English law that 'King can do no wrong' and, for that reason, his actions are beyond the process of the court. Any and every action taken by the President is really the action of his ministers and subordinates. It is they, who have to answer for, defend and justify any and every action taken by them in the name of the President, if such action is questioned in a Court of law. The President cannot be called upon to answer for or justify the action. It is for the Council of Ministers to do so. Where the President acts through his subordinates, it is for the subordinate to defend the action. Before deciding the issue of applicability of Article 74(2) to the instant case, it is pertinent to refer again to the provisions of Article 74(2), which clearly stipulates that the court shall not inquire into whether any advice was at all tendered and even if there was any such advice, the court shall not inquire as to what advice was tendered.

In this connection the following observations of Justice Sawant and Justice Kuldip Singh in *S. R. Bommai vs. Union of India* (AIR 1994 SC 1918) regarding the scope and ambit of

Article 74(2) are quite relevant: “The object of Article 74(2) was not to exclude any material or documents from the scrutiny of the Courts but to provide that an order issued by or in the name of the President could not be questioned on the ground that it was either contrary to the advice tendered by the Ministers or was issued without obtaining any advice from the Ministers. Its object was only to make the question whether the President had followed the advice of the Ministers or acted contrary thereto, non-justiciable.” Justice Ahmadi also agreed that Article 74(2) is no bar to the production of all the material on which the ministerial advice was based.

This issue has been further clarified in a recent case by the Hon’ble Supreme Court (*Rameshwar Prasad and Ors. vs. Union of India and Anr.* AIR2006SC980): “A plain reading of Article 74(2) stating that the question whether any, and if so what, advice was tendered by Ministers to the President shall not be inquired into in any Court, may seem to convey that the Court is debarred from inquiring into such advice but *Bomma* has held that Article 74 (2) is not a bar against scrutiny of the material.” In S.P Gupta’s case the question arose as to whether the views expressed by the Chief Justice of the High Court and the Chief Justice of India on consultation form part of the advice. In this case the two Chief Justices were consulted on “full and identical facts” and their views were obtained and it is after considering those views that the Council of Ministers tendered its advice to the President. The views expressed by the two Chief Justices preceded the formation of the advice. The Hon’ble Supreme Court clearly held that merely because their views are referred to in the advice that is ultimately tendered by the Council of Ministers, they do not necessarily become part of the advice. The Court further ruled that what is protected against disclosure under clause (2) of Article 74 is only the advice tendered by the Council of Ministers. The reasons that have weighed with the Council of Ministers in giving the advice would certainly form part of the advice. But the material on which the reasoning of the Council of Ministers is based and advice given cannot be said to form part of the advice.

The Hon’ble Apex Court illustrating the point with the example of a judgment clearly laid down the law as follows: “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 be held to be outside the exclusionary rule enacted in clause (2) of Article 74.”

The appellant has in this connection referred to the decision of the Hon’ble Supreme Court in *R. K. Jain vs. Union of India & Ors.* (AIR 1993 SC 1769) wherein the Apex

Court has held the claim of the State Minister and the State Secretary for immunity of state documents from disclosure as unsustainable. But in this case, the Hon'ble Court did not find it necessary to disclose the contents to the petitioner or to his counsel. It may be mentioned that in this case the immunity was claimed by the State under the Evidence Act as well as under the constitutional provisions and the Hon'ble Court refused to grant a general immunity so as to cover that no document in any particular class or one of the categories of Cabinet papers or decisions or contents thereof should be ordered to be produced. It would not be out of context to refer to the decision of the Apex Court in *State of Punjab vs. Sukhdev Singh*, AIR 1961 SC 493, wherein the Hon'ble Court held that the documents which embody the minutes of the meetings of the Council of Ministers and indicate the advice given by the Council cannot be produced in a court of law unless their production is permitted by the head of the department. It was not for the court to go into the question as to whether the public interest will be really injured or not by its disclosure.

But in *State of U.P. vs. Raj Narain* (AIR 1975 SC 884) the following observations of Hon'ble Justice Mathew are worth quoting: "In a government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can be but few secrets. The people of this country have a right to know every public act, everything that is done in a public way, by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearing. The right to know, which is derived from the concept of freedom of speech, though not absolute, is a factor which should make one wary, when secrecy is claimed for transactions which can, at any rate, have no repercussion on public security. To cover with veil of secrecy, the common routine business is not in the interest of the public. Such secrecy can seldom be legitimately desired. "

The case of *S.P. Gupta v. Union of India*, 1981 SCC Supp. 87, decided by a seven-Judge Constitution Bench is generally considered as having broken new ground and having added a fresh, liberal dimension to the need for increased disclosure in matters relating to public affairs. In that case, the consensus that emerged amongst the Judges was that in regard to the functioning of government, disclosure of information must be the ordinary rule while secrecy must be an exception, justifiable only when it is demanded by the requirement of public interest.

In *Dinesh Trivedi vs. Union of India* (1997) 4 SCC 306 the Court reiterated the limitations of the Right to Information Act. In this context, the following observations of the Supreme Court are noteworthy. "In modern constitutional democracies, it is axiomatic that citizens have a right to know about the affairs of the Government which having been elected by them seeks to formulate sound policies of governance aimed at their welfare. However, like all other rights, even this right has recognized limitations; it is, by no means, absolute. "

In *Doypack Systems Pvt. Ltd. etc. vs. Union of India* (AIR 1988 SC 782), the production of the documents was resisted by the Attorney-General on behalf of the Union of India on

the ground that the documents were not relevant and in any event most of them were 'privileged' being part of the documents leading to the tendering of the advice by the Cabinet to the President, as contemplated by Article 74(2) of the Constitution. Rejecting the claim for production of the documents, the Hon'ble Supreme Court held as follows: "It is settled law and it was so clearly recognised in Raj Narain's case (supra) that there may be classes of documents which public interest requires should not be disclosed, no matter what the individual documents in those classes may contain or in other words, the law recognises that there may be classes of documents which in the public interest should be immune from disclosure. There is one such class of documents which for years has been recognised by the law as entitled in the public interest to be protected against disclosure and that class consists of documents that it is really necessary for the proper functioning of the public service to withhold from disclosure. The documents falling within this class are granted immunity from disclosure not because of their contents but because of the class to which they belong. This class includes cabinet minutes, minutes of discussions between heads of departments, high level inter-departmental communications and dispatches from ambassadors abroad "Cabinet papers are, therefore, protected from disclosure not by reason of their contents but because of the class to which they belong. It appears to us that Cabinet papers also include papers brought into existence for the purpose of preparing submission to the Cabinet."

From the above decisions of the Apex Court, it may be inferred that Article 74(2), 78 and 361 of the Constitution of India do not *per se* entitle the public authorities to claim "privilege" from disclosure. Now since the Right to Information Act has come into force, whatever immunity from disclosure could have been claimed by the State under the law stands virtually extinguished, except on the ground explicitly mentioned under Section 8 and in some cases under Section 11 of the RTI Act. In this context, it would be pertinent to refer to the provisions of Section 8 of the Right to Information Act, which enlists various exemptions and clause (1)(i) whereof reads as under: (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. From the above, it appears that the Cabinet papers including records of deliberations of the Council of Ministers, Secretaries and other officers shall be made public, once a decision has been taken or the matter is complete. As such, the veil of confidentiality and secrecy in respect of Cabinet papers has been lifted by the first proviso to section 8(1) (i) of the Right to Information Act, 2005. Thus Cabinet papers including records of deliberations of the Council of Ministers, etc. can be withheld or disclosure whereof can be denied only if: i) the matter is still pending or: ii) the information comes within one of the specified exemptions under section 8(1). In view of the above observations, the CPIO cannot deny

information sought under the Right to Information Act by taking recourse to either the Law of Evidence or Article 74(2), of the Constitution of India.

In this connection, it would be pertinent to refer to a latest decision of the Apex Court in *Rameshwar Prasad and Ors. vs. Union of India (UOI) and Anr.* (AIR2006SC980) wherein it has been clearly mentioned that every material that the President sees or is placed before him does not become a part of the ‘advice’. The following observations in the said case are worth quoting: “But it is difficult to appreciate how does the supporting material, become part of advice. The respondents cannot say that whatever the President sees -- or whatever is placed before the President becomes prohibited material and cannot be seen or summoned by the Court.” This, however, does not mean that the disclosure can be claimed as a matter of right in respect of all types/categories of information/correspondence.

Even in *S. P. Gupta’s* case, the Hon’ble Supreme Court held that the disclosure of documents relating to affairs of State involves two competing dimensions of public interest, namely, the right of the citizen to obtain disclosure of information, which competes with the right of the State to protect the information relating to its crucial affairs. It was further held that, in deciding whether or not to disclose the contents of a particular document, a Judge must balance the competing interests and make final decision depending upon the particular facts involved in each individual case. It is important to note that it was conceded that there are certain classes of documents which are necessarily required to be protected, e.g. Cabinet Minutes, documents concerning the national safety, documents which affect diplomatic relations or relate to some State secrets of the highest importance, and the like in respect of which the Court would ordinarily uphold Government’s claim of privilege.

In *R. K. Jain vs. Union of India* (AIR 1993 SC 1769) the following observations of the Apex Court need to be mentioned: “In a democracy it is inherently difficult to function at high governmental level without some degree of secrecy. On such sensitive issues it would hamper to express frank and forthright views or opinions. Therefore, it may be that at that level the deliberations and in exceptional cases that class or category of document gets protection, in particular, on policy matters. Therefore, the Court would be willing to respond to the executive public interest immunity to disclose certain documents where national security or high policy, high sensitivity is involved. Information relating to national security, diplomatic relations, internal security or sensitive diplomatic correspondence *per se* are class documents and that public interest demands total immunity from disclosure. Even the slightest divulgence would endanger the lives of the personnel engaged in the services etc.”

In *People’s Union for Civil Liberties v. Union of India* AIR 2004 SC 1442 the Hon’ble Supreme Court stated that Right to Speech and Publish does not carry with it an unrestricted right to gather information. A reasonable restriction on the exercise of the right to know is always permissible in the interest of the security of the State.

In *Chairman, Railway Board vs. Chandrima Das* (AIR 2000 SC 988) the Court held that fundamental rights guaranteed under Part III of the Constitution are not absolute in terms. Those rights will be available subject to such restrictions as may be imposed in the interest of the security of the State, or other important considerations. Interest of the nation and security of the State is supreme. Primacy of the interest of the nation and the security of the State will have to be read into the Universal Declaration as also in every Article dealing with Fundamental Rights including Article 21.

An information requested under the Act can, however, be denied under the provisions of Section 8 or Section 11. In the instant case too, the CPIO has also taken recourse to Section 8 (1) (a). In paragraph two and three of the letter dated November 28, 2005 addressed to the appellant, the CPIO, while denying the information to the appellant, has stated as under: “It may also be pointed out that in terms of Section 8 (1) (a) of the Right to Information Act, 2005, the information asked for by you, the disclosure of which would prejudicially affect the sovereignty and integrity of India, the security, strategic, scientific or economic interests of the State etc. In these circumstances, the undersigned expresses its inability to provide you the copies of the correspondence as desired by you under the Right to Information Act, 2005.” From the above, it is difficult to understand as to on what grounds the information has been denied. It is also difficult to comprehend as to how the disclosure of the information is going to affect the strategic, scientific or economic interests of the State. It appears that the denial has been communicated in a mechanical manner.

Even the Appellate authority has failed to take cognizance of these infirmities in the order of denial of information. The Appellate authority did not examine as to whether the information sought for by the Appellant could qualify for exemption under Section 8 (1) (a) of the Act. In view of the observations made above and in view of the facts and circumstances of the case, the only relevant ground for denial could be that the disclosure could prejudicially affect the security of the nation and not on other grounds like the strategic, scientific or economic interests of the State etc. It has however been strongly argued on behalf of the appellant that disclosure will in fact help restore confidence in a section of the community that was badly affected by civil strife. In contra, it has been forcefully submitted by the learned Additional Solicitor General that correspondence concerns a matter involving national security and it will not be in public interest to disclose the same. It is legally permissible for the public authority to deny the information on grounds of national security under section 8(1) (a).

However, a public authority may still allow access to such information if public interest in disclosure outweighs the harm to the protected interests. Prima facie the correspondence involves a sensitive matter of public interest. The sensitivity of the matter and involvement of a larger public interest has also been admitted by all concerned including the appellant.

In *S. P. Gupta's* case, the Hon'ble Supreme Court has held that the disclosure of documents relating to the affairs of State involves two competing dimensions of public

interest, namely, the right of the citizen to obtain disclosure of information, which competes with the right of the State to protect the information relating to its crucial affairs. It was further held that, in deciding whether or not to disclose the contents of a particular document, a Judge must balance the competing interests and make final decision depending upon the particular facts involved in each individual case. Since two differing stands have been taken before us in regard to public interest, applying the decision in SP Gupta's case, we consider it appropriate, that, before taking a final decision on this appeal, we should personally examine the documents to decide whether larger public interest would require disclosure of the documents in question or not.

Mr. Prashant Bhushan, representing the Appellant has also agreed that some part of the correspondence may be held to be covered by Section 8(1) (a) and as such its disclosure may have to be denied, but at the same time he has submitted that then also it will be the duty of the Commission to sever that part which is prejudicial to the security and integrity of the State and disclose remaining part of the correspondence.

The Commission after careful consideration has, therefore, 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.

Accordingly we direct the public authority to produce the impugned documents for our perusal in a sealed cover, at 11.00 A.M. on 22nd August, 2006 through a senior officer, who shall remain present during perusal and who will thereafter take them back after sealing the same in our presence. Summons to that effect be sent accordingly by the Registrar.<sup>32</sup>

[Wajahat Habibullah Chief Information Commissioner; M.M. Ansari, O.P. Kejariwal and Padma Balasubramaniam Information Commissioners.]

### **Delhi High Court issues Stay on a Decision given by CIC**

*[For the first time after the enactment of the RTI Act, a High Court issued stay on a Decision given by CIC.]*

The Delhi High Court on 22 August, 2006 stayed the CIC order directing the government to make available to it copies of late president K.R. Narayanan's letters to then prime minister Atal Bihari Vajpayee about the 2002 communal violence of Gujarat. Justice Anil Kumar stayed the August 8 order till January 11, 2007 on an application moved by the Union Government saying that the letters could not be made available to

<sup>32</sup> CIC/MA/A/2006/00121-8 Aug, 2006



CIC as it would impinge on the national security and integrity.

Additional Solicitor General Gopal Subramaniam and Standing Counsel Rajiv Mehra argued before the court that the CIC's order was "erroneous, ultra vires and untenable in law."

Quoting Article 74 and 78 of the Constitution, the Union Government submitted that any advice tendered by the Union Council of Ministers or correspondence exchanged between the President and the Prime Minister enjoyed immunity from public scrutiny.

The Centre asserted that the correspondence between the President and the Prime Minister were "classified" and "privileged" documents under Article 74 and hence the provisions of the Right to Information Act, 2006 cannot override the same.

The petition complained that the CIC erroneously applied the provisions of Section 6 of RTI Act in seeking production of the classified documents from the Government.

Rashtrapathi Bhavan had earlier rejected a similar plea from the Justice Nanavathi Commission probing the post-Godhra communal carnage in Gujarat. Allowing the plea, Justice Anil Kumar said: "The national security and integrity must prevail upon all the rights even if they are enshrined in the constitution."

## Interpret the transparency law liberally!

*Many recent judgments favored liberal interpretation of RTI laws and boosted the morale of the transparency lovers. The following statements will be inscribed with golden letters in the history of openness:*

“Through every pore of its 31 sections, the Act [the RTI Act] celebrates the spirit of knowledge.”

-- Hon'ble Justice Sanjib Banerjee, Calcutta High Court, in *Pritam Roj v The University of Calcutta & Others* [W.P. No. 22176 (W) of 2007, Judgment date: 28 March 2008], objecting to the ‘floodgate theory’ of the CIC, decided that a student should have access to his evaluated answer script in University exams under the RTI Act.

“A rights based enactment is akin to a welfare measure, like the Act [the RTI 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.”

-- Hon'ble Justice S. Ravindra Bhat, Delhi High Court, in *Bhagat Singh v. Chief Information Commissioner and Ors.*, WP(C) No. 3114/2007, Judgment date: 3 Dec.2007

“[T]he statute [FOI Act], whose whole purpose is to secure the release of information, should be construed in as liberal a manner as possible and, so long as individual and other private rights are respected, and the cost limits are not exceeded, I do not see myself any reason why the Commissioner should not be accorded the widest discretion in deciding the form and type of information which should be released in furtherance of its objectives”.

-- Lord Marnoch (Scotland), in *Common Services Agency v Scottish Information Commissioner* [2006] CSIH 58, 1 December 2006, the first Court of Session case on the FOI (Scotland) Act; during his long career only ever had one civil decision and one criminal decision overturned.

“There is much force in Lord Marnoch’s observation in the Inner House that, as the whole purpose of FOISA is the release of information, it should be construed in as liberal a manner as possible”.

-- Opinion of UK House of Lords in *Common Services Agency v Scottish Information Commissioner* [2008] UKHL 47 (9 July 2008)

