



Central Information Commission

Technical Sessions
Background Papers

7th Annual Convention-2012
12th & 13th October
DRDO Bhawan, New Delhi

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Compliance, Lessons Learnt: Successes & Failures

12th October, 2012

At 1430 hrs

Shri Wajahat Habibullah, Chairman, NCM & Former CIC Chairperson

Dr O P Kejariwal, Former IC

Shri G R Sufi, SCIC, Jammu & Kashmir

Shri M N Gunavardhan, SCIS, SIC, Kerala

Shri D Thangaraj, SIC, Karnataka

Shri Jagadananda, SIC, Odisha

&

13th October, 2012

At 1400 hrs

Ms. Aruna Roy, Social Activist Chairperson

Shri N S Napalchyal, SCIC, Uttarakhand

Shri R I Singh, SCIC, Punjab

Shri Naresh Gulati, SCIC, Haryana

Shri Ratnakar, Gaikwad, SCIC, Maharashtra

Shri Bhim Sen, SCIC, HP

Background Paper on Compliance, Lessons Learnt: Successes & Failures

It is now widely accepted that the right to information laws, within a short period of time, have made the people aware of their rights to seek information about functioning of public authorities in a whole new way; thus paving the way for transparency and accountability in the process of Governance besides deepening the concept of participatory democracy. In the developing countries which face the twin challenges of endemic corruption and inefficiency in governmental institutions and need for rapid economic and social progress, the operation of the right to information laws, even in the initial years of their operation, have exhibited vast transformational potentiality. These laws hold out the promise that they have the power to suck out the toxins in governmental systems and cleanse them.

Government's trustworthiness in the eyes of the citizen is enhanced by the willingness with which State's institutions accept and adopt transparency. The citizen is deterred by the culture of secrecy and is intimidated by the mystique of governance. In either case, the result is distancing of the citizen from State institutions. RTI Act has for the first time given to the citizen an instrument to directly challenge the system and to enter into its most hallowed portals.

Structural- Functional Framework

The Act mandates a legal-institutional framework to set out a practical regime of right to access public information. It prescribes both, mandatory disclosure of certain kinds of information by public authorities, and designation of Public Information Officer (PIO)/ APIOs in all public authorities to attend to the

requests from the citizens for information. It also provides the citizens the right to appeal. Furthermore, the Act also mandates the constitution of Information Commission(s), to enquire into complaints, hear second appeals, oversee and guide the implementation of the Act.

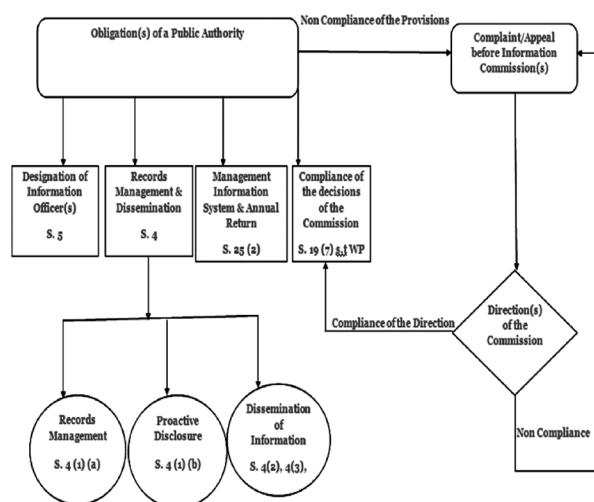
The Act casts certain obligations both, on the part of the public authorities and the Information Commissions. The obligations of the public authorities are enumerated below:

- A. Records Management (Section 4 (1) (a))
- B. Proactive Disclosure of Information (Section 4 (1) (b), (c))
- C. Dissemination of Information (Section 4 (2), (3) & (4))
- D. Designation of Information Officers (Section 5)
- E. Implementation of Decisions of the Information Commission (Section 19 (7) s.t WP)
- F. Management Information Systems and Annual Returns (Section 25 (2))

The obligations of the Information Commissions are mentioned as under:

- A. To receive and enquire into a complaint (Section 18 (1))
- B. To give notice of its decision, including any right of the complaint (Section 19 (9))
- C. To decide the appeal in accordance with such procedure (Section 19 (10))
- D. To prepare a report on the implementation of the provisions of the Act (Section 25 (1))

Figure 1 : Structural - Functional Framework of Compliance



Areas of Concern

A. Poor record management practices and Obsolete record management guidelines:

It is pertinent to realize at the outset that of the three phrases in currency viz. “right to information”, “freedom of information”, and “access to information”; the last one is critical for compliance with the time sensitivity of providing information under the RTI Act. Ineffective record management system and collection of information from field offices results in delay in processing of RTI applications: As per Section 4 (1) (a) of the Act, a Public Authority shall “maintain all its records duly catalogued and indexed in a manner and form which facilitates the Right to Information under this Act and ensure that all records that are appropriate to be computerised are, within a reasonable time and subject to availability of resources, computerised and connected through a network all over the country on different systems so that access to such records is facilitated”. However, findings of various studies point towards a weak record management system; whereby critical field level information is not available at the higher levels of hierarchy.

It has been noticed that even in Central Government Ministries, the status of recordkeeping is a problem area; and record management is mostly storage centric rather than retrieval centric. In most of the places, the current rules pertaining to record management only cater to categorisation of records based on time period for storage before destruction. In most states, record keeping procedures have not been revised for decades. Most significantly the practice of cataloguing, indexing and orderly storage is absent; critical for quick-turnaround in case of information sought under RTI Act. Even where records are stored, retrieval of intelligible information is a challenge. It is perhaps because of this situation that there is a tendency to give bulk unprocessed information rather than relevant and pertinent information.

B. Ineffective implementation of suo motu disclosure provisions of the Act:

The RTI Act, 2005 (RTIA) specifically obligates that one of the basic responsibilities of the Public Authorities (PAs) is to disseminate information on suo- moto basis. Section 4(1) (b); sub clauses i-xvi; specifically mentions the type of informations which need to be provided by the PAs; known as suo moto or proactive disclosure. It is somewhat akin to the disclosure requirements contained in the United States’ Administrative Procedure Act (5 USC 552(a)(1-2)). Indian RTI advocates expected that the RTIA’s proactive disclosure requirements would eliminate the need for many RTI requests by compelling the publication of frequently-sought information. Unfortunately, many public authorities have not been able to pay adequate attention to the RTIA’s proactive disclosure requirements under the RTI Act. Studies in the past viz PWC report have revealed that public authorities have invariably failed to take adequate steps

to assure compliance with this provision; and even where information has been proactively disclosed, it is often incomplete or soon out-of-date. PWC's survey of PIOs found that 43 percent were not aware of the proactive disclosure requirements at all (PriceWaterhouseCoopers report 2009, 8 and 49-50). The RAAG study has also mentioned about state of poor compliance in its study (RTI Assessment & Analysis Group report 2009, 11-12).

C. Inadequate ICT usages for information dissemination:

The Act incorporates a progressive approach, and calls for implementation of ICT with a view to store and disseminate information efficiently. It has been emphatically stated in the Act that, "All public authorities shall maintain all its records duly catalogued and indexed in a manner and the form which facilitates the right to information under this Act and ensure that all records that are appropriate to be computerized are, within a reasonable time and subject to availability of resources, computerized and connected through a network all over the country on different systems so that access to such records is facilitated."

The status of compliance on the part of public authorities in this regard is abysmal. The dissemination of information through website is one of the most cost effective of all measures. Although public authorities, in compliance with the directions of the Central Information Commissions dated 15 November 2010, in case no CIC/AT/D/2010/000111, are submitting their returns in this regard; as per report, submitted to the Commission till 22 September, 2012, reveals that, out of 2336 public authorities registered in the database of the CIC, 890 public authorities are yet to enter even their website addresses. It

further reveals that 779 public authorities have not updated RTI manuals/disclosures as well as webpage address. In all there are 848 public authorities who have not updated RTI manuals/disclosures and webpage address for the last one year.

D. Submission of RTI returns u/s 25 by the public authorities

The numbers of public authorities as well as their percentage, who have submitted their returns online, a facility provided by Central Information Commission, have shown a fluctuating trend over the years (2006-07, 2007-08, 2008-09 and 2009-10). In the year 2011-12 and 2010-11, 1593 of 2314 (68.8%) and 1452 of 2149 (67.5%) submitted their returns respectively. However, during 2009-10, 1427 of 1847 (77.26%) public authorities submitted their returns. The status of submission of returns by public authorities has shown a clearly declining trend for the period 2008-09 to 2010-11. During the year 2010-11 the number of public authorities, who have submitted their returns, has declined by approximately 10 percentage points.

The Commission, in view of inordinate delays by public authorities in submitting annual returns in preceding years, introduced the system of submission of quarterly returns at regular interval during 2010-11. Every public authority was required to submit returns for each quarter in order to be eligible for assessment of its performance during 2010-11. However, the goal of submission of annual returns by cent percent public authorities for all four quarters in any year has remained a distant dream.

E. Non Compliance of the directions of the Commission

The Information Commissioners in their orders for disclosure of information generally set a time line for the PIO to

provide the information to the appellant. When the information is not received or the correct information is not provided, the appellants write to the CIC informing about noncompliance of its orders.

The Commission receives large number of complaints because their decisions are purportedly not complied with by the concerned public authorities. Although no such estimates as to what percentage of disposed cases are reported as complaints for non compliance are generated by the Commissions, one estimate at CIC however indicates that around 40% of the complaint cases fall in this category. The issue of non compliance is actually highly subjective. Whether a decision is complied with or not, is often not easy to ascertain. Both parties may dispute claims of correctness of information. The PIO may not respond to notices. Appellants may not be satisfied with the information but that may be the only information available on the record. However, since careful examination of complaints about non-compliance, issuing notices to parties followed by hearing is a time consuming process; the remedy perhaps lies in strict adherence to decision of the Commission in letter and spirit.

F. Inadequacies in Right to Information rules

The extant Right to Information rules do not address many issues which leave scope for confusion and subjectivities in the implementation of RTI Act.

- I. No specific rules have been prescribed for disposing a Complaint by the Commission.
- II. Absence of format for filing a complaint before the Commission.
- III. No definition for 'Registry'.
- IV. Restricting the RTI request within a

specified number of words perhaps militates against the spirit of the Act.

- V. No specific provisions for 'Compliance of the Order of the Commission' by the public authorities.
 - VI. No specific provisions for 'Recovery of Penalty and Payment of Compensation' and 'Recommendation for Disciplinary Action'.
 - VII. No specific provisions for 'Abatement of an Appeal/Complaint'.
 - VIII. Absence of Clarification regarding holders of "information" for priced publications.
- A. First Appellate Authority a weak link in RTI regime**

The strength of any chain of activities lies in its various links. Hence the success or failure of implementation of the Act depends on understanding and executing their respective roles by concerned role players in the RTI regime responsible for ensuring supply of information. The role of the first Appellate Authority in the RTI Act is as important as that of the Commission. Large number of appeal/complaints before the Commission, inter alia, would be reflective of the quality of functioning of the First Appellate Authorities of the public authorities. The RTI Act does not prescribe with due clarity either duties and responsibilities nor any deterrent in the event of failure to do so for the First Appellate Authorities. This perhaps appears to be one of the greatest causes for the indifferent attitude of the First Appellate Authorities in the RTI regime. As senior officer(s) of the organization, they need not only to discharge their quasi judicial function properly but take corrective measures also to strengthen the supply end of information management in

accordance with provisions of the RTI Act especially section 4.

B. Absence of standard/uniform procedure in deciding complaint for non compliances

The need for ensuring compliance of orders of the Information Commissions cannot be emphasized enough. Non-compliance not only negates any sense of justice the appellant may deserve, but also indicates disrespect towards the institution and the spirit of the RTI Act. However, there is significant absence of any uniform process of handling the cases of non compliance by the Information Commissions. Some Information Commissioners treat non-compliance of their orders as a complaint which is registered separately and disposed; whereas, others consider them as a part and extension of earlier case record and the matter is dealt with like a normal correspondence in a file.

C. Increasing Pendency

The creation of backlog and pendency in

disposal of appeals and complaints does not augur well for the future of right to information in the country. One of the reasons for considering the RTI Act to be a revolutionary one is stipulation about strict response time for furnishing information backed up by individual penalty on erring government official. This requirement of timeliness has been extended to the First Appellate Authority as well – an order has to be given within thirty days from the date on which the first appeal is filed. However, the long queues at the level of the Information Commissions are cause of major concern amongst stakeholders especially information seekers. This may perhaps be a case for stipulating reasonable timeline for disposal of second appeals too.

Conclusion

The issues raised above are some of the areas of major concern in the implementation of the RTI Act. It appears necessary to discuss and debate these issues and lay down a way forward for legal and pragmatic solutions.

Right to Information: Privacy versus Disclosure

13th October, 2012

At 1000hrs

Shri Shashi Tharoor, MP, Lok Sabha **Chairperson**

Shri A N Tiwari, Former CIC

Shri Shekhar Gupta, Editor-in-Chief, Indian Express

Shri K T S Tulsi, Senior Advocate, SCI

Shri Venkatesh Nayak, CHRI

Right to Information: Privacy versus Disclosure

Introduction:

In the last 10 years there has been an increasing interplay in the policy and legislation of Right to Information and Right to Privacy ostensibly one trying to limit the scope of the other.

RTI Act provides every citizen a right to access information held by the Public Authorities. At the same time, the right to privacy confers on a person requisite control on, access to and use of personal information held by the Public Authorities.

Citizen's Right to access Information has been widely accepted and appreciated all over the world. This has become the trigger point for dilution the positional differences between the citizenry and the Government as information in the hands of citizens is empowerment. However an Individual's privacy is increasingly being challenged by the new technologies and practices facilitating access to and sharing of individual's personal data and information at real as well as virtual platforms.

Despite the source being the Constitution, both the facets of the laws have found myriad interpretation by the judicial authorities all over the World. Unfortunately the judicial dictas have failed to develop a laid down mechanism for identifying core issues, limit conflicts and balancing of respective rights. The approach of judiciary has been 'case to case' basis at least in India.

It is a settled preposition that Right to freedom of Speech and expression as enshrined in Article 19 (1) (a) of the Constitution of India encompasses right to impart and receive information, thus Right to information has stood incorporated by the interpretative process, laying the unequivocal statement of law that there is a definite right to information

to the citizens of this country inbuilt in the constitutional framework.

Similarly, the Right to privacy is enshrined in Article 21 of the Constitution of India by making it an essential ingredient of the personal liberty. Right to Privacy has become an integral part of the fundamental right to life, a cherished constitutional value and it has positioned itself in an eloquent status with the new emerging technological challenges and practices.

The International Position

Right to Information: A record number of Countries from around the world have taken steps to enact legislation giving effect to this right either as a 'right driven instrument' or as 'access instrument'. Importance of this right emanates from the fact that Information held by the Public Authorities is not held for the consumption and use of the Public officials alone but for the citizens also.

Three main regional systems of human rights – America, Europe, and Africa – have formally recognized the importance of freedom of information as a human right. The European Court of Human Rights (ECHR) has held that Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, guarantee freedom of expression, "basically prohibiting a Government from restricting a person from receiving information that others wish or may be willing to impart to him".

In *Guerra and Others v. Italy*, European Court of Human Rights, Judgment of February 19, 1998, the Court went on holding that the government was under an obligation to provide certain environmental information to residents in an 'at-risk' area, even though

it had not yet collected that information. The Parliamentary Assembly of the Council of Europe has considered that “public access to clear and full information must be viewed as a basic human right”.

Right to Privacy: On the basis of the past experience and cultural understanding, the meaning of Privacy varies among countries even those who have codified ‘Right to Privacy’. With technological advancements, the personal information does not limit itself to any physical boundaries, thereby increasing the importance of the Privacy rights among individuals.

Governments that collect personal information related to persons, natural as well as juristic, such as taxation, medical, employment, health, religion, personal identifiers like fingerprints, DNA mapping, and personal communications have evolved and expanded. This has led to the concerns about the possibility of abuse of such personal information for purposes not envisaged while collecting the information.

In the case *United States v. Jones, U.S 10-1259 (2012)*, the Supreme Court of the United States ruled unanimously that government agents violated the Constitution when they tracked a suspect for 28 days outside the city limits using a GPS device installed without a warrant.

In the United Kingdom, the Human Rights Act, 1998, “incorporates” as British law the “European Convention for the Protection of Human Rights and Fundamental Freedoms” signed in 1950. Article 8(1) of the Convention says that “everyone has the right to respect for his private and family life, his home and his correspondence”. Clause (2) carves out permissible restrictions, which are “necessary in a democratic society” in the interests of national security, for the prevention of crime, etc.

The Harmonious Construction of the two Conflicting Fundamental Rights

There are overlaps between the RTI and Privacy rights that can lead to conflicts. Conflicts basically arise due to the misunderstanding about what information is intended to be protected or disclosed and to whom. Several issues are to be dealt in such disclosure of as personal details of the Public officials to the third party, details of government contracts with the private bodies, details of the persons who are in a fiduciary relationship with the Public Authority (Such as Doctors, Lawyers, etc.), whether court and criminal records are to be made public even when they do not answer the description of ‘Public Records’.

The issue becomes more important once the information is disclosed in the database format over internet. Questions about the relevance of the data protection laws for the disclosure of personal information (even if it is publicly available) are important.

In most of the countries, including India, Privacy has been one of the core exceptions used in the disclosure of information under the RTI. But as the time advances the need and the interpretation of Privacy Laws *vis a vis* RTI also changes.

It is to be understood that both the Rights are basically designed to ensure accountability of the state towards the citizens at the same time protecting the privacy interest of the persons. Should such rights be examined on a case by case basis with a view towards relative importance of various interests or umbrella legislation can take care of all disclosures.

Following are the common types of information that are requested and the conflicts that arise thereto in Indian Context:

1. Information about Annual Confidential Reports (ACR's) of the Public Officials sought by the third party.

The information sought in such cases has a relationship to a public activity which is performed by the Individual and is certainly not related to his/her personal or family life. At the same time the individual may not like any third party to know the evaluation done by his senior officer regarding his performance. But the views of the High Court judges vary adding to the uncertainty about the contours. CPIOs have no clear cut sliced solutions to say the circumstances in which Section 8(1)(j) get precedence over Section 11 or vice versa. Is it an essential component of 'right to privacy' that disclosure will harm the third party or 'privacy' can be claimed by the third party without showing the accompanying 'harm'.

2. Disclosure of Contractual Information between the Public Authority and Private Organizations.

The disclosure of the requisite information may be needed while evaluating tenders but this may desist Private Organizations to voluntarily disclose crucial information required for evaluation as it may disclose, Commercial confidence, trade secrets or Intellectual Property of the Organizations in question. Dealing with each case separately may allow the disclosure of information, severing the necessary trade secrets, as the said disclosure can be crucial in identifying the fraud/scams in Government contracts. This develops a dichotomous relationship for the private organization.

3. Details of the persons and related informations (Past records) who are in

a fiduciary relationship with each other (Such as Doctors, Lawyers, Insurance Agents, Employees etc.).

Fiduciary relationship such as Doctor-patient, trustee- beneficiary, attorney-client, guardian-ward, Employer-Employee which have a duty of care to act for the benefit of other on matter related to the scope of the their relationship. Under what circumstances information pertaining to such relationships becomes disclosable as 'case to case approach' only promotes litigation cost. This also brings to the fore the issue of 'larger public interest' being at variance with 'compelling state interest' .

4. Disclosure of the Answer sheets of a particular student to the rest of the candidates taking the examination.

Evaluated Answer sheets of a candidate is disclosable 'information' in the hands of the Public Authority as per Supreme Court judgement. But the said disclosure (severing the name of the candidates and examiner) to the third party might rather help the other candidates to prepare better for the examination, once the evaluated Answer sheet is disclosed. Also, such disclosure might not invade the individual's privacy or will hamper his intellectual property, as the examination is over and final results are declared. But the 2 consecutive Supreme Court judgements, Aditya Bandopadhyay and Shounak Satya, allows disclosure to the parties concerned.

5. The yard stick available to the CPIO to adjudicate on matters of privacy under section 8 (1) (j) of the Act.

From the perspective of the reasonable and prudent person, section 11 procedure begins when the boundaries of section 8

(1) (j) gets exhausted. Theoretically this may appear to be divided by a boundary but drawing of the boundaries in practical situations gets blurred. It is like the boundaries of air space and outer space.

6. Disclosure of 'Information' collected by Public Authority from 'Private Bodies' like JV companies, Public Private Partnerships etc.

Under Section 2 (f) of the RTI Act, 'information' includes information relating to private body which can be

accessed by a public authority under any other law for the time being in force. Will this mean that any information coming from 'private bodies' will necessarily have to follow Section 11 procedure in case its disclosure is sought as this information is necessarily a 'third party' information in the hands of the public authority. This will make the role of CPIO more like an 'adjudicator' and less like a 'facilitator' and it is anybody's guess whether CPIOs are not equipped to handle such complexities due to their position in the organizational hierarchy.