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RIGHT TO INFORMATION

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RIGHT TO INFORMATION

Introduction

Right to information has been seen as the key to strengthening participatory democracy and ushering in people-centered governance. Access to information can empower the poor and the weaker sections of society to demand and get information about public policies and actions, thereby leading to their welfare. Without good governance, no amount of developmental schemes can bring improvements in the quality of life of the citizens. Good governance has four elements- transparency, accountability, predictability and participation. Transparency refers to availability of information to the general public and clarity about functioning of governmental institutions. Right to information opens up government's records to public scrutiny, thereby arming citizens with a vital tool to inform them about what the government does and how effectively, thus making the government more accountable. Transparency in government organizations makes them function more objectively thereby enhancing predictability. Information about functioning of government also enables citizens to participate in the governance process effectively. In a fundamental sense, right to information is a basic necessity of good governance.

In recognition of the need for transparency in public affairs, the Indian Parliament enacted the Right to Information Act (hereinafter referred to as the RTI Act or the Act) in 2005. It is a path breaking legislation empowering people and promoting transparency.

The most contentious issue in the implementation of the Right to Information Act relates to official secrets. In a democracy, people are sovereign and the elected government and its functionaries are public servants. Therefore by the very nature of things, transparency should be the norm in all matters of governance. However it is well recognised that public interest is best served if certain sensitive matters affecting national security are kept out of public gaze. Similarly, the collective responsibility of the Cabinet demands uninhibited debate on public issues in the Council of Ministers, free from the pulls and pressures of day-to-day politics. People should have the unhindered right to know the decisions of the Cabinet and the reasons for these, but not what actually transpires within the confines of the 'Cabinet room'. The Act recognizes these confidentiality requirements in matters of State and Section 8 of the Act exempts all such matters from disclosure.

Official Secrets Act (Osa) And Other Laws

'Official Secret' means any information the disclosure of which is likely to prejudicially affect the sovereignty and integrity of India, the security of State, friendly relations with foreign states, economic, commercial, scientific and technological matters relating to national security and includes: any secret code, password, sketch plan, model, article, note or document in relation to a prohibited place."

Contentious issues

- The most contentious issue in the implementation of the Right to Information Act relates to official secrets. In a democracy, people are sovereign and the elected government and its functionaries are public servants. Therefore by the very nature of things, transparency should be the norm in all matters of governance. However it is well recognized that public interest is best served if certain sensitive matters affecting national security are kept out of public gaze.

- The Right to Information Act has a non-obstante clause:

“Section. 8(2): notwithstanding anything in the Official Secrets Act, 1923 nor any of the exemptions permissible in accordance with sub-section (1), a public authority may allow access to information, if public interest in disclosure outweighs the harm to the protected interests”.

The provisions of the Act which allow disclosure of information even where there is a clash with the exemption provisions of Sec.8(1) enjoy a general immunity from other Act and instruments by virtue of Sec.22 of the Act :

“Section 22- The provisions of this Act shall have effect notwithstanding anything inconsistent there with contained in the Official Secrets Act, 1923, and any other law for the time being in force or any instrument having effect by virtue of any law other than this Act”.

- Section 5 of OSA stated that, , any person having information about a prohibited place, or such information which may help an enemy state, or which has been entrusted to him in confidence, or which he has obtained owing to his official position, commits an offence if (s)he communicates it to an unauthorised person, uses it in a manner prejudicial to the interests of the State, retains it when (s)he has no right to do so, or fails to take reasonable care of such information. Any kind of information is covered by this Section if it is classified as ‘secret’. The word “secret” or the phrase “official secrets” has not been defined in the Act. Therefore, public servants enjoy the discretion to classify anything as “secret”.
- The Law Commission in its 43rd Report (1971), summarised the difficulties encountered with the all inclusive nature of Section 5 of OSA, in the absence of a clear and concise definition of ‘official secret’, in the following words:

‘The wide language of section 5 (1) may lead to some controversy. It penalizes not only the communication of information useful to the enemy or any information which is vital to national security, but also includes the act of communicating in any unauthorized manner any kind of secret information which a Government servant has obtained by virtue of his office.’

- Thus, every noting in the Secretariat file to which an officer of the Secretariat has access is intended to be kept secret. But it is notorious that such information is generally communicated not only to other Government servants but even to some of the non-official public in an unauthorized manner. Every such information will not necessarily be useful to the enemy or prejudicial to national security. A question arises whether the wide scope of section 5(1) should be narrowed down to unauthorized communication only of that class of information which is either useful to the enemy or which may prejudicially affect the national security leaving unauthorized communication of other classes of secret information to be a mere breach of departmental rules justifying disciplinary action. It may, however, be urged that all secret information accessible to a Government servant may have some connection with national security because the maintenance of secrecy in Government functions is essentially for the security of the State. In this view, it may be useful to retain the wide language of this section, leaving it to the Government not to sanction prosecution where leakage of such information is of a comparatively trivial nature not materially affecting the interests of the State.
- The Law Commission also recommended consolidation of all laws dealing with national security and suggested a “National Security Bill”. The various enactments in force in India dealing with **offences against the national security are:-**
 - The Foreign Recruiting Act, 1874;
 - The Official Secrets Act, 1923;
 - The Criminal Law Amendment Act, 1938;

- The Criminal Law Amendment Act, 1961; and
- The Unlawful Activities (Prevention) Act, 1967.
- The definition of “foreign state” is very wide and will include all countries beyond the limits of India, including not only de jure Governments but also de facto Governments. Recruitment for service in such foreign states has an indirect but close bearing on national security and hence should find a place in the proposed law.

The main offences created by the Official Secret Act are as follows:-

- “Spying”, or entry into a prohibited place etc., transmission or collection of secret information, and the like;
- Wrongful communication of or receiving secret information of the specified type;
- Harboursing spies;
- Unauthorized use of uniforms, falsification of reports etc., in order to enter a prohibited place, or for a purpose prejudicial to the safety of the State;
- Interference with the police or military, near a prohibited place.

The first question we have to consider is whether there is a really necessity for a separate consolidated law on the subject, or else whether the aforesaid statutes may be allowed to remain as before.

The main advantages of consolidation of statutes are these:-

- a) Consolidation diminishes the bulk of the statute book and makes the law easier for those who have to administer it (including Judges, administrators, the Bar and the litigant public); for they have only one document to consult instead of two or more.
- b) The consolidated Act speaks from one and the same time, and thus the convenience arising from the interpretations of sections of various Acts speaking from different times is avoided.

The art of legislative drafting has altered very much during the last century and the language used, the length of the sentences, the arrangement of the clauses and the sections may have to be drastically altered to conform to modern style of drafting. This applies specially to the Foreign Recruiting Act and the Official Secrets Act which will, in any case, require revision.

- c) Some of the provisions of the earlier Acts may have to be omitted as unnecessary.

In addition to these advantages, there arises an opportunity of incorporating in the new Act some of the provisions of the foreign codes dealing with national security which may be suited for

Indian conditions also. For these reasons, we are of the view that there should be a consolidated statute entitled the National Security Act.

The Commission, on careful consideration agrees with the amendment proposed by the Shourie Committee, as it reconciles harmoniously the need for transparency and the imperatives of national security without in anyway compromising the latter. These can be incorporated in the proposed new chapter in the NSA (National Security Act) relating to Official Secrets.

The ‘Shourie Committee’ on OSA:

“It is the Official Secrets Act that has been regarded in many quarters as being primarily responsible for the excessive secrecy in government. Its “Catch-all” nature has invited sustained criticism and demand for its amendment. Section 5 of this Act provides for punishment for unauthorized disclosure of Official secrets but omits to define secrets”.

Governmental Privilege in Evidence

Public Law in its procedural aspect is of as much interest as substantive law. Although the citizen may sue public bodies and the Government, it does not necessarily follow that the law and procedure applied by the courts in such suits will be the same as is applied in litigation between private citizens. Special procedural advantages and protections are enjoyed by the State. One such protection operates in the field of evidence and is in the nature of a privilege regarding the production of certain documents and disclosure of certain communications.

UNDER THE GOVERNMENT PRIVILEGE IN EVIDENCE 2ND ARC RECOMMENDED THAT,

Section 123 of the Indian Evidence Act, 1872 should be amended to read as follows:

“123. (1) Subject to the provisions of this section, no one shall be permitted to give any evidence derived from official records which are exempt from public disclosure under the RTI Act, 2005.

(2) Where he withholds such permission, he shall make an affidavit containing a statement to that effect and setting forth his reasons therefore.

(3) Where such officer has withheld permission for the giving of such evidence, the Court, after considering the affidavit or further affidavit, and if it so thinks fit, after examining such officer or, in appropriate cases, the Minister, orally:

a) Shall issue a summons for the production of the unpublished official records concerned, if such summons has not already been issued

b) Shall inspect the records in chambers; and

c) Shall determine the question whether the giving of such evidence would or would not be injurious to public interest, recording its reasons therefore.

(4) Where, under sub-section (3), the Court decides that the giving of such evidence would not be injurious to public interest; the provisions of subsection (1) shall not apply to such evidence.

Provided that in respect of information classified as Top Secret for reasons of national security, only the High Court shall have the power to order production of the records.”

Section 124 of the Indian Evidence Act will become redundant on account of the above and will have to be repealed.

Accordingly, the following will have to be inserted at the appropriate place in the Code of Civil Procedure, 1908 and the Code of Criminal Procedure, 1973:

“Any person aggrieved by the decision of any Court subordinate to the High Court rejecting a claim for privilege made under section 123 of the Indian Evidence Act, 1872 shall have a right to appeal to the High Court against such decision, and such appeal may be filed notwithstanding the fact that the proceeding in which the decision was pronounced by the Court is still pending.”

Exempted organizations under the Act

The Armed Forces should be included in the list of exempted organization (Second Schedule of the Act), because almost all activities of the Armed Forces would be covered under the exemption 8(a) which states that there shall be no obligation to give to any citizen, information which would prejudicially affect the sovereignty and integrity of India, the security, strategic, scientific or economic interests of the State.

The Act provides for disclosure when allegations of corruption and human rights abuses are made even in respect of the organizations included in the Second Schedule {Section 24 (1)}. Also, Section 8 (2) makes disclosure mandatory in respect of exempted categories, if public interest in disclosure outweighs the harm to the protected interests. Therefore, by including Armed Forces in the Second Schedule, while national security is safeguarded, disclosure is still mandatory when public interest demands it.

• **Recommendations –**

- The Armed Forces should be included in the Second Schedule of the Act.
- The Second Schedule of the Act may be reviewed periodically.
- All organizations listed in the Second Schedule have to appoint PIOs. Appeals against orders of PIOs should lie with CIC/SICs. (This provision can be made by way of removal of difficulties under section 30).

Rights and obligations under the Act

In order to enforce the rights and fulfill the obligations under the Act, building of institutions, organization of information and creation of an enabling environment are critical.

Therefore, the Commission has as a first step reviewed the steps taken so far to implement the Act as follows:

I. BUILDING INSTITUTIONS:

- a) Information Commissions
- b) Information Officers and Appellate Authorities.

II. INFORMATION AND RECORD-KEEPING:

- a) Suo -motu declaration under Section 4.
- b) Public Interest Disclosure.
- c) Modernizing recordkeeping.

III. CAPACITY BUILDING AND AWARENESS GENERATION

IV. CREATION OF MONITORING MECHANISMS

- Despite a legal obligation to constitute Information Commissions, 6 States have failed to do so even 10 months after its enactment. The States, which have not constituted Information Commissions so far (as on 3-5-06), are Bihar, Jharkhand, Manipur, Sikkim, Arunachal Pradesh and Mizoram. This needs to be rectified immediately.
- The State Governments are still in the process of appointing Information Commissioners, but an analysis of the background of the State Chief Information Commissioners indicates the preponderance of persons with civil service background. Members with civil services background no doubt bring with them wide experience and an intricate knowledge of government functioning; however to inspire public confidence and in the light of the provisions of the Act, it is desirable that the Commissions have a large proportion of members with non civil services background.

Recommendations under it:

- a) Section 12 of the Act may be amended to constitute the Selection Committee of CIC with the Prime Minister, Leader of the Opposition and the Chief Justice of India. Section 15 may be similarly amended to constitute the Selection Committee at the State level with the Chief Minister, Leader of the Opposition and the Chief Justice of the High Court.

- b) The GOI should ensure the constitution of SICs in all States within 3 months.
- c) The CIC should establish 4 regional offices of CIC with a Commissioner heading each. Similarly regional offices of SICs should be established in larger States.
- d) At least half of the members of the Information Commissions should be drawn from non civil services background. Such a provision may be made in the Rules under the Act, by the Union Government, applicable to both CIC and SICs.

Recommendation for designating information officers and appellate authorities:

- a) All Ministries/ Departments/Agencies/Offices with more than one PIO have to designate a nodal Assistant Public Information Officer with the authority to receive requests for information on behalf of all PIOs. Such a provision should be incorporated in the Rules by appropriate governments.
- b) PIOs in Central Secretariats should be of the level of at least Deputy Secretary /Director. In State Secretariats, officers of similar rank should be notified as PIOs. In all subordinate agencies and departments, officers sufficiently senior in rank and yet accessible to public may be designated as PIOs.
- c) All public authorities may be advised by the Government of India that along with the Public Information Officers they should also designate the appellate authority and publish both, together.
- d) The designation and notification of Appellate Authorities for each public authority may be made either under Rules or by invoking Section 30 of the Act.

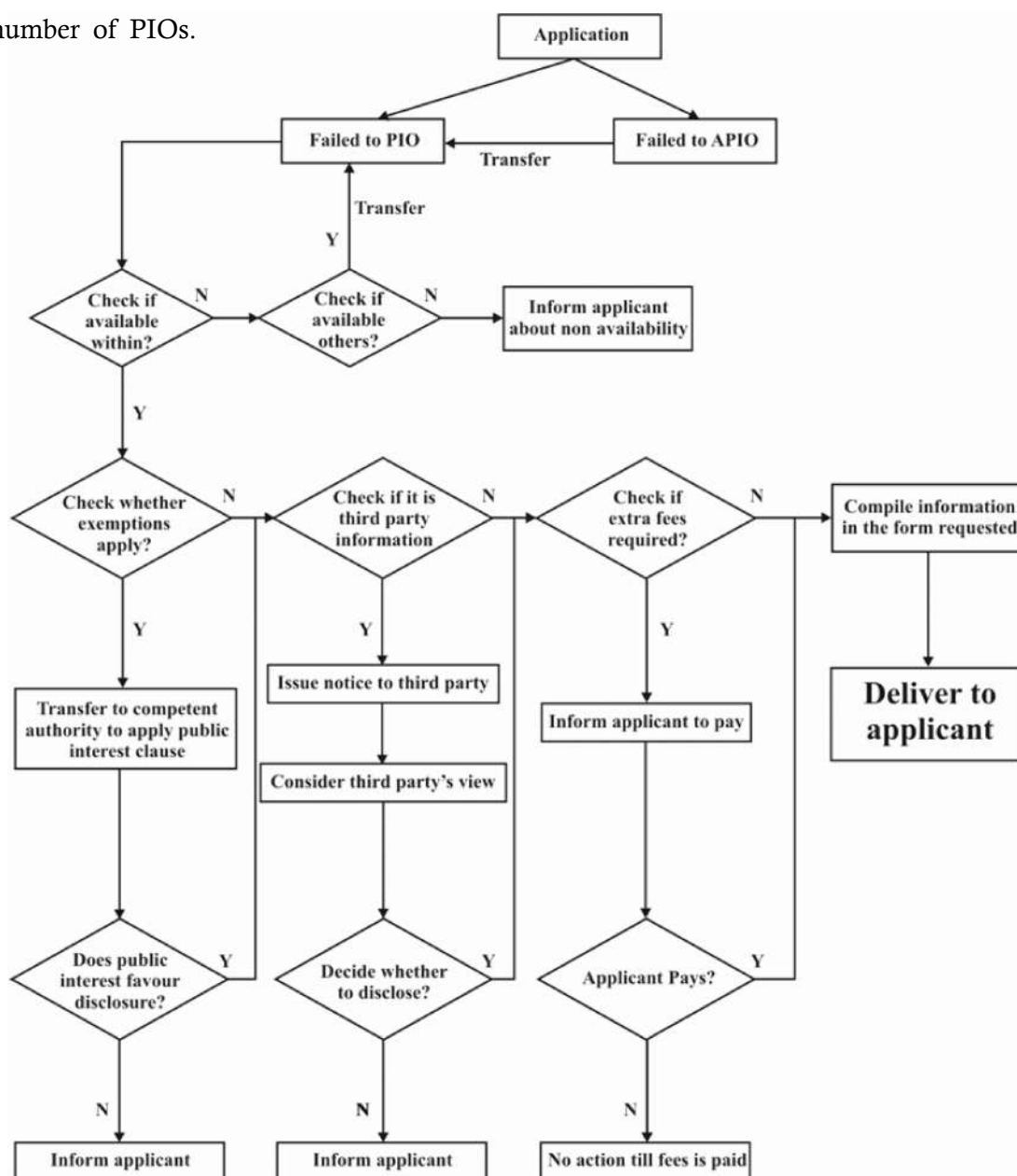
Recommendations under monitoring mechanism:

- a) The CIC and the SICs may be entrusted with the task of monitoring effective implementation of the Right to Information Act in all public authorities. (An appropriate provision could be made under Section 30 by way of removal of difficulties).
- b) As a large number of Public Authorities exist at regional, state, district and sub district level, a nodal officer should be identified wherever necessary by the appropriate monitoring authority (CIC/SIC) to monitor implementation of the Act.
- c) Each public authority should be responsible for compliance of provisions of the Act in its own office as well as that of the subordinate public authorities.
- d) A National Coordination Committee (NCC) may be set up under the chairpersonship of the Chief Information Commissioner with the nodal Union Ministry, the SICs and representatives of States as members. A provision to this effect may be made under Section 30 of the Act by way of removing difficulties. The National Coordination Committee would:
 - Serve as a national platform for effective implementation of the Act,
 - Document and disseminate best practices in India and elsewhere,
 - Monitor the creation and functioning of the national portal for Right to Information,
 - Review the Rules and Executive orders issued by the appropriate governments under the Act,
 - Carry out impact evaluation of the implementation of the Act; and
 - Perform such other relevant functions as may be deemed necessary.

Issues in implementations

The implementation of the RTI Act is an administrative challenge which has thrown up various structural, procedural and logistical issues and problems, which need to be addressed in the early stages. Based on the case studies conducted by the Commission, responses of various Ministries to a questionnaire, and interactions with the stakeholders, a number of difficulties /impediments were noted:

- Complicated system of accepting requests.
- Insistence on demand drafts.
- Difficulties in filing applications by post.
- Varying and often higher rates of application fee.
- Large number of PIOs.



FLOWCHART OF THE PROCESS INVOLVED IN GIVING INFORMATION UNDER RTI ACT

Recommendations of inventory of the public Authorities

Starting from Ministries of GOI, each Ministry should have details of all public authorities immediately under its control. Similarly each public authority should have an exhaustive list of agencies and offices under its immediate control. This should be followed till the lowest public authority in the hierarchy is reached.

- At the Government of India level the Department of Personnel and Training has been identified as the nodal department for implementation of the RTI Act. This nodal department should have a complete list of all Union Ministries/ Departments which function as public authorities.
- Each Union Ministry/ Department should also have an exhaustive list of all public authorities, which come within its purview. The public authorities coming under each ministry/ department should be classified into (i) constitutional bodies, (ii) line agencies, (iii) statutory bodies, (iv) public sector undertakings, (v) bodies created under executive orders, (vi) bodies owned, controlled or substantially financed, and (vii) NGOs substantially financed by government. Within each category an up-to date list of all public authorities has to be maintained.
- Each public authority should have the details of all public authorities subordinate to it at the immediately next level. This should continue till the last level is reached. All these details should be made available on the websites of the respective public authorities, in a hierarchical form.
- A similar system should also be adopted by the States.

Recommendation on single window agency at district level

After sufficient awareness generation, it is expected that a large number of requests for information would come to the field level Public Authorities. Presently almost all departments and agencies of the State Government are represented at the District level. All these offices are often dispersed and most citizens would be unaware of their location. Under such circumstances it becomes difficult for an applicant to identify the Public Authority and to locate it. Therefore it is necessary to have a Single Window Agency.

- A Single Window Agency should be set up in each District. This could be achieved by creating a cell in a district-level office, and designating an officer as the Assistant Public Information Officer for all public authorities served by the Single Window Agency. The office of the District Collector/ Deputy Commissioner or the Zilla Parishad is well suited for location of the cell. This should be completed by all States within 6 months.
- The lowest office in any organization which has decision making power or is a custodian of records should be recognized as a public authority.

Application to non-governmental bodies

- A non-governmental body needs to be substantially financed by government to be categorized as a public authority under the Act. There is however no definition of “substantially financed.”
- Organizations which perform functions of a public nature that are ordinarily performed by government or its agencies, and those which enjoy natural monopoly may be brought within the purview of the Act.
- Norms should be laid down that any institution or body that has received 50% of its annual operating costs, or a sum equal to or greater than Rs. 1 crore during any of the preceding 3 years should be understood to have obtained ‘substantial funding’ from the government for the period and purpose of such funding.
- Any information which, if it were held by the government, would be subject to disclosure under the law, must remain subject to such disclosure even when it is transferred to a non-government body or institution.
- This could be achieved by way of removal of difficulties under section 30 of the Act.

What if, information is beyond the time limit of 20 years?

'Any information relating to any occurrence, event or matter which has taken place, occurred or happened twenty years before the date on which any request is made under section 6 shall be provided to any person making a request under that section.'

A uniform limit of 20 years may on a few occasions pose problems for the Public Authorities as well as the applicants. There is a significant percentage of records which is permanent in nature. These include the records of rights maintained by the State Land Revenue Department, the Registrars and Sub Registrars of Lands, important Court Rulings, important files regarding policy decisions in various Public Authorities, Birth and Death Registrations etc. In such cases request are received for events which may be well beyond 20 years.

The stipulation of making available 20-year old records on request should be applicable only to those public records which need to be preserved for such a period. In respect of all other records, the period of availability will be limited to the period for which they should be preserved under the record keeping procedures.

What is the procedure to follow the public grievances in 2nd ARC?

In a large number of cases information sought to be accessed stems from a grievance against a department/agency. Information is the starting point in a citizen's quest for justice and is not an end in itself. Information thus becomes a means to fight corruption and mis-governance or obtain better services.

Functionaries/departments tend to be defensive rather than proactive in redressing a grievance (or even in disclosing information) particularly when it directly pertains to their conduct (or misconduct). This proclivity underlines the need for an independent forum to hear complaints into acts of omission and commission, harassment, corruption etc. which emerge either through information collected under the Right to Information Act or otherwise.

A successful example of this mechanism is the Public Grievances Commission (PGC) set up by the Delhi Government in 1997. When the Delhi Right to Information Act came into force in 2001, the PGC was made the appellate authority to decide appeals under the Act.

Public Grievances Commission:

An appeal involving a request for information as to why the Registration Department continued to use antiquated rules to register land transactions led to the PGC commissioning an independent report the working of the Registration Department, with recommendations for its reforms.

States may be advised to set up independent public grievances redressal authorities to deal with complaints of delay, harassment or corruption. These authorities should work in close coordination with the SICs/ District Single Window Agencies, and help citizens use information as a tool to fight against corruption and mis-governance, or for better services.

About the request for the information:

The PIO may refuse a request for information if the request is manifestly frivolous or vexatious. Such a refusal shall be communicated within 15 days of receipt of application, with the prior approval of the appellate authority. Provided further that all such refusals shall stand transferred to CIC/SIC, as the case may be and the CIC/SIC shall dispose the case as if it is an appeal under section 19(3) of the RTI Act. But information may be denied on the basis of, if the work involved in processing the request would substantially and unreasonably divert the resources of the public body.

Right to information act to the legislature

The definition of public authority {Section 2(b)} includes any authority, or body, or institutions of self government, established or constituted by or under the Constitution, or any law made by Parliament or State Legislature, or by a notification or order of the appropriate government. Section 2(e) therefore includes, the presiding officers of the

Legislature at the Union and State levels as well as the Chief Justices of the Supreme Court and High Courts. The intent of the Parliament to make the law applicable to all public institutions including the Legislatures and Judiciary is clearly evident. Most of the observations and recommendations of the Commission in this Report apply largely to the Executive branch of government. The Legislature and Judiciary are also covered by the Act.

Administrative processes within the courts would have to be brought within the ambit of this law, at the same time, without compromising with the independence and the dignity of the courts. There is need to bring uniformity in the information recording systems, classification of cases. The Act may be used as an instrument to build capacity to evolve efficient systems of information dissemination.

A system of indexing and cataloguing of records of the legislatures, which facilitates easy access, should be put in place. A tracking mechanism needs to be developed, A tracking mechanism needs to be developed, the working of the legislative committees should be thrown open to the Public, the records at the district court and the subordinate courts should be stored in a scientific way, by adopting uniform norms for indexing and cataloguing, the administrative processes in the district and the subordinate courts should be computerised in a time bound manner.

Equally important is a computerised tracking mechanism, so that the legislators as well as the general public can trace the sequence of events and compliance by the executive agencies on matters like petitions, CAG reports and action taken on reports of enquiry commissions or House committees.

Removal of difficulties under the act

The implementation of the Act is yet to stabilize and it is perhaps too early to identify difficulties that may be encountered.

- All organisations listed in the Second Schedule have to appoint PIOs.
- Provision should be made to include annual confidential reports, examination question papers and related matters in the exemptions under the RTI Act.
- The CIC and the SICs should be entrusted with the task of monitoring effective implementation of Right to Information in all public authorities.
- A National Coordination Committee (NCC) may be set up under the chairpersonship of the Chief Information Commissioner with the nodal Union Ministry, the SICs and representatives of States as members. A provision to this effect may be made under Section 30 of the Act by way of removing difficulties.

Who should be brought under the ambit of the RTI Act?

- Organisations which perform functions that are ordinarily performed by government or its agencies, and those which enjoy natural monopoly should be brought within the purview of the Act.
- Norms should be laid that any institution or body that has received 50% of its annual operating costs, or a sum equal to or greater than Rs. 1 crore, during any of the preceding 3 years should be understood to have obtained 'substantial funding' from the government for the period and purpose of such funding.

- Any information which, if it were held by the government, would be subject to disclosure under the law, must remain subject to such disclosure even when it is transferred to a non-government body or institution.

Conclusion

The Right to Information law of 2005 signals a radical shift in our governance culture and permanently impacts all agencies of state. The effective implementation of this law depends on three fundamental shifts: From the prevailing culture of secrecy to a new culture of openness; from personalized despotism to authority coupled with accountability; from unilateral decision making to participative governance

Effective application of the Act is depends largely on the institutions created, early traditions and practices, attendant changes in laws and procedures, and adequate participation of people and the public servants.

The issue relates to changes in other laws and practices involving state secrets, civil service conduct rules and classification of documents, on the other hands, implementation of the RTI Act itself, in particular process engineering, record keeping, disclosures, access and monitoring. Right to information is necessary, but not sufficient, to improve governance. A lot more needs to be done to usher in accountability in governance, including protection of whistle blowers, decentralization of power and fusion of authority with accountability at all levels. Nevertheless, this law provides us a priceless opportunity to redesign the processes of governance, particularly at the grass roots level where the citizens' interface is maximum.



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