



Right to Information Act, 2005: A Mandate for Legal and Procedural Transparency-An Evaluation

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Abstract

Right to Information Act which is considered as a mandate for legal and procedural transparency in India was passed in 2005, but still even today the Act seems to be merely a paper tiger. The intentions with which the Act has been passed are not yet fulfilled because of lack of political will in its implementation and the inherent lacunas existing within the Act. Now the ray of hope lies in the hands of Judiciary. It plays an effective role in its implementation through its various decisions. The present paper tries to evaluate these aspects of Right to Information Act, 2005.

Key Words: *Transparency, Good Governance, Accountability, Jeopardy.*

Introduction: Right to know about the activities of government is implicit in the spirit of democracy, thus legal and procedural transparency is a condition precedent for any form of democracy. People cannot be kept ignorant about functioning of government because later is a representative chosen by the former being real sovereign. Discloser of information with regard to the functioning of the government must be considered as the rule and secrecy an exception. In India, in order to turn the above mentioned statement into reality, The Right to Information Act, 2005 (hereinafter to be referred as RTI Act) has been enacted. This is a revolutionary piece of legislation. The right to information promotes transparency; empowers the citizens; reduces corruption; increases efficiency; makes officials accountable and puts an end to their indifference, arrogance and corruption¹. Even without passing this Act, the Right to Information is a pre-existing fundamental right conferred on the citizens and traceable under Articles 19 and 21 of the Constitution of India as declared by certain judgments. of the Apex court of this country. The Court has elaborated the scope of fundamental rights consistently with strict opposition towards the intrusions into them by the agents of the state. Hence, the Indian Judiciary has upheld the rights and dignity of individual in true spirit of good governance².

Scope of Right to Information: It is now well settled that right to information is a fundamental right flowing from Article 19 (1) (a) of the Constitution. Article 19(1) (a) guarantees fundamental right to free speech and expression which, by implication includes within it the right of access to information. The prerequisite for enjoying this right is knowledge and information. Therefore, the right to information becomes a constitutional right, being an aspect of the right to free speech and expression which includes the right to receive and collect information³. The Right to Information also seems to flow from Article 21 of the Constitution i.e. from the right to life and liberty, which includes right to know about things that affect our lives. The expression “right to life and personal liberty” is a broad term, which includes within itself variety of rights and attributes. In *Reliance Petrochemical Ltd. vs Proprietors of Indian Express Newspaper, Bombay Pvt. Ltd & others*⁴, the Supreme Court read into

¹ Justice P.S. Narayana and Dr. G.B. Reddy, *Right to information and Law*, Gogia Law Agency, Hyderabad, Third Edition, 2007, PP -13-14.

²Hamdard Davakhana vs. Union of India, AIR 1960 SC 554, State of U.P. vs Raj Narain, AIR 1975 SC 885, S.P. Gupta vs Union of India, AIR 1982 SC 149, Bennett Coleman vs Union of India, AIR 1973 SC 106.

³Shalu Nigam, *Right to Information Law and Practice*, JBA Publishers, Delhi, First Edition, 2006, P-63.

⁴ 1988 (004) SCC 0592

Article 21 as broad right to include right to know within its preview. The Apex court held the right to know is a necessary ingredient of participatory democracy. Article 21 confers on all persons a right to know which includes a right to receive information. The ambit and scope of this article is much wider as compared to Article 19 (1) (a). Thus the courts have expanded the scope of the right to information by the way of judicial activism.

Right to Information also leads to good governance. “Good governance” means the efficient and effective administration in a democratic framework. It involves high level of organizational efficiency and effectiveness corresponding in a responsive way in order to attain the predetermined goals of society. As per the United Nations Commission on Human Rights, the key attributes of good governance include transparency, responsibility, accountability, participation and responsiveness to the need of the people. A government is expected to be fully (responsible) accountable to its people and transparent in the use of public resources⁵.

With the introduction of RTI Act, it was argued by experts that, the right to information will be proved a vital tool for good governance. Transparency and accountability are two chief components for good governance. If there is no transparency, accountability cannot be fixed. Therefore, for good governance, there should be maximum disclosure and minimum confidentiality⁶. The logic behind the Act is quite clear and unambiguous. In India, democracy is the form of government which means the rule of common masses. So it is the inherent right of the citizens to know about the day to day activities of the government. Hence, the government should be made accountable towards the people and there should be no secrets in between the two. It will ensure the government’s responsibility to meet the community needs. This will all lead to the good governance and obviously a citizen can act as an enforcer of such good governance through the auspices of the Act itself.

Critical Analysis of The Right to Information Act 2005: The object of RTI Act 2005 is to provide for setting out the practical regime of right to information for citizen, to secure access to information under the control of public authorities, in order to promote transparency and accountability in the working of every public authority. The object of the Act is being revealed in the preamble of the Act itself, which is as follows:

1. Whereas the constitution of India has established Democratic Republic; and
2. Whereas democracy requires an informed citizenry and transparency of information which are vital to its functioning and also to contain corruption and to hold governments and their instrumentalities accountable to the governed; and
3. Whereas revelation of information in actual practice is likely to conflict with other public interests including efficient operations of the governments, optimum use of limited fiscal resources and the preservation of confidentiality of sensitive information ; and
4. Whereas it is necessary to harmonize these conflicting interests while preserving the paramountcy of the democratic ideal ; and
5. Whereas it is expedient to provide for furnishing certain information to citizens who desire to have it.

From the perusal of objects and reasons for this enactment, it is apparent that a wide range of authorities, both at central and state levels have been covered within its ambit so as to widen its applicability which would surely result in more accountability and good governance on the part of government. Under the Act, role of the government and the public have been interchanged. Generally laws are executed by the government and the public abide by those laws. But under the Right to information Act, 2005, public will be the executer and the government has to act as per the desire of an individual.

Furthermore, RTI Act 2005 has provided a foolproof procedural mechanism for the exercise of fundamental right which is now a statutory right too. But in order to access the efficiency of such procedural mechanism enumerated under the Act, it is necessary to analyze certain provisions enacted under the Act as there are certain inherent loopholes existing under it.

⁵ Caesor Roy , “Right to Information and its significance to Ensure Good Governance in India”, *Nyayadeep* , Volume XIII, Issue 2 &3, April & July , 2012 , pp-89-90.

⁶ Krishna Pal Malik, *Right to Information*, Allahabad Law Agency, Faridabad, Haryana, First Edition, 2011, p-189.

Loopholes Under the Right to Information Act 2005: The said Act, through its **Chapter II** titled as **Right to Information and Obligations of public authorities**, makes it obligatory for every public authority to maintain all its records in such a manner as to facilitate the Right to Information and Publish:

- a. The relevant information and data regarding its organization , functions, duties and roles played by all its officers and employees, the procedure followed in the decision making process etc.
- b. The right cannot be questioned on the ground that the applicant has no reason to want the information he is seeking for.
- c. The information can be denied only for the reason that it falls within one or more exceptions incorporated in section 8⁶ of the Act and for no other reason.

The **first** loophole in Section 8(1) (I)⁷ of the Act is that it contains a provision under which the right of a citizen to obtain information regarding cabinet papers including records of deliberations of Council of Ministers, Secretaries and other officers has been excluded. No specific reasons have been given in the statement of objects and reasons for exclusion of this right. It is true that under sub-section (2) of section 8, this information can be obtained by a person provided it is established that public interest in disclosure of this information out ways the harm to the protected interest. The act is silent about the meaning of the “protected interest”. Hence, there exists a loophole which excludes the right of a citizen to obtain information as to the decisions, comments and notings of the officers concerned in the government file⁸.

The reason which has been advanced for the above-mentioned exclusion is that this will enable officials to express their opinion freely in noting section. The arguments advanced in favour of exclusion are as follows:

Firstly: It is quite possible that an official might have expressed a negative opinion on a certain matter and he might have been overruled by his superiors. If his opinion is known to the public, he might be subjected to undue criticism for holding an opinion which he had expressed honestly but which might be debatable or controversial. In other words, if internal opinions expressed by the bureaucrats are known publicly this might compromise on the principle of anonymity of the bureaucracy⁹.

Secondly: There might be instances where the matter involves heavy stakes in terms of business interests and the person against whose interest a certain opinion has been expressed by the official concerned may feel he has been harmed by the official. This may place the official concerned in a

⁷ Section 8 provides there shall be no obligation under the Act to give any citizen- (a) information, disclosure of which would prejudicially affect the sovereignty and integrity of India, the security, strategic, scientific or economic interests of the state, relation with foreign state or lead to incitement of an offence; (b) information which has been expressly forbidden to be published by any court of law or tribunal or the disclosure of which may constitute contempt of court; (c) information, the disclosure of which would cause a breach of privilege of parliament or the State Legislature; (d) information including commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party, unless the competent authority is satisfied that larger public interest warrants the disclosure of such information; (e) information available to a person in his fiduciary relationship, unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information; (f) information received in confidence from foreign Government; (g) information, the disclosure of which would endanger the life or physical safety of any person or identify the source of information or assistance given in confidence for law enforcement or security purposes; (h) information which would impede the process of investigation or apprehension or prosecution of offenders; (i) Cabinet papers including records of deliberations of the council of ministers, Secretaries and other officers. (j) information which relates to personal information the disclosure of which has no relationship to any public activity or interest , or which would cause unwarranted invasion of the privacy of the individual unless the Central Public Information Officer or the State Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information.

⁸ Justice N. Santosh Hedge, “An Overview of Right to Information Act with reference to Official Secrets Act,” *Nyayadeep*, Volume VII, Issue I, January 2006,P-17.

⁹ Ashok Narayan.” Information Freeways- II”, *The Statesman*, August 21, 2006,P-8.

rather precarious position with respect to the person against whose interest he had expressed the opinion on the file. The result may be that if the noting section of the file is to be made public, the official concerned may hesitate to write elaborate notes and try to play it by the ear¹⁰.

Thirdly: The final decision is taken by the senior official and the minutes seldom mention and detailed reasons for arriving at a decision or what is worse, opinions expressed by all those who participated in that meeting. Therefore, notes of dissent are just not there on record. This is very dangerous for sincere honest and straight forward officials who might have voiced a note of dissent but whose views are not recorded on the file¹¹.

On the Other hand, the **counter-view** is that this will take the punch away from the Act, because the noting section alone contains the detailed reasons for arriving at the final decision. There is definitely an element of truth in the public belief that the reasons for arriving at a decision are available only in the noting section of the files and not in the correspondence section or in the official orders issued. As a general rule orders should be speaking ones. However in practice the reasons recorded in the order are too general or vague like "in public interest." Therefore, if noting sections of the files are not made available to the public, the latter might be kept in dark about the reasons for arriving at a decision¹².

The second main loophole under RTI Act, 2005 is in section 12 which talks about constitution of the Committee for appointments of members of Central Information Commission. In the original Bill, the Chief Information Commissioner and the Information Commissioners were to be appointed by the President of India on the recommendation of a Committee consisting of:-

- The Prime Minister of India, who shall be the chairperson of the Committee
- The Leader of opposition in Lok Sabha and
- The Chief Justice of India.

But the Bill which became Act, the place of the Chief Justice of India has been replaced by a Union Cabinet Minister to be nominated by the Prime Minister. Probably, the Judiciary in India or the Chief Justice of India concerned could not be, in any way interested in being the member of that Committee. But the Head of the Judiciary would have brought about a better sense of independence to the concerned Commission. This indicates the approach of the executive and the legislature to devalue the Judiciary¹³.

Lack of Political Will in Implementing Right To Information Act 2005: Public Accountability is a facet of administrative efficiency. Publicity of information serves as an instrument for the oversight of citizens. Therefore, a government which produced a trust worthy flow of information creates greater certainty and transparency. The key which weakens accountability or the effectiveness of the government or the public sector is the lack of information¹⁴.

Countries which have introduced laws relating to freedom of information are seeking to replace a "Culture of secrecy that prevails within their public service with a culture of openness". These new information laws are intended to promote accountability and transparency in government by making the process of government decision-making more open. Although some records may legitimately be exempt from disclosure, exemptions should be allowed narrowly in as much as discloser is the rule rather than the exception¹⁵. But our government does not seem to be willing to enunciate above stated rules in practice. The following two examples indicate such an attitude:-

1. A civil society group files PIL in Delhi High Court seeking that criminal, financial and educational background of candidates contesting elections to Parliament and State assemblies be made accessible to voters, so that voters can make an informed choice while voting. The Court upheld the petition, giving directions to the Election Commission (EC) of India to implement the Court's orders. While the EC did not seem to have any problems with the decision of the High Court, the

¹⁰ Ibid.

¹¹ Ibid.

¹² Ibid.

¹³ Supra 9, P-18

¹⁴ Justice Y.K. Sabharwal, "Right to Information Good Governance," *Nyayadeep*, Volume VII, Issue 4, October 2006, PP-24-25.

¹⁵ Ibid

Union of India appeals against it to the Supreme Court as several political parties become interveners to the dispute and oppose the judgment.

The Supreme Court upholds the High Court judgment. Then an all-party meeting decides not to allow the Court's decision to be implemented and to amend the Representation of People Act to prevent implementation of the Court's judgment. The amendment of the above said act is again challenged in the Supreme Court and is declared "null and void and unconstitutional". It took four years and a lot of patience and persistence to get an opportunity for citizens/voters to know whom they could or had to vote for. The conclusion about knowing what to do and the willingness to do the right thing seems obvious¹⁶.

2. The same organization that filed the PIL seeking disclosure of Candidate's background mentioned above realized that while elected members of Parliament and State Assemblies were important elements in the political system and governance of the country, perhaps the more important and critical elements were the political parties. It is the political parties who choose the candidates who can and will contest elections (with the exceptions of independents, of course) and by implication decide whom we, the people can vote for. Even before deciding whom we can vote for, political parties are the mobilizers and makers of public opinion.¹⁷ Regarding such political parties, the Association for Democratic Reforms (ADR) filed an application under the Right to Information Act, seeking copies of income tax returns of political parties, the political parties, excepting the CPI and the CPM, objected to making copies of their income tax returns accessible to the citizens. All the public information officers of the Income Tax Department accepted this plea of the political parties and denied the request of ADR.

The two examples given above also highlights, kind of an effort and persistence it takes to nudge the political system towards transparency which the legislature itself has enacted and which is possibly the only way left to make even a slight dent in the deep-rooted malaise of corruption. The saying 'Sunlight being the best disinfectant' will come true only when concerned citizen persist in their efforts to bring in transparency.

It is further ironic that President A.P.J Abdul Kalam, (as he then was), on giving his assent to the Right to Information Act, request that all communications emanating from Rashtrapati Bhavan and between the President and the Prime Minister be excluded from disclosure to the public, an exemption that is not in keeping with the spirit of the Act. The government efforts to reduce the effectiveness of the Act have been extremely disheartening. Furthermore, it also seems that the government's anxieties have all but made it forget why India needed an RTI Act in the first place¹⁸.

On the same pattern, the office of Chief Justice of India (CJI) saying that since the CJI is a constitutional authority, it is not covered by the RTI Act of 2005, which expectedly generated a lot of debate. The judiciary's unique position in the constitutional scheme of India is well known. The constitution provides for an independent judiciary while the people have great respect for the judges the latter too have been championing the cause of the people's right to know. More over the judges themselves invoke the right to know when they found their own interests in jeopardy. How can the same right not be invoked when people demand information or accountability of the judges? Judges generally hold the view that the functioning of the judiciary is transparent as the proceeding take place in the open court and every judgment is a public document which is subject to fair and constructive criticism. However, after the RTI Act came into force though decisions of all functionaries have come under scrutiny, the judges have been seeking exemption. As a result little is known about the functioning of the judiciary on the administrative side.

Fortunately the picture has been made clear by a Parliamentary Committee, constituted for Personal Law and Justice. On August 29, 2008 it held that judiciary comes under the preview of RTI Act with regard to all activities of administration except "Judicial decision making". The Committee discussed the interpretation of section 2 (h) of the RTI Act, 2005 i.e. definition of public authority, said the provision is very clear that all the constitutional authorities come under the definition of public authority. The Committee further examined in detail every clause of the RTI Act, 2005 and

¹⁶ Jagdeep S. Chhokar, "Transparency can curb Corruption: Break the politician – bureaucrat nexus," *The Tribune*, Chandigarh, May 27, 2008, P-10

¹⁷ Ibid

¹⁸ Indrajeet Mistry, "RTI will Improve Governance," *The Tribune*, October 1, 2006, P-13.

was conscious of the fact that all wings of the State, Executive, Legislature and Judiciary are fully covered under this act since all organs of the state are accountable to the citizens of India in a democratic state. It is more so since the judiciary is having a dual role as administrative function and Judicial decision making. This is a welcome step towards better implementation of the RTI Act, 2005.

A judgment delivered by Delhi High Court in the case of CPIO, Supreme Court of India v. Subhash Chandra Aggarwal and Others¹⁹ held that the RTI Act “is premised on disclosure being the norm and refusal an exception” therefore, the Act mandated providing details of Supreme Court judges assets to RTI applicants. Handling out the ruling, the High Court directed the Supreme Court’s Central Public Information Officer (CPIO) to release within four weeks, the information sought by an RTI applicant about asset declarations made by judge of the Apex court. Disposing of the CPIO’s appeal the High Court held that the CJI is a public authority under the RTI Act and he holds information pertaining to asset declarations in his official capacity as the Chief Justice, that office is a public authority under the Act and is covered by its provisions. It is held that details relating to declaration of assets by the SC judges are information within the meaning of the expression under section 2 (f) of the RTI Act. The information pertaining to declaration given to the CJI and the contents of such declaration are information and subject to the provisions of the RTI Act. This Judgment has added a new feather in the cap of the judiciary.

Suggestions to Make Right to Information Act Effective: Precisely, keeping in view the citizens fundamental right i.e. right to know, the central government enacted Right to Information Act, 2005 which aims at transforming the poor quality government in the country and make India truly worthy of its position as the world’s largest democracy. Nurturing a transparent and corruption free environment through effective implementation of the RTI law can help India build up private and foreign investor confidence in the economy, encourage long-term private investment and thereby reinforce growth and development. The purpose of the Act can be served only if the Act is used in a proper manner instead of various people asking for purposeless information in a haphazard manner

The information covered under the RTI act should be used broadly for the following purposes²⁰:

- (1) Individual applicants may like to know where their cases are pending, what the norms are, which would be made applicable in deciding their requests and what are the levels, these cases would pass through so that they can have an idea of what kind of decision to expect and when.
- (2) Cases where irregularities and corruption have taken place, people can have access to crucial information/record which can be submitted to the proper authority or to the Vigilance Commission so that the responsibility can be fixed on the culprits. Even the mere accessibility of all such records/information would be a deterrent against the public servants indulging in malpractices.
- (3) Intellectuals, NGOs, social organizations etc. can get relevant data/parameters of the schemes, plans, budget etc. so that they can make useful suggestions to the public authorities and the government about how best these schemes can be implemented. In a way by having access to information the public can participate in the policy making and administrative process.
- (4) If any person is aggrieved by any decision/action of any public authority he/she can get the relevant record/information so that he/she is better equipped to have his/her grievances redressed at an appropriate forum.
- (5) India possesses one of the worlds most active and wide-ranging media sectors. Equipped with the RTI Act, the media can fulfill its role as a watchdog of government activities more effectively and is less vulnerable to government attempts to undermine its credibility. It may prove itself as another channel of communication between the government and the people.

Conclusion: The objectives of the Act can be achieved only if the public has proper guidance as to how to use its provisions. At present the evidence of rich guidance being available to the public is lacking. The Act is mainly being used by government employees against whom inquiries are in progress because, they know how best to utilize the Act. Perhaps it would have been better if the Central Information Commission or the State Information Commission had been specifically entrusted

¹⁹ W.P.(C) 288/2009.

²⁰ Supra 9

with the task of overseeing effective implementation of the Act. These Commissions are expected to play a pro-active role and ensure that the objectives of the Act are achieved in letter and spirit.

In sum, India has a real chance to break the shackles of poor governance that have left the majority of its population disillusioned with successive government promises to lift them out. In this respect, the government must now wake up and realize the extent to which its resistance to the Act is placing India's future at stake. Though the passage of the RTI Act was a legal watershed, without the government's full backing for the law's full and effective implementation, fulfilling the right to information for Indian citizens can never happen.