

# THE RIGHT TO INFORMATION – NEW LAW AND CHALLENGES

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The Parliament enacted one more law, governing the right to know of the citizens in India. The Right to Information Act, 2005, got the assent of the President<sup>1</sup>, after the approval by the Parliament in its speedy and marathon discussions. The earlier Freedom of Information Act 2002, had got assent of the President; but it did not notify and finally repealed.

The debatable question is not on the quality of the right guaranteed by the new enactment, but its enforceability. The right to get information is an inherent right in a democratic form of government. The right of the people to know the working and performance of its Government is one of their predominant rights. Such rights enable transparency in the governmental affairs and necessitate accountability towards the people.

Once the Apex Court held,

“The people of this country have a right to know every public act, every thing 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 repercussions on public security. To cover with a veil, the common routine business is not in the interest of the public. Such secrecy can seldom be legitimately desired. It is generally desired for the purpose of parties and politics or personal self interests of bureaucratic routine. The responsibility of officials to explain and to justify their acts is the chief safeguard against oppression and corruption”<sup>2</sup>.

Above verdict alights the real ambit and scope of the right to information. The term right to information are often used interchangeably and have long been regarded as a fundamental human right. In its very first session in 1946, the UN General Assembly adopted Resolution 59 (1), stating.

“Freedom of information is a fundamental human right and.. the touch-stone of all the freedoms to which the United Nations is consecrated.”

While in Apex Court, Bhagwati, J. had endorsed, “Open Government is the new democratic culture of an open society towards which every liberal democracy is moving and our country should be no exception.”<sup>3</sup>

The concepts of Open Government and Right to Information are inter-relatable. The viability to access to Government is the prime criteria in deciding the openness of a Government. Participation in government by the people is regarded, as an important aspect of democracy and peoples desisted from participating in governmental affairs unless they have information as to what is going on in the Government. A modern democratic State being answerable and accountable to its people, the people are entitled to know what policies and programme, how and why, are being framed and followed by the Government.

An important feature justifying the openness in governmental activities is that, being an activist entity, the Government accumulates a vast armory of powers in a welfare state. Out of this powers, from Defense to Education, from External Affairs to Poverty Elevation, the Government frames and implements collective policies and schemes. These powers are used to affect economic interests and the personal liberty of the individual. Therefore, it is extremely essential that these powers have to be exercised for public good, not improperly and for the purposes of which the powers are conferred. Hence, this objective can be best ensured by giving access to the individual to Governmental information and not in shrouding in secrecy as to how the Government exercises its power in individual cases.

Secret Governments and the corruption in public administration are the real evils of the century. That is why the United National called for an international campaign to check the tendency to withhold information from the people with effective right to information legislations<sup>4</sup>. By the end of March 2004 about 50 countries, all over the world, had enacted comprehensive laws to facilitate access to official information.

Since power tends to corrupt, and absolute power tends to corrupt absolutely, there is an inherent danger that the vast powers available to the executive may be used not for public good, but for private gain, or for corrupt motive. In such a circumstances the Right to Information laws are critical tools in the fight against Corruption. It enhances transparency. It encourages political institutions by enhancing public confidence in their operation. If unbridled corruption continues to infect a society or political system, it may eventually lead to social unrest due to the division it creates between those who have easy access to goods and services and those who remain excluded. It is the poor who always bear the greatest burden of a corrupt society.

Nevertheless the Official Secrets act, 1923 that designed to protect the executive activism in India, would shut the door before the common man irrespective of this right to know guaranteed in article 19(1) of the Constitution of India<sup>5</sup> and Section 19 of the Universal Declaration of Human Rights.

The right to information does not mean the free flow of information without any restriction. Like all other fundamental rights, the right to information is also subject to reasonable restrictions. Article 19(2) of the Constitution limits the range of restrictions in certain circumstances like in the interest of 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. An enactment like Official Secrets Act would get justification under such express restrictions or implied 'Governmental Necessities'.

The major criticism against the Official Secrets Act that has left a deep mark on the equation between the state and the citizen, a government institutions are used to operating as a closed, intimidating system. Another major condemnation of the Official Secrets Act is that it covers a broad area under the term of "Secret". Any kind of information is covered under the Act provided it is a "Secret" which includes any official code, password, sketch, plan, model, article, note, document or information. Nowhere the word 'secret' or "official secrets" are defined in the Act. The limitation is that the Act applies only to official secrets and not to secrets of a private nature. Hence, the Act extends to the secrets of every Governmental Affairs; thereby the common men are desisted from accessing the information under a procedure established by law.

Such a story situation invited the enactment of right to Information Law. By enacting a comprehensive Right to Information Law, the government has to throw open its doors and invite people in to the process of governance with appropriate accessibility. It should actively intervene to educate people about their right to access information, and the scope and method of exercising this right, while simultaneously trying to promote a culture of openness within official structures. But Indian experiences are nothing but reverse.

The Right to Information Law in India has a recent origin. The Draft bill framed by the Press Council of India, in 1995, provided feasible provisions including setting up of state and national level Council for Freedom of Information, which would act as the final custodians of the right. The bill was unsuccessful due to the non-cooperation of the Central Government.

Later in 1997 a working group under the chairmanship of Mr. H.D. Shourie drafted another bill, which was finally reworked in to the freedom of information bill, 2000 . In 2003 the parliament enacted the freedom of Information Act under veiling the vehement criticism from, the different corners of the society. The said Act, without experimented in practice, now become repealed and right to Information Act, 2005 is enacted .

The Right to Information Act 2005 endorse the right to information as Citizen's right<sup>6</sup>. It imposes certain obligations to the public authority regarding the maintenance of records in computerized form and publication of inside details of organization, function and management structure<sup>7</sup>.

Section 5 of the Act necessitates appointment of Public Information Officers by the Public authorities in both Central and State level in all its administrative units or offices within 100 days of the enactment of the Act.

A citizen of India can apply for the information from a public authority on making on application in writing or through electronic means along with fee. The application is to be addressed to the concerned Public Information Officer (PIO) or Assistant Public Information Officer (APIO) of the related public authority. On receiving such an application PIO or APIO shall take decision on such application by providing the required Information or rejecting the application for any of the reason specified in section 8 and 9 of the Act.

The right to information, now being a statutory right, is not an absolute right. There are many exceptional circumstances to deny the disclosure of the information. The disclosure of any information which would prejudicially affect the national interest, such as sovereignty and Integrity of India, Security, Strategic, Scientific or economic interest of the State, relation with foreign State are some of such restrictions. The parameters of such restrictions are significant that limits the right in large volume. However the new enactment excluded certain grounds of refusal of disclosure incorporated in section 9 of the Freedom of Information Act 2002, such as the refusal of Information already published and when the request is in too general in nature.

The privileges of Judiciary and parliament are protected under Section 8 of the Act. Commercial Confidence, trade Competition, criminal Investigation, cabinet papers individual privacy are some of the reasonable restrictions envisaged in the Act.

A residuary and discretion any power is given to the Public Information Officers to enable the disclosure of information if public interest in disclosure of the information out weighs the harm to the public authority.

Section 9 of the Act protects the information on copyrights, if the request involves infringement of copyright of a person. If any disclosure affects the third party interest, adjudication before disclosure with prior notice to a affected third party is provided<sup>9</sup>. In addition to all these the Act excludes the activities of the intelligence and Security organization in the Central or State level such as IB RAW, Revenue Intelligence, BSF, CRPF, CLSF etc as enumerated in the Second Schedule<sup>10</sup>.

The Act provides for the appointment of Central Information Commission and State Information Commission for tenure of 5 years to supervise the enforcement of rights. The Chief Central information commissioner accompanied by the Information Commissioners not more than ten, heads the central Information commission. The Committee consisting of Prime Minister, opposition Leader and one Cabinet Minister makes the appointments.

The appointment of State Chief Information Commissioner and other state Information Commissioners are made by the committee consisting of the Chief Minister, Opposition Leader and one Cabinet Minister.

The appointment, removal and powers of the information commissioner are seems to be fair, which would facilitate independency of the institution. Fixed Tenure, rational qualifications, rigid formalities for removal etc... are some of the significant features. The information commissioner shall have the power to order disclosure of information and also to require the public authority to grant compensation to the complainant.

The order of rejection of request for information by the public information officer is appealable before the senior officer of the PIO in the respective public authority within 30 days of the receipt of the order. The Central Information commission is the second appellate authority.

The second appeal shall be file within 90 days of receipt of the order in first appeal. The Act mandates speedy disposal of the appeals by the first appellate authority and second appellate authority with in a maximum time of 45 days of filing of appeal.

Earlier in the Bill there was a specific provision enabling appeal to the High Courts against the orders the commission on the points of facts and law. Now that provision is deleted during the debate. However the aggrieved person can resort writ remedy under Article 226 of the constitution of India.

The rights to Information Act, 2005 provides penal provisions to check the abuse of power by the Public Information Officer. Defaulted officers are liable to fine up to Rs. 25,000/- subject to adjudication by the commission with notice to the Officer. Defaulted officers are also subject to the disciplinary jurisdiction under the concerned service rules.

The new act substitutes the Freedom of Information Act, 2002 to “ensure greater and more effective access to information” with “more progressive, participatory and meaningful” changes. However the new enactment lacks meaningfulness in certain extent. A right to information legislation should assume that the maximum information is to be available to the public. Openness of public activities will be meaningful only if the disclosure of information is available to the public in connection with framing of

policies entering in contracts and also in decision making. The circumstances which limit the right under section 8 is undefined, covering the most of the governmental activities by leaving ambiguity. The restrictions are much wider as it based on the type of the document, not on the basis of the content of the document.

The governmental agencies dealing in revenue enquiry and security are excluded from the purview of the Act except in case of allegation of corruption and human rights violation. Such a complete prohibition irrespective of certain class of information gathered by them is unwarranted that no public bodies should be completely exempt from complying with the right to information law.

The Right to Information Act governs only the public authority as defined under the Act. However the right to Information, in the prestatute period being a fundamental right flows from Article 19(1) has a wide range, to include the private sector performing public functions also, in the light of the extended definition of 'State' under the Article 12. During this globalization and anti-nationalization era, the involvement of the private bodies in the public activities are vital and to impose accountability through transparency in relation to private as well as public functionaries is inevitable. The promotion of access to Information Act, 2000 of South Africa prepared to accept a healthier experiment by including the private sector in the regime of right to information.

However as per the Act, if any information with regard to a private body is with the public authority, such information can be accessible or available to disclosure after issuing a notice to the private body.

The general obligation of the public authority to publish information under Section 4 is automatic. Yet any default in such publications is not subject to the penal action.

The Right to Information Bill provided for prosecuting the defaulted officers, which may ultimately result in maximum 5 years imprisonment and monetary fine. However during the debate the penalty provision was diluted by dropping the provision for prosecution and added a provision to apply the disciplinary jurisdiction under services rules.

The multi phase regime of right to information amounts jurisdictional conflict. The 2005 Central enactment covers all the authorities and body and institution of self government established or

constituted by or under Constitution of India, any other law made by parliament or by State legislature or by notification issued or order made by the central or state governments including any other body controlled or substantially financed by the central or State Government and also the NGOs financed by the Governments.

The State enactments cover the offices and bodies of the State Governments. The Kerala Right to Information Bill, 2002, covers all offices of the State Government, all authorities constituted under the State Acts, Company, Societies or any organizations or body funded, owned or controlled by the State Government. The State enactment excludes offices of Central Government, Army and Para Military establishments, Body or corporation owned or controlled by the central Government, Governor's Secretariat, Local Self Governments and High Court of Kerala and all other courts and tribunal and other organizations having the Status of Courts. In other States such as Rajasthan<sup>11</sup>, Karnataka<sup>12</sup>, Tamil Nadu<sup>13</sup> and Assam<sup>14</sup>, the local authorities are under the regime of State right to Information Acts.

In an added phase the Chapter XXV of the Kerala Panchayat Raj Act, 1994 deals with the right to information with regard to the Panchayats in Kerala. Section 271B mandates every Panchayat to disseminate information to required persons.

However the right to Information Act, 2005 appears to be progressive in some other point of view. An effective and efficient two tier appellate mechanism is provided in the Act. Strict time limit is given to respond the request for information and disposal of the appeals. Independent adjudication mechanism under Central and State level Chief Information Commissioner is provided. every public body except intelligence and security agencies of the nation is included in the exhaustive definition of public authority'. More over the Act provides an automatic enforcement, irrespective is notification, on the 120<sup>th</sup> day of its enactment<sup>15</sup>.

A mere enactment or implementation of its provision will not ensure the right as such. The major component of the right to information chain is the Civil Service of the Country. A proper and effective training to the civil servants only will ensure the prompt enforcement of rights. The failure in implementing and enforcing anti corruption laws is the finest example for mistreatment of law by the civil servants. of course the achievements of a legal mechanism depends on the person man it. The nation needs an activist Information Commissioner as the watch dog of the right to information. The

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### **Foot notes**

1. The right to Information Act, 2005 got assent of the President of India on 15<sup>th</sup> June 2005, published in Gazette of India, Extra Ordinary, part II, Section 1, No 25 dated 21<sup>st</sup> June 2005.
2. State of Uttar Pradesh V. Raj Narain, Air 1975 SC 865
3. SP Gupta v. Union of India, AIR 1982 SC149 1985
4. See Practical Guidance Note, Right to Information by Bureau of Development Policy, United Nations Development Programme, July, 2004 contact elizabeth.mccall@undp.org
5. Dinesh Trivedi v. Union of India, (1977) 4 SCC 306,
6. See.5.3 of the Right to Information Act, 2005.
7. See.5.4 of the Right to Information Act, 2005.
8. See.5.7 of the Right to Information Act, 2005.
9. See.11 of the Right to Information Act, 2005.
10. See.S.24 of the Right to Information Act, 2005.
11. See Rajasthan Right to Information Act, 2000 (Act 13 of 2000)
12. See Karnataka Right to Information Act, 2000 (Act 28 of 2000).
13. See Tamil Nadu Right to Information Act, 1997 (Act 24 of 1997).
14. See assam Right to Information Act, 2001, (Act 9 of 2002).
15. The Central Government clarifies that Some provisions have come into force with immediate effect viz obligations of public authorities {S.4 (1)}, designation of public Information Officers and Assistant Public Information Officers (S.S) (1) and 5(2) Constitution of Central Information Commission (S.12) and 13), constitution of State Information Commission (S.15) and 156, non Applicability of the Act to Intelligence and Security Organizations {S.24} and power to make rules to carry out the provisions of the Act (S.27 and 28) and other – provisions with effect from 12<sup>th</sup> October 2005.

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