

# DRAFT

## Transparency and Privacy

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### INTRODUCTION

The two concepts, transparency and privacy, can be both opposing and inter related. On one level the protection of individual privacy is achieved through institutional and governmental transparency, as transparency of actions taken by the government or private sector, concerning the individuals works to inspire trust. On another level situations of privacy and transparency bring out the question of how the public good should be balanced against public and private interests.

Both the concepts of transparency and privacy are based on the use of information and are concerned with the preservation of citizens' rights. To achieve these means transparency uses the disclosure of governmental/corporate information and is applied to public figures, governments, and corporates while privacy establishes standards for personal information and is applied to private individuals. Finding an appropriate balance between privacy and transparency is a challenging task as the standards associated with transparency and privacy cannot be applied equally across different groups. Privacy and transparency only become meaningful when one looks at what information needs to be private and what information needs to be public as applicable to private persons, public persons, corporates, private entities, and governments.

When transparency is mandated for institutions, both public and private, it creates accountability, builds public trust, and creates informed individuals. For Governments, transparency makes the government accountable for its citizens' personal information in order to prevent the assembling of detailed profiles, by limiting its collection of personal information to only that mandated by law. When transparency is mandated for the functioning of the Government it forces public officials to be transparent to the citizens, raises questions about what information should be disclosed for the greater good, and raises what powers of investigation into allegations of corruption should be given to law enforcement or independent bodies. For private institutions transparency can be attained legally through statutory requirements of disclosure, and inadvertently through whistle blowers who disclose information to the public either through a legal mechanism or through the media, because they believe it is for the benefit of the public. It is important to require transparency because of the need to trust the decisions being made by those institutions. Privacy is tied into institutional disclosures of information both in terms of what categories of information can be searched and disclosed and what protection should be put in place over identifying information that is a part of the disclosure.

## LEGISLATION

When applying the privacy principles to legislation that addresses transparency, the purpose of the principles change, and not all the principles apply. Each legislation analyzed below lays out which principles will and will not apply to the specific legislation.

### *Right to Information Act, 2005<sup>1</sup>*

In India, the Right to Information Act, 2005 (**RTI Act**) works to promote transparency, contain corruption, and hold the Government accountable to citizens. The Act establishes the right of citizens to request information held by public authorities from appointed public information officers in each governmental department.

The many times that the government has used privacy as a means to with hold information from individuals, and the many times that public figures have had personal information disclosed about them demonstrates the importance of ensuring that privacy is clearly incorporated into the Act.

The present provisions in the Act protect privacy by drawing a clear line between public and private information, thus establishing what data can and cannot be disclosed. Yet, the inconsistent interpretation of the Act by the various information officers can lead to a violation of privacy if sensitive information is disclosed. Because the Act speaks to the public disclosure of information the principles of notice, choice and consent, collection limitation, and purpose limitation will not fully apply. Below is an outline specifying how the provisions of the Act align with the privacy principles, and recommendations as to how missing aspects of the privacy principles can be incorporated into the Act.

### *Oversight*

- *Overseeing officers:* The Central Information Commissioner and State Information

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1 The Right to Information Act, 2005. Available at: <http://www.righttoinformation.gov.in/rti-act.pdf>

Commissioners are adjudicating authorities who deal with complaints from the orders of Public Information Officers.<sup>2</sup> Public Information Officers are established at the governmental department level to respond to RTI requests.

- *Complaint Mechanism:* The Central Information Commissioner or State Information Commissioner is responsible for receiving and inquiring into complaints by individuals, including whether or not private information should be disclosed under the Act.<sup>3</sup>

### *Disclosure*

- *Public Disclosure of Information:* Governmental bodies are required to publicly release information that has been specified by the Act on a yearly basis.<sup>4</sup>
- *Notice to third party of disclosure:* Any public information officer that intends to disclose information, which relates to, or has been supplied by a third party must provide notice **to the third party within five days** of receiving the request for disclosure, and provide that third party the opportunity to defend against the disclosure of the information.<sup>5</sup> The third party may make a defense in writing or orally, regarding whether the information should be disclosed within ten days of receiving the notice of disclosure.<sup>6</sup>
- *Information exempted from disclosure:* The Act lists the types of information that are exempt from public disclosure. These include information that:<sup>7</sup>
  - would affect the sovereignty, integrity, security, strategic, scientific or economic interests of the state; relations with foreign States or lead to incitement of an offense;<sup>8</sup>
  - the courts have prohibited from being published; or disclosure of which may lead to contempt of court;<sup>9</sup>
  - would cause a breach of privilege of parliament or the State Legislature;<sup>10</sup>
  - relates to a company's trade secrets, intellectual property, or commercial confidence; unless the larger public interest warrants such disclosure;<sup>11</sup>
  - available to a person in his fiduciary relationship; unless the larger public interest warrants such disclosure;<sup>12</sup>
  - information received in confidence from a foreign government;<sup>13</sup>
  - information that would endanger the life or safety of an individual or identify the source of assistance given in confidence for law enforcement purposes if disclosed;<sup>14</sup>
  - information that would impede the process of investigation; apprehension or prosecution of offenders;<sup>15</sup>

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2 Right to Information Act, 2005, s.5(1), 12 and 15.

3 Right to Information Act, 2005 s.18(1).

4 Right to Information Act, 2005 s.4(b).

5 Right to Information Act, 2005 s.11(1).

6 Right to Information Act, 2005 s. 11(2).

7 Right to Information Act, 2005 s. 8.

8 Right to Information Act, 2005 s. 8(1)(a).

9 Right to Information Act, 2005 s. 8(1)(b).

10 Right to Information Act, 2005 s. 8(1)(c).

11 Right to Information Act, 2005 s. 8(1)(d).

12 Right to Information Act, 2005 s. 8(1)(e).

13 Right to Information Act, 2005 s. 8(1)(f).

14 Right to Information Act, 2005 s. 8(1)(g).

15 Right to Information Act, 2005 s. 8(1)(h).

- cabinet papers including records of deliberations of the Council of Ministers, Secretaries and other officers till the matter is complete, or over;<sup>16</sup>
- 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 disclosure would be in the interest of the larger public good;<sup>17</sup>

\*provided that the information which cannot be denied to the Parliament or a State Legislature shall not be denied to any person.<sup>18</sup>

- *Exceptions for disclosure:* Any public official is permitted to disclose information (exemptions included) if it is determined that public interest outweighs the protected interest.<sup>19</sup>
- *Organizations exempted from disclosure:* Who will be brought under the ambit of the RTI Act, and to what extent does the jurisdiction of the RTI Act reach have been contested issues for many years. According to Schedule II of the Act the following twenty two governmental bodies are exempted from the provisions of the Act: Intelligence Bureau, Research and Analysis Wing, Directorate of Revenue Intelligence, Central Economic Intelligence Bureau, Directorate of Enforcement, Narcotics Control Bureau, Aviation Research Centre, Special Frontier Force, Border Security Force, Central Reserve Police Force, Indo-Tibetan Border Police, Central Industrial Security Force, National Security Guards, Assam Rifles, Sashastra Seema Bal, Special Branch (CID) Andaman and Nicobar, Crime Branch CID-CB Dadra and Nagar Haveli, Special Branch Lakshadweep Police, Special Protection Group, Defence Research and Development Board, Border Road Development Board, Financial Intelligence Unit - India. Recently, the CIC has determined that RAW is not exempt from the Right to Information Act. Furthermore, the question of whether or not the Right to Information can be waived in a contractual agreement, namely in a public private partnership<sup>20</sup> is being addressed by the CIC. In a press note responding to this question the CIC stated “*It may not be appropriate to expand or reduce the jurisdiction of the Information Commissioner through a contractual arrangement...*” [Note: Please either footnote the highlighted sentence with the case in which the CIC has held that RAW is within the purview of the RTI Act or delete it, I could not find any case that says that, although one case says that list of officers of RAW can be provided by the DOPT under the RTI Act but that also says that any information received from RAW itself cannot be provided]

## Missing Principles

- *Access and Correction:* If individuals receive incorrect information, or a public figure finds that his/her information is incorrect, a process for access and correction of information shared through RTIs should be established.
- *Openness:* Governmental organizations releasing information should provide information as to steps taken to ensure privacy over information.
- *Purpose Limitation:* A data retention policy should be created regarding information requests and governmental documents that can be released under the Act. The retention policy should specify the duration of retention and the format in order to ensure consistency

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<sup>16</sup> Right to Information Act, 2005 s. 8(1) (i) .

<sup>17</sup> Right to Information Act, 2005 s. 8(1) (j).

<sup>18</sup> Right to Information Act, 2005 s. 8(1), *Proviso*.

<sup>19</sup> Right to Information Act, 2005 s.8(2).

<sup>20</sup> Letter from Montek Singh Ahluwalia. March 14<sup>th</sup> 2011. Available at: <http://cic.gov.in/IMP-Letters/Reply-From-DC-14032011.pdf>

in storage across governmental departments.

- *Security*: Security measures should be put in place to ensure against loss, unauthorized access, destruction, use, processing, storage, modification, or unauthorized disclosure of information held by the government.

## Case Law

### High Court Cases

*Union Public Service Commission v. R.K Jain*,<sup>21</sup>(2012)

There have been a number of cases in which the scope of section 8(1)(j) of the RTI Act under various circumstances and the extent of the right to privacy has been discussed. We shall now discuss some of them to get a greater understanding of how the Courts of law have interpreted the provisions of the RTI Act when it comes in conflict with somebody's right to privacy. In the case of *Union Public Service Commission v. R.K. Jain*,<sup>22</sup> RTI application was filed by a person asking for the records pertaining to disciplinary proceedings of a third party public official. This information was denied by the UPSC but the CIC allowed the information to be disclosed. Agreeing with the decision of the CIC, the Delhi High Court held that:

“22. Merely because information that may be personal to a third party is held by a public authority, a querist does not become entitled to access it, unless the said personal information has a relationship to a public activity of the third person (to whom it relates), or to public interest. If it is private information (i.e. it is personal information which impinges on the privacy of the third party), its disclosure would not be made unless larger public interest dictates it. Therefore, for example, a querist cannot seek the personal or private particulars provided by a third party in his application made to the passport authorities in his application to obtain a passport, merely because such information is available with the passport authorities, which is a public authority under the Act. The querist must make out a case (in his application under Section 6 of the Act) justifying the disclosure of the information sought on the touchstone of clause (j) of Section 8(1) of the Act.

.....

34. It follows that the “privacy” of a person, or in other words his “private information”, encompasses the personal intimacies of the home, the family, marriage, motherhood, procreation, child rearing and of the like nature. “Personal information”, on the other hand, as aforesaid, would be information, in any form, that pertains to an individual. Therefore, “private information” is a part of “personal information”. All that is private is personal, but all that is personal may not be private. A person has a right to keep his private information, or in other words, his privacy guarded from disclosure. It is this right which has come to be recognised as fundamental to a person's life and liberty, and is accordingly protected from unwarranted/unauthorised invasion under the Act, and can be overridden only in “larger public interest”.

35..... The expression “larger public interest” connotes that the public interest that is sought to be addressed by the disclosure of the private information, serves a large section of the public, and not just a small section thereof. Therefore, if the information has a bearing on the state of

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<sup>21</sup> <http://lobis.nic.in/dhc/VS/judgement/17-07-2012/VS13072012CW12432011.pdf>

<sup>22</sup> <http://lobis.nic.in/dhc/VS/judgement/17-07-2012/VS13072012CW12432011.pdf>

the economy; the moral values in the society; the environment; national safety, or the like, the same would qualify as “larger public interest”.

36. Take for instance, a case where a person is employed to work in an orphanage or a children’s home having small children as inmates. The employer may or may not be a public authority under the Act. That person, i.e. the employee, has a background of child abuse, for which he has undergone psychiatric treatment in a government hospital. A querist could seek information regarding the medical and psychiatric treatment undergone by the person concerned from the government hospital where the person has undergone treatment, in larger public interest, even though the said information is not only personal, but private, vis-à-vis. the employee. The larger public interest in such a case would lay in protecting the children living in the orphanage/ children’s home from possible child abuse.

40. The information sought, in the present case, also does not relate to the privacy of the charged officer. Disciplinary inquiry of the charged officer is with regard to the alleged irregularities committed by him while discharging public duties and public functions. The disclosure of such information cannot be regarded as invasion of his privacy.

41. Even otherwise, the disclosure of such information would be in the larger public interest, keeping in view the object of the Act, which is to promote transparency and accountability and also to contain corruption.”

After discussing the issues in detail the Delhi High Court culled out the following principles in regard to the situation where Section 8(1)(j) would apply:

(i) The information sought must relate to “Personal information” as understood above of a third party. Therefore, if the information sought does not qualify as personal information, the exemption would not apply;

In this regard it might be appropriate to quote what the Court considered as “private information”:

“34. It follows that the “privacy” of a person, or in other words his “private information”, encompasses the personal intimacies of the home, the family, marriage, motherhood, procreation, child rearing and of the like nature. “Personal information”, on the other hand, as aforesaid, would be information, in any form, that pertains to an individual. Therefore, “private information” is a part of “personal information”. All that is private is personal, but all that is personal may not be private. A person has a right to keep his private information, or in other words, his privacy guarded from disclosure. It is this right which has come to be recognised as fundamental to a person’s life and liberty, and is accordingly protected from unwarranted/unauthorized invasion under the Act, and can be overridden only in “larger public interest”.”

(ii) Such personal information should relate to a third person, i.e., a person other than the information seeker or the public authority;

This means that the Court, in trying to outline the boundaries of section 8(1)(j) is upholding the principle of access i.e. the Court is saying that the exemption from disclosure under section 8(1)(j) does not apply to information that relates to the information seeker but only to information that applies to third parties, thus upholding the right of individuals from accessing their own information under the RTI Act.

AND

(iii) (a) The information sought should not have a relation to any public activity qua such third person, or to public interest. If the information sought relates to public activity of the third party, i.e. to his activities falling within the public domain, the exemption would not apply. Similarly, if the disclosure of the personal information is found justified in public interest, the exemption would be lifted, otherwise not; OR (b) The disclosure of the information would cause unwarranted invasion of the privacy of the individual, and that there is no larger public interest involved in such disclosure.

This seems to suggest that unwarranted invasion of one's privacy is a ground to keep the information from being disclosed even if it is information that has a relation to the public activity of such third person, unless the larger public interest warrants such an invasion of privacy.

#### Case Highlights

- **Personal Information (third party information) held by a public authority can be disclosed under two circumstances:**
  - **it has a relationship to the public activity (i.e. his activities falling in the public domain) of the third party,**
  - **there is a larger public interest involved.**
- **Information having a bearing on the state of the economy; the moral values in the society; the environment; national safety, or the like, the same would qualify as "larger public interest"**
- **Information relating to disciplinary inquiries against public servants may be disclosed as it does not relate to the privacy of the charged officer. Thus such information cannot be considered as "personal information".**

It may be noted that this case may not hold such high precedent value in light of the later case of *Girish Ramchandra Deshpande vs. Central Information Commissioner*,<sup>23</sup> (discussed later in this chapter) which was decided by the Supreme Court only a few months later wherein the Supreme Court said that "copies of all memos issued to the third respondent, show cause notices and orders of censure/punishment etc. are qualified to be personal information as defined in clause (j) of Section 8(1) of the RTI Act. The performance of an employee/officer in an organization is primarily a matter between the employee and the employer and normally those aspects are governed by the service rules which fall under the expression "personal information", the disclosure of which has no relationship to any public activity or public interest."

*Jamia Millia Islamia v. Sh. Ikramuddin*,<sup>24</sup> (2011)

In the case of *Jamia Millia Islamia v. Sh. Ikramuddin*,<sup>25</sup> a person asked for details of a land deal between Jamia Millia and some individuals. Jamia refused claiming invasion of privacy under section 8(1)(j). The question involved was whether a public authority such as a university itself can claim that its privacy rights will be violated by the disclosure. Answering the question in the negative, the Court held that:

"16. However, in my view the expression "personal information" used in Section 8(1)(j) of the Act, does not relate to information pertaining to the public authority to whom the query for

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<sup>23</sup> <http://www.judis.nic.in/supremecourt/imgs1.aspx?filename=39615>

<sup>24</sup> <http://lobis.nic.in/dhc/VS/judgement/22-11-2011/VS22112011CW56772011.pdf>

<sup>25</sup> <http://lobis.nic.in/dhc/VS/judgement/22-11-2011/VS22112011CW56772011.pdf>

disclosure of information is directed.

**17. No public authority can claim that any information held by it is "personal". There is nothing "personal" about any information, or thing held by a public authority in relation to itself.** The expression "personal information" used in Section 8(1)(j) means information personal to any other "person", that the public authority may hold. That other "person" may or may not be a juristic person, and may or may not be an individual. For instance, a public authority may, in connection with its functioning require any other person - whether a juristic person or an individual, to provide information which may be personal to that person. It is that information, pertaining to that other person, which the public authority may refuse to disclose, if it satisfies the conditions set out in clause (j) of Section 8(1) of the Act, i.e., if such information has no relationship to any public activity or interest vis-à-vis the public authority, or which would cause unwarranted invasion of the privacy of the individual, under clause (j) of Section 8(1) of the Act. The use of the words "invasion of the privacy of the individual" instead of "an individual" shows that the legislative intent was to connect the expression "personal information" with "individual". In the scheme of things as they exist, in my view, the expression "individual" has to be and understood as "person", i.e., the juristic person as well as an individual.”

Thus the right to protection of personal information extends to juristic persons (corporations, trusts, etc.) as well. This is different from the constitutional concept of the right to privacy which is available only to individuals.

#### **Case Highlights**

- 1. Public authorities cannot claim that information held by them in relation to themselves, is ‘personal’.**
- 2. The expression “personal information” found in the RTI Act refers to information that is personal to another individual.**
- 3. The Protection under Section 8(1)(j) extends to juristic persons (corporations, etc.) as well.**

*Secretary General Supreme Court of India v. Subhash Chandra Agarwal*,<sup>26</sup> (2010)

In the case of *Secretary General, Supreme Court of India v. Subhash Chandra Agarwal*,<sup>27</sup> an RTI application was filed seeking information as to whether Supreme Court and High Court Judges had been providing their asset details as per the requirements of a 1997 Resolution of the Full Court of the Supreme Court. One of the grounds on which this information was denied was that such a disclosure would affect the right to privacy of the Judges. A Full Bench of the Delhi High Court, while deciding whether such information should be disclosed under the RTI Act also discussed the interplay between the right to privacy and the right to information in the following words:

“114. There is an inherent tension between the objective of freedom of information and the objective of protecting personal privacy. These objectives will often conflict when an applicant seeks access for personal information about a third party. The conflict poses two related challenges for law makers; first, to determine where the balance should be struck between these aims; and, secondly, to determine the mechanisms for dealing with requests for such information. The conflict between the right to personal privacy and the public interest in the disclosure of personal information was recognized by the legislature by exempting purely personal information under Section 8(1)(j) of the Act. Section 8(1)(j) says that disclosure may

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<sup>26</sup> <http://lobis.nic.in/dhc/APS/judgement/12-01-2010/APS12012010LPA5012009.pdf>

<sup>27</sup> <http://lobis.nic.in/dhc/APS/judgement/12-01-2010/APS12012010LPA5012009.pdf>



be refused if the request pertains 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." Thus, personal information including tax returns, medical records etc. cannot be disclosed in view of Section 8(1)(j) of the Act. If, however, the applicant can show sufficient public interest in disclosure, the bar (preventing disclosure) is lifted and after duly notifying the third party ( i.e. the individual concerned with the information or whose records are sought) and after considering his views, the authority can disclose it. The nature of restriction on the right of privacy, however, as pointed out by the learned single Judge, is of a different order; in the case of private individuals, the degree of protection afforded to be greater; in the case of public servants, the degree of protection can be lower, depending on what is at stake. This is so because a public servant is expected to act for the public good in the discharge of his duties and is accountable for them.

115. The Act makes no distinction between an ordinary individual and a public servant or public official. As pointed out by the learned single Judge "----- an individual's or citizen's fundamental rights, which include right to privacy - are not subsumed or extinguished if he accepts or holds public office." Section 8(1)(j) ensures that all information furnished to public authorities - including personal information [such as asset disclosures] are not given blanket access. When a member of the public requests personal information about a public servant, - such as asset declarations made by him - a distinction must be made between personal data inherent to the person and those that are not, and, therefore, affect his/her private life. To quote the words of the learned single Judge "if public servants ---- are obliged to furnish asset declarations, the mere fact that they have to furnish such declaration would not mean that it is part of public activity, or "interest". ----- That the public servant has to make disclosures is a part of the system's endeavour to appraise itself of potential asset acquisitions which may have to be explained properly. However, such acquisitions can be made legitimately; no law bars public servants from acquiring properties or investing their income. The obligation to disclose these investments and assets is to check the propensity to abuse a public office, for a private gain." Such personal information regarding asset disclosures need not be made public, unless public interest considerations dictates it, under Section 8(1)(j). This safeguard is made in public interest in favour of all public officials and public servants.

116. In the present case the particulars sought for by the respondent do not justify or warrant protection under Section 8(1)(j) inasmuch as the only information the applicant sought was whether 1997 Resolution was complied with. That kind of innocuous information does not warrant the protection granted by Section 8(1)(j). We concur with the view of the learned single Judge that the contents of asset declarations, pursuant to the 1997 Resolution, are entitled to be treated as personal information, and may be accessed in accordance with the procedure prescribed under Section 8(1)(j); that they are not otherwise subject to disclosure. Therefore, as regards contents of the declarations, information applicants would have to, whenever they approach the authorities, under the Act satisfy them under Section 8(1)(j) that such disclosure is warranted in "larger public interest".

Although the Full Bench of the Delhi High Court discussed the issue of whether the assets of Supreme Court Judges can be disclosed under the RTI Act, it did not decide that question one way or the other since that particular information was not asked for was whether the Judges had been submitting this information to the Chief Justice or not, and had not specifically asked for the asset details of the Judges. It is possible that no decision was given on this issue since the Supreme Court Judges had voluntarily decided to declare their assets on the website of the Supreme Court which is still an ongoing practice. However, this is not the case with all High Courts in India and their Judges do not list their assets on the Court websites.

### Case Highlights

- 1. There is an inherent tension between the right to information and the right to privacy.**
- 2. The tension between the right to information and the right to privacy requires that a balance be found between the two and a mechanism be established for requests where this conflict arises.**
- 3. The protection from disclosure of personal information provided to private citizens is to be greater than in case of public servants.**
- 4. Contents of asset declarations of Supreme Court Judges are “personal information” and are not otherwise subject to disclosure unless the larger public interest so demands.**

*Girish Ramchandra Deshpande vs. Central Information Commissioner*,<sup>28</sup> (2012)

In the case of *Girish Ramchandra Deshpande v. Central Information Commissioner*,<sup>29</sup> information was sought regarding the service career, assets and liabilities, movable and immovable properties of a public servant. The Supreme Court held that such information is personal in nature and can be only disclosed if there is a public interest involved and in this case, it was held that no such public interest could be demonstrated:

“13. We are in agreement with the CIC and the courts below that the details called for by the petitioner i.e. copies of all memos issued to the third respondent, show cause notices and orders of censure/punishment etc. are qualified to be personal information as defined in clause (j) of Section 8(1) of the RTI Act. The performance of an employee/officer in an organization is primarily a matter between the employee and the employer and normally those aspects are governed by the service rules which fall under the expression "personal information", the disclosure of which has no relationship to any public activity or public interest. On the other hand, the disclosure of which would cause unwarranted invasion of privacy of that individual. Of course, in a given case, if the Central Public Information Officer or the State Public Information Officer of the Appellate Authority is satisfied that the larger public interest justifies the disclosure of such information, appropriate orders could be passed but the petitioner cannot claim those details as a matter of right.

14. The details disclosed by a person in his income tax returns are "personal information" which stand exempted from disclosure under clause (j) of Section 8(1) of the RTI Act, unless involves a larger public interest and the Central Public Information Officer or the State Public Information Officer or the Appellate Authority is satisfied that the larger public interest justifies the disclosure of such information.

15. The petitioner in the instant case has not made a bona fide public interest in seeking information, the disclosure of such information would cause unwarranted invasion of privacy of the individual under Section 8(1)(j) of the RTI Act.

16. We are, therefore, of the view that the petitioner has not succeeded in establishing that the information sought for is for the larger public interest. That being the fact, we are not inclined to entertain this special leave petition. Hence, the same is dismissed.”

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<sup>28</sup> <http://www.judis.nic.in/supremecourt/imgs1.aspx?filename=39615>

<sup>29</sup> <http://www.judis.nic.in/supremecourt/imgs1.aspx?filename=39615>

### Case Highlights

1. **The copies of all memos, show cause notices and orders of censure/punishment etc. issued to a public servant are personal information .**
2. **The details relating performance of an employee/officer in an organization fall under the expression "personal information".**
3. **Details disclosed by an individual in the income tax returns are “personal information”.**

*President's Secretariat v. Nitish Kumar Tripathi*,<sup>30</sup> (2012)

In the case of *President's Secretariat v. Nitish Kumar Tripathi*,<sup>31</sup> details of donations made by the President of India were sought through an RTI application. The CIC asked the President's secretariat to provide the information and Supreme Court agreeing with the CIC's decision held:

“9. The donations made by the President of India cannot said to relate to personal information of the President. It cannot be said that the disclosure of the information would cause unwarranted invasion of the privacy of, either the President of India, or the recipient of the donation. A person who approaches the President, seeking a donation, can have no qualms in the disclosure of his/her name, address, the amount received by him/her as donation or even the circumstance which compelled him or her to approach the First Citizen of the country to seek a donation. Such acts of generosity and magnanimity done by the President should be placed in the public domain as they would enhance the stature of the office of the President of India. In that sense, the disclosure of the information would be in the public interest as well.

10. The submission of Mr. Chandhiok that the learned CIC has confused donations with subsidy is not correct. The CIC has consciously noted that donations are being made by the President from the public fund. It is this feature which has led the learned CIC to observe that donations from out of public fund cannot be treated differently from subsidy given by the Government to the citizens under various welfare schemes. It cannot be said that the CIC has misunderstood donations as subsidies.”

It can be seen that although the Court has categorically held that details (names, addresses and amounts) of donations made by the President are not “personal information” of the President, it went on to add a further layer of argument saying that even if somehow it was considered as personal information, it would be in the public interest to disclose such information.

Further, by equating donations given by the President with Government subsidies, this case sets a precedent which can be utilized for getting information under other welfare schemes such as MPLADS, MLALADS, etc.

### Case Highlights

1. **Details of Donations (names, addresses and amount) made by the President of India from the public fund are not considered personal information.**
2. **Donations by the President can be treated at par with subsidies given under various welfare schemes.**

### Central Information Commission Cases

*Mr. S. Rajamohan v. BSNL, Chennai*,<sup>32</sup> (2009)

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<sup>30</sup> <http://lobis.nic.in/dhc/VS/judgement/07-07-2012/VS14062012CW33822012.pdf>

<sup>31</sup> <http://lobis.nic.in/dhc/VS/judgement/07-07-2012/VS14062012CW33822012.pdf>

32 <http://indiankanoon.org/doc/1864526/>

This case demonstrates that the call records of third parties are considered to be private information and are protected from disclosure under the RTI Act. The case also provides insight into the data retention policy of BSNL. In the case Mr. Rajamohan filed a request with BSNL (a government owned telco) asking for the details and date and time of calls from his residential and office phone. The CPIO denied this information for the reason that the local data would be too voluminous, and there is no practice to record local calls made unless the number is being monitored. However, if a specific request is made with the concerned authorities and the authorities request the recording from BSNL, local calls made from the applicant's number will be recorded and supplied. The CPIO also stated that telephone calls from a third party number cannot be supplied, as it would warrant an invasion of privacy. The case was closed and the call records were not supplied to Mr. Rajamohan.<sup>33</sup>

This case also shows that the CIC is aware of the fact that even if someone asks for the call records of his/her phone it may involve the privacy of the person on the other side of the conversation and therefore may not be disclosed. It may also be noted that in this case the applicant was taking advantage of the fact that the data controller is a state entity and therefore amenable to the transparency laws of India.**Case Highlights**

**1. Call records of third parties are considered to be private information and are protected from disclosure under the RTI Act.**

*Ms. Kanchan Vora v. Union Bank Of India*,<sup>34</sup> (2008)

This case demonstrates that information relating to the bank accounts of third parties is considered to be private information, protected from disclosure by the RTI Act. In the case Ms. Kanchan Vora requested the date of opening and account statements of Ladhakechand OR Vora. Ms. Kanchan Vora stated that she was a surviving partner of the firm, though her name was not on the account. The Bank replied that because her name was not in the documents, the bank could not provide her with the requested information. Upon appeal the CIC agreed with the bank, stating that the information was third party information, the disclosure of which would be an unwarranted invasion of privacy.

This case seems to demonstrate that a data controller (in this case the nationalized bank) has the obligation to determine the identity of the data subject before disclosing the data in case the applicant is holding himself out as the data subject.

**Case Highlights**

**1. Partners (under the Partnership Act) cannot ask for information if their name is not on the account documents.**

*Shri P. Thavasiraj v. Dept. Of Atomic Energy*,<sup>35</sup> (2008)

This case demonstrates that contents of departmental enquiries can be considered to be private information and exempted from disclosure under the RTI Act. In the case Shri. Thavasiraj submitted an RTI to the Department of Atomic Energy Mumbai requesting, among other things, copies of a CBI

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<sup>33</sup> <http://indiankanoon.org/doc/1864526/>

<sup>34</sup> <http://indiankanoon.org/doc/456808/>

<sup>35</sup> [http://indiankanoon.org/doc/1718696](http://indiankanoon.org/doc/1718696/)

request (to initiate prosecution in a criminal case) and the Department of Atomic Energy's final order granting such request.<sup>36</sup> The disclosure of these documents were denied to Shri. P. Thavasiraj on the grounds that the disclosure of the information contained in the documents sought would not be in the public interest. Shri. Thavasiraj appealed the decision twice, but the CIC upheld the decision to not disclose the information stating that the contents of the reports falls within the definition of private information.<sup>37</sup>

### **Case Highlights**

- 1. Contents of departmental enquiries in a criminal case, upto the stage of departmental permission, can be considered to be private information and exempted from disclosure under the RTI Act.**

*K.P. Subhashchandran v. National Aviation Company*,<sup>38</sup> (2008)

This case demonstrates that passenger details are considered private information and protected from disclosure by the RTI Act. In the case Sh. Subhashchandran requested from the National Aviation Company of India, (the company that owns Air India) travel details of passengers who had traveled on a specific flight. The CPIO refused to disclose the information on the grounds that it would not be in the public interest and that the details are shared with them in a fiduciary capacity.

### **Case Highlights**

- 1. Travel details of passengers are considered private information and protected from disclosure by the RTI Act.**
- 2. Travel details shared with a travel company by the customers are given in a fiduciary capacity.**

*Bimal Kanti Datta v. Income Tax Department*,<sup>39</sup> (2008)

This case demonstrates that tax records are considered private information and exempted from disclosure under the RTI Act. In the case Shri Brimal Kanti Datta requested the Income Tax Returns of Meena Rani Datta from the Income Tax Department. Shri Brimal Kanti Datta argued that he needed access to the records to use in court and for the administration of justice, although the explicit purpose was not clarified in the order of the CIC. The information officer prohibited the disclosure of the tax records arguing that 'it is not open to the appellant to demand that he should be allowed access into private third party information for ongoing litigation in a court of law. This concept of 'administration of justice' is far too self serving to merit consideration'."

It seems that the applicant was trying to use the concept of 'administration of justice' in a private litigation so as to bring it within the ambit of public interest so as to overcome section 8(1)(j).

### **Case Highlights**

- 1. Tax records are considered private information and exempted from disclosure under the RTI Act.**

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<sup>36</sup> The Code of Criminal Procedure, 1973 requires that before a criminal proceeding can be initiated against a public servant, the prosecuting agency must take permission to initiate such proceedings from the department where the public servant works.

<sup>37</sup> *Shri P. Thavasiraj v. Dept. of Atomic Energy on September 2008*, <http://indiankanoon.org/doc/1718696>

<sup>38</sup> <http://indiankanoon.org/doc/1067875/>

<sup>39</sup> <http://indiankanoon.org/doc/292462/>

## **2. Use of records in a litigation is not a ground to violate the privacy rights of a third party.**

*M. Nagaraju v. Department Of Post*,<sup>40</sup> (2008)

This case demonstrates that information contained in record books containing transactional and customer information is personal information and exempted from disclosure under the RTI Act. In the case Mr. Sevaks requested from the Department of Post a copy of a signature book containing the date, name of depositor, specimen signature, and preliminary receipt Nos. and Account No. of people who had permanent records in the Brach Post Office of Channapatna. The Information Officer denied the request, and Mr. Sevaks appealed the decision. In response to the appeal the CIC held that Mr. Sevaks had not cited any public interest or activity that would warrant a disclosure of the information, and thus the disclosure of the information would warrant an invasion of privacy of the depositors.

### **Case Highlights**

- 1. Information contained in record books containing transactional and customer information is personal information and exempted from disclosure under the RTI Act.**

*Dheeraj Gehani v. Ministry Of Defence*,<sup>41</sup> (2009)

This case demonstrates that health records are personal information and are exempted from disclosure under the RTI Act. In the case Shri Dheeraj Gehani sought the medical records of Captain Pallavi. The CPIO denied disclosure of the information on the grounds that it was personal information having no relationship to any public activity or interest. Shri Gehani appealed the decision, but the Commission upheld the decision not to disclose the information.

It is relevant here to point out the fact that the applicant seems to be trying to utilize the transparency laws of India in a roundabout way by asking the data controller which is the public authority rather than the hospital (which may not have been amenable to the RTI Act) to access the information of a third party.

### **Case Highlights**

- 1. Health records are personal information and are exempted from disclosure under the RTI Act, unless it is connected to public activity or interest.**

*Shri. Chetan Kothari v. Bhabha Atomic Research Centre*,<sup>42</sup> (2011)

This case demonstrates that records pertaining to the deceased are considered personal information and are exempt from disclosure under the RTI Act. In the case Dr. Rajabali Lane requested from the Bhabha Atomic Research Centre information regarding the employees that had committed suicide during the past 15 years. The CPIO revealed the number of suicides but no further details. The decision was appealed and the Commission upheld the decision not to disclose the information as the family members of the deceased have a right to live a life of dignity and it would cause an invasion of privacy.

It is important to note here that the CIC is not talking about the privacy rights of the deceased person

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<sup>40</sup> <http://indiankanoon.org/doc/215697/>

<sup>41</sup> <http://indiankanoon.org/doc/163722/>

<sup>42</sup> <http://indiankanoon.org/doc/425930/>

but instead it is relying upon the privacy rights of the family members of the deceased to deny the disclosure of information to the applicant.

### **Case Highlights**

- 1. Names of those who commit suicide (under the employment of a public sector body) cannot be disclosed as it would be personal information of the family of the deceased.**

*Sanjiv Kumar Jain v. Regional Passport Office*,<sup>43</sup> (2006)

In the case Shri Sanjiv Jain and his wife felt that a Dr. Prasad was not a competent doctor and had forged his documents. Inquiring further, the Jain's requested the passport details of Dr. Prasad from his graduating university and from the Regional Passport Office. The University partially supplied the passport details and the Regional Passport Office denied the details. The Jain's appealed the decision. The Commission ruled that though typically the Commission would not have disclosed the information as it related to a third party and the third party should be given notice, because the doctor was fraudulent, the matter was of public interest and the disclosure was allowed.

It seems that the CIC did not give notice to the third party in this case before allowing for the information to be released as specified in section 11(1) of the Act. Although it is true that section 11(1) is applicable only to the State Public Information Officer and the Central Public Information officer, not the CIC however the end result seems to be that a vested right of receiving notice enjoyed by the third party has been circumvented. In this case however the CIC has not specifically held that passport details are personal information, although the fact that it disclosed the information relying upon public interest seems to suggest that it does consider passport details as personal information.

### **Case Highlights**

- 1. Investigation of a Doctor practicing on fraudulent degrees is a matter of public interest and requires that passport details of such a doctor be disclosed under the RTI Act.**

*Mr. Ansari Masud A.K v. Ministry of External Affairs*,<sup>44</sup> (2008)

In this case, the Appellant, Mr. Ansari requested by way of a RTI Application the passport and other passport enclosures details of Mr. Pawar. The CIC conceded and held that "*disclosure of details of a passport cannot be considered as causing unwarranted invasion of the privacy of an individual and therefore is not exempt from disclosure under Section 8(1) (j) of the RTI Act- more so since passport details are readily made available by an individual in several instances; either to a travel agent, at airline counters etc*"

In this case the CIC seems to consider passport details as personal information but also concluded that the disclosure of such information would not cause unwarranted invasion of privacy.

### **Case Highlights**

- 1. Disclosure of details of a passport cannot be considered as causing unwarranted invasion of the privacy**

*Ms. K Sharada v. Ministry of External Affairs*,<sup>45</sup> (2009)

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<sup>43</sup> <http://indiankanoon.org/doc/1888134/>

<sup>44</sup> [www.indiankanoon.org/doc/1479476](http://www.indiankanoon.org/doc/1479476)

<sup>45</sup> <http://bit.ly/Q6DwoX>

In this case Ms. Sharada, through an RTI application, sought information/copies of all documents submitted by Mr. Suhas Chakma at the time of applying for his Passport; including proof of date of birth and Citizenship document. Her contention was on the basis that Mr. Chakma is not known to have any birth certificate. Nor is he known to have applied for a Citizenship certificate. No proof exists of his having Indian nationality either by birth or by naturalization. Meanwhile, he avails of all the benefits of Indian citizenship such as a passport, ration card and voting rights and even receives additional benefits through an ST certificate.

Mr. Sharada also maintained that the information was already in the public domain since Mr. Chakma had to submit details pertaining to his nationality and date of birth while applying for a position at JNU. Ms. Sharada was further concerned that there were instances of people applying for admission/employment/positions on the basis of forged and false documents. She argued that the information should be released in the interests of transparency and in order to clarify the inconsistencies that she had noticed. Mr. Sharada further pointed out that the RTI application was filed pursuant to a complaint registered against Mr. Suhas Chakma, with the Foreigners Regional Registration Office on the grounds that despite being a Bangladeshi national he had registered himself as an Indian citizen through fabricated documents and certificates. Along with the appeal, she submitted three judgments reflecting the concern of the Delhi High Court on the issue of detection deportation of illegal migrants from Bangladesh to substantiate her submissions on larger public interest concerns. Initially, the CPIO dismissed the Application on the basis of the privacy provisions of the RTI Act, whereby third party information is privileged and protected. When the case was appealed, the CIC took a different stance and maintained that public interest supersedes individual interest. Taking into consideration the risk that illegal immigrants pose to national safety and security, the CIC ruled that the details of Mr. Suhas's passport documents should be made public.

### **Case Highlights**

#### **1. Passport details can be disclosed under provisions of the RTI Act if larger public interest so demands such as to find out if the third party is an illegal immigrant.**

*Mr. Pritpal Singh Sawhney v. Ministry Of External Affairs,*<sup>46</sup> (2011)

This case demonstrates that passport details, when not in the public interest, cannot be disclosed under the RTI Act. In the case Shri Pritpal Sawhney requested from the Regional Passport Office, the passport details of Mr. Ghai, who had a criminal case pending against him. The CPIO at the Passport Office declined to disclose the passport details on the ground that the information related to third parties, and the disclosure would cause an unwarranted invasion of privacy. Shri Pritpal Sawhney filed an appeal with the Commission on the grounds that public interest was involved because a criminal case was pending against Shri Ghai. The Commission maintained that the passport details sought belong to a third party, and thus are exempt from disclosure under the RTI Act.

It is interesting to note here that the mere pendency of a criminal case and the argument that information is required for such a criminal case is not considered as falling within the concept of 'public interest' so as to disclose personal information. However in the case of *Sanjiv Kumar Jain* discussed above, the CIC considered that investigation of a doctor practicing on fraudulent documents is within the bounds of public interest.

### **Case Highlights**

#### **1. Just because a criminal case is pending against the third party, does not mean that it**

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<sup>46</sup> <http://indiankanoon.org/doc/1773560>



**would be in the public interest to release his passport details.**

*Saralla Vara Prasada v. Ministry of External Affairs*,<sup>47</sup> (2011)

Through an RTI application, information was sought regarding the passport details of Ms. Rotte Bujji's age, marital status and her parent's name. Initially, the information was denied to the individual, but after two appeals, the CIC ruled that the information could be disclosed. On the first appeal to the decision, the PIO (Passport Information Officer) as well as the FAA (First Appellate Authority), refused to disclose the information that was sought, because the information belonged to a third party and might cause an invasion of privacy to the third party. Furthermore, under the RTI Act, third parties are allowed to appeal a decision to disclose information that related to them. The decision of the PIO and the FAA was appealed and taken to the Central Information Commission. The CIC contradicted the earlier rulings by the PIO and FAA and stated that the requested information could be disclosed. It also clarified that for information to be considered 'personal information' the following criteria must be satisfied:

1. The information must be personal. This means it must apply to a person and not an institution or corporation.
2. If information is given in the course of a public activity, that it has a relationship with a public activity or interest. This includes situations where the individual supplies personal information to the government, or asks for permission, license or authorization or forms of identity from the government. Thus, where the State routinely obtains information about its citizens, this information is in relation to a public activity and is not an intrusion on privacy.

Based on the above reasoning the CIC concluded that the passport details sought in this case cannot be considered as exempted under section 8(1)(j) of the RTI Act.

In 2012, the decision that a passport is a public document in the *Saralla Vara Prasada vs. Ministry of External Affairs* case was reiterated multiple times by the CIC, including in the case of *Mr. G Gururaga Rao vs. Ministry of External Affairs*<sup>48</sup> and *Shri Durgesh Vijavargiya vs. Ministry of External Affairs*.<sup>49</sup> In the case of Mr. G. Gururaga Roa, the passport information being requested was of a public officer rather than a citizen, while in the case of Shri Durgesh Vijayvargiya, requested information pertaining to the addresses of certain persons as well as the validity of their passports, details of fresh passport issued if any, details of present residence along with visa information, etc. In both cases the CIC authorized the disclosure of the information.

### **Case Highlights**

#### **1. Passport details cannot be protected from disclosure under the RTI Act.**

*Mr. Pramod Kumar v. Regional Passport Office*,<sup>50</sup> (2011)

In this case Mr. Kumar requested the passport application along with other certificates of Savitha Kalikar from the Regional Passport Office. The PIO responded that the information sought is personal information relating to a third party, the disclosure of which has no relation to public interest. Mr. Kumar appealed the decision stating that the views of the third party must be taken before disclosure is allowed. The Appellate Authority held that procedure must be followed and the third party contacted,

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<sup>47</sup> <http://bit.ly/TX2s4v>

<sup>48</sup>. <http://bit.ly/RkpY9g>

<sup>49</sup>. <http://bit.ly/OSuxbn>

<sup>50</sup> [http://www.rti.india.gov.in/cic\\_decisions/CIC\\_SG\\_A\\_2012\\_001287\\_19287\\_M\\_84918.pdf](http://www.rti.india.gov.in/cic_decisions/CIC_SG_A_2012_001287_19287_M_84918.pdf)

and that if the information does not qualify as ‘personal information’; it can be disclosed under the Act. The procedure under the RTI Act in relation to third parties was discussed very succinctly in the following words:

“It is evident that the PIO is expected to follow the procedure of Section 11 when he “intends to disclose any information or record”. This means that the PIO has come to the conclusion that the information is not exempt as per the provisions of the RTI Act. It is clearly stated at Section 11 (1) that ‘submission of third party shall be kept in view while taking a decision about disclosure of information’. The information ‘which. relates to or has been supplied by a third party and has been treated as confidential by that third party’. Thus the procedure of Section 11 comes into effect if the PIO believes that the information exists and is not exempt, and the third party has treated it as confidential. The PIO must send a letter to the third party within 5 days of receipt of the RTI application. It only gives the third party an opportunity to voice its objections to disclosing information. The PIO will keep these in mind and denial of information can only be on the basis of exemption under Section 8 (1) of the RTI act. As per Section 11 (3), the PIO has to determine the whether the information is exempt or not and inform the appellant and the third party of his decision. If the third party wishes to appeal against the decision of the PIO, he can file an appeal under Section 19 of the Act as per the provision of Section 11 (4).

Section 11 does not give a third party an unrestrained veto to refuse disclosing information. It clearly anticipates situations where the PIO will not agree with the claim for non-disclosure by a third party and provides for a appeal to be made by the third party against disclosure, which would have been unnecessary, if the third party had been given a veto against disclosure.”

In this case the CIC disclosed the information relying on the *proviso* to section 8(1)(j) which states that information which would not be denied to the Parliament or State Legislature cannot be denied to any person.

### **Case Highlights**

- 1. For information to be personal it must apply to a person.**
- 2. The State routinely collecting information about citizens is a public activity.**

From the abovementioned cases one can easily ascertain that there is definitely some doubt as to whether passport information is considered of a personal nature or not and therefore whether it can be disclosed if there is no public interest involved in such disclosure. There seem to be decisions of the CIC going both ways but lately they seem to have taken the view that passport details are information given in relation to a public activity. However, it must be noted that these are decisions of the CIC and not of any High Court or the Supreme Court. In addition, there is a mention by the Delhi High Court in the case of *V.K. Jain v. UPSC* (also known as *obiter dicta*, which is non binding) which seems to suggest that passport details would be considered as personal information and should not be disclosed if no public interest is served by such disclosure.

*Amit Chamaria v. University Of Delhi*,<sup>51</sup> (2008)

This case demonstrates that student records can be disclosed under the RTI Act. In the case Amit Chamaria requested a number of details from the University of Delhi including: the details of students in various courses, details of the names of students and which course they were admitted to, what

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<sup>51</sup> <http://indiankanoon.org/doc/98221/>

scheme the students have taken after admission, the details of their results, and the present number of foreign students enrolled in the university. The CPIO at the University supplied the number of foreign students at the University, but not the details of the students. Amit Chamaria appealed the decision and the Commission ruled that the details of the students, the details of the courses, and the details of the results of the students should be disclosed and are not protected from exemption under the Act.

### ***Case Highlights***

#### **I. Student records such as details of the students, details of the courses as well as results can be disclosed under the RTI Act.**

*M. Rajamannar v. IGNOU*,<sup>52</sup> (2009)

This case demonstrates that information pertaining to the qualifications of individuals can be disclosed under the RTI Act. Mr. Rajamannar filed a request with the Academic division of Maidan Garhi in New Delhi for information pertaining to qualifications of Sh. Ashok Kumar Nishesh, and Ms. Sangeeta Saxena. The PIO denied disclosing the information. Mr. Rajamannar appealed the case to the appellate authority. The Appellate Authority maintained that there is no public interest served in seeking photo copies of the qualifications and therefore are exempted from disclosure under the RTI Act. Overturning the decision of the Appellate Authority the CIC held that educational certificates had been given to the public authority in the process of selection at the time of recruitment which is a public activity and disclosure of the educational certificates of any individual cannot be considered an invasion on privacy.

### ***Case Highlights***

#### **1. Information pertaining to the qualifications of individuals working in a public institution can be disclosed under the RTI Act.**

*Mr. V.R. Sharma v. Ministry of Labor and Employment*,<sup>53</sup> (2011)

In this 2011 appeal to the CIC by Mr. Sharma, by way of a RTI application it was requested that he be given information regarding the Annual Confidential Report (ACR) of officers to ascertain the manner in which they were promoted to a higher grade. The CIC, taking into account the nature of the request observed that for the Section 8(1) (j) exception to apply the information should be:

- Of a personal nature, not attributable, related or attached to institutions, organizations and corporates.
- The phrase 'disclosure of which has no relationship to any public activity or interest' should apply to information must have been given in the course of a public activity.
- The disclosure of the information should lead to unwarranted invasion of the privacy of the individual. The State has no right to invade the privacy of an individual. There are some extraordinary situations where the State may be allowed to invade the privacy of a citizen. In those circumstances special provisions of the law apply usually with certain safeguards. Therefore where the State routinely obtains information from citizens, this information is in relationship to a public activity and will not be an intrusion on privacy.

Taking the facts of the appeal and circumstances into account; the Court ruled that though the information sought is "personal"; disclosure of such information cannot be construed as unwarranted invasion of the privacy of the officer concerned since the ACR contains information disclosed by an officer to the public authority- in the course of public activity. The position taken by the CIC; was that

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<sup>52</sup> <http://indiankanoon.org/doc/1312655>

<sup>53</sup> <http://indiankanoon.org/doc/1640569/>

“a public servant is accountable to the public and therefore, every citizen has the right to obtain information that may assess his credibility, integrity and performance.”

The CIC also drew on the Supreme Court’s ruling in *Union of India vs. ADR in Appeal (Civil) 178 of 2001 and W. P. (Civil) 294 of 2001 decided on 02/05/2002* where it was observed that “persons who aspire to be public servants by getting elected have to declare inter alia their property details, any conviction/ acquittal of criminal charges, etc. It follows that persons who are already public servants cannot claim exemptions from disclosure of charges against them or details of their assets. Given our dismal record of mis-governance and rampant corruption which colludes to deny citizens' their essential rights and dignity, it is imperative for achieving the goal of democracy that the citizens' right to information is given greater primacy with regard to privacy”. Therefore, disclosure of information such as property details, any conviction/ acquittal of criminal charges, etc of a public servant, which is routinely collected by the public authority and provided by the public servants, cannot be construed as an invasion of the privacy of an individual and must be provided to an applicant under the RTI Act. Similarly, citizens have a right to know about the strengths and weaknesses as well as performance evaluation of all public servants.

It is interesting to note that the CIC has relied upon a case given in the context of politicians or elected representatives and has extrapolated the reasoning given there to apply it to bureaucrats as well.

### **Case Highlights**

#### **1. Details of Personnel Information such as Annual Confidential Reports of public servants cannot be considered as personal information.**

*Shri Prakash Jus Roy v. Deputy Commissioner of Police*,<sup>54</sup> (2009)

The Appellant in the case by way of a RTI Application, requested information from the CIC with regard to FIR and arrest warrant information in the name of Mr. Rajendra Jaina and his father T.C. Jaina. The Commission ruled against the decision of the District Commissioner of Police (DCP), Delhi that the information sought was not third party information which can be deemed privileged within the purview of an exception under Section 8(1)(j) of the RTI Act. The CIC while ruling, observed that under Article 12 of the Universal Declaration of Human Rights (1948) as well as Article 17 of the International covenant of Civil and Political Rights (to which India is a party); privacy is determined in a manner in which “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home and correspondent, nor to unlawful attacks on his honour and reputation”.

The Commission reiterated that the information sought by the Appellant was critical to the larger public good. More so since the information requested has been disclosed to Parliament and has been a matter of discussion as well- clearly establishing that the information has been already disclosed in public fora. The CIC further observed that the “test always in such matter is between private rights of a citizen and the right of third person to be informed. The third person need not give any reason for his information. Considering that, we must hold that the object of the Act, leans in favor of making available the records in the custody or control of the public authorities” Privacy, as an exemption could not be claimed by the Respondent, Mr. Rajender Jaina or the DCP, Delhi on the basis of the exemption provision in the Act. The Rule of Law as rightly applied here should take into account the larger good and interests of society with a view to keep all offenses at bay.

### **Case Highlights**

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<sup>54</sup> <http://www.indiankanoon.org/doc/1960517/>

1. A third party need not give any reason as to why they want that information.
2. FIR and arrest warrant information is not ‘personal information’ and can be disclosed under the provisions of the RTI Act.

### *Official Secrets Act, 1923*<sup>55</sup>

In India disclosure of information pertaining to the Government of India is restricted by the Official Secrets Act, 1923. The Act was established to protect sensitive governmental documents and communications. Under the Act, both the individual and a company can be held liable for offences. It is important to note that the RTI Act can override the provisions of the Official Secrets Act, 1923 namely public authorities are required to disclose information that is prohibited by the Official Secrets Act, 1923 if it is determined that it is in the public interest to do so. In the context of the Act, all information that relates to the works of the Government is critical information that should be treated according to the privacy principles to ensure that the Government does not use the provisions of the Act to be non-transparent to the citizens while at the same time the privacy of sensitive governmental information is protected. Because the Act speaks to the protection of governmental secrets the principles of notice, choice and consent, and collection limitation will not fully apply. The Act currently only has provisions which speak to the principles of *purpose limitation* and *disclosure to third parties*.

### *Oversight*

- *Disclosure to Law enforcement:* Persons are required to give authorities any information relating to an offence under the Act, and failure to comply is punished with a fine and imprisonment which may extend to three years.<sup>56</sup> Warrants can be issued for search and seizure into any place which might contain evidence of an offence under the Act that has been committed or which is about to be committed.<sup>57</sup> The Act only allows officers above the rank of Sub-divisional Magistrate to issue search warrants, and only allows police officers above the rank of inspector to demand information from persons.

The Government could appoint an independent overseeing body to oversee what information is being labeled as an ‘official secret’ and subsequently not disclosed.

### *Purpose Limitation*

- *Use:* Unlawful and improper communication, receiving, retention, use, and handling of ‘official secrets’<sup>58</sup> is prohibited.<sup>59</sup> This provision is re-enforced as anyone guilty of violating these standards is penalized with imprisonment that can extend to five years (in certain circumstances it can extend to life imprisonment or death) and is liable to fine.<sup>60</sup> The use of uniforms, falsification of reports, forgery, impersonation, and false documents for the

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55 The Official Secrets Act, 1923. Available at: [http://mha.nic.in/pdfs/Official\\_Secret\\_Act1923.pdf](http://mha.nic.in/pdfs/Official_Secret_Act1923.pdf)

56 The Official Secrets Act, 1923 s. 8(1) and (2).

57 The Official Secrets Act, 1923 s. 11 sub-section 1.

<sup>58</sup> Secret official code or password, any sketch, plan, model, article, note, document or information which relates to a place, or which is likely to assist directly or indirectly an enemy, the disclosure of which is likely to affect the sovereignty and integrity of India, the security of the State or friendly relations with foreign States. Section 5.

59 The Official Secrets Act, 1923 s. 5 (1)(a)(b)(c)(d) “code or pass word, sketch, plan, model, article, note, document or information document or information which relates to or is used in a prohibited place or relates to anything in such a place.

60 The Official Secrets Act, 1923 s. 5(4).

purpose of gaining entry to a prohibited place or for any other purpose prejudicial to the safety of the country is prohibited.<sup>61</sup> The unlawful or improper retention, sharing, communication, and unlawful possession of any 'official document' is prohibited.<sup>62</sup>

To strengthen the principle of purpose limitation, the Act could require that all information determined to be a governmental secret, must be relevant and intended for a stated purpose. The Act could also require that all official secrets be anonymized and made public after a certain period of time has passed and their purpose has been served.

### Missing Principles

- *Security*: The Government should take all measures to ensure the security of data considered to be an 'official secret' or 'secret document' to protect against loss, unauthorized access, destruction, use, processing, storage, modification, and unauthorized disclosure.
- *Openness*: The Government could take all steps possible to implement practices, procedures, policies, and systems in a manner proportional to the scale, scope, and sensitivity of information that is not allowed to be disclosed to the public. Information regarding these steps should be made available to the public in an intelligible form, using clear and plain language. Conflicting with the principle of openness is the current provision in the Act which allows a court order for exclusion of the public from any proceedings under the Act on the grounds that any publication of evidence or any statement would be prejudicial to the safety of the State.<sup>63</sup>

### *The Prevention of Corruption Act, 1988*<sup>64</sup>

The Prevention of Corruption Act, 1988 replaced the Prevention of Corruption Act, 1947 and the Criminal Law Amendment Act, 1952. The Act creates multiple offences which constitute acts of corruption. In the context of the Act information related to a public figure's assets and financial transactions is critical. Unlike the RTI Act, which enables citizens to request information from the Government, the Prevention of Corruption Act, 1988 enables law enforcement agencies to investigate governmental officials on allegations of corruption. Because the Act is working towards exposing corruption the principles of choice & consent, and notice will not fully be applicable.

### *Disclosure*

- *Disclosure to law enforcement*: In the case of the Delhi Special Police Establishment, police officers not below the rank of Inspector of Police have the power to investigate complaints of corruption.<sup>65</sup> In the case of Bombay, Calcutta, Madras etc. the Assistant Commissioner of Police is empowered to investigate.<sup>66</sup> Elsewhere the Deputy Superintendent of Police may investigate.<sup>67</sup> Each of these bodies may investigate any offence under the Act, and make arrests without warrants.<sup>68</sup> Any police officer not below the rank of Superintendent of Police, unless specially authorized, has the power to inspect and take certified copies of a

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61 The Official Secrets Act, 1923 s. 6(1).

62 The Official Secrets Act, 1923 s. 6(2) (a) (b) 'Official Document' is defined as passport, naval, military, air force, police, or official pass, permit, certificate, license, or other document of as similar character.

63 The Official Secrets Act, 1923 s. 14.

64 The Prevention of Corruption Act 1988. Available at: [http://cbi.nic.in/rt\\_infoact/pcact.pdf](http://cbi.nic.in/rt_infoact/pcact.pdf)

65 Prevention of Corruption Act 1988 Section 17 (a).

66 Prevention of Corruption Act 1988 17(b).

67 Prevention of Corruption Act 1988 17(c).

68 Prevention of Corruption Act 1988 17(c).

banker's book. In order to inspect a banker's book, the Superintendent of Police must have reason to suspect the commission of an offence, and may only inspect the book to the extent that it relates to the accounts of the suspected persons, or of any other person suspected to be holding money on behalf of such person.<sup>69</sup>

### *Oversight*

- *Courts:* The Central Government or the State Government may appoint special Judges to try any offence that is punishable under the Act, any conspiracy to commit or attempt to commit any offence.<sup>70</sup> A special Judge may take cognizance of an offence without the accused being committed to him for trial, and must follow the procedure prescribed by the Code of Criminal Procedure.<sup>71</sup>

In practice the Act creates a special Judge to try cases of corruption amongst public officials, even if the public official is not present, and allows the police vast powers to investigate and arrest suspected individuals without warrant. Though, it is important that the law provides for mechanisms to stop corruption, the Act currently allows the police vast powers of access to personal information with no safeguards in place for the individual or the information.

### **Missing Principles**

- *Notice:* If a public figure's records are legally accessed, after the close of the investigation the public figure should be notified of the same.
- *Openness:* Organizations and bodies carrying out the provisions of the Act must publicly communicate the steps taken to adhere to privacy principles.
- *Security:* Law enforcement agencies collecting information must have in place safeguards to prevent the loss, unauthorized access, destruction, use, processing, storage, modification, de-anonymization, and unauthorized disclosure of information.
- *Disclosure:* If in any case collected information is disclosed to third parties, the third party must be bound to adhere to privacy principles.

## **PROPOSED LEGISLATION**

### *The LokPal Bill, 2011*<sup>72</sup>

The Lokpal Bill is a proposed anti-corruption law that creates an independent ombudsman body empowered to investigate complaints or allegations of corruption against public servants. Unlike the Prevention of Corruption Act, which only empowered law enforcement to investigate allegations of corruption, the LokPal Bill empowers citizens to directly file complaints of corruption against public figures. The Bill proposes that the Act would extend to the whole of India, and would also apply to public servants outside of India.<sup>73</sup> Critical information under the Bill includes information related to a public figures assets and financial transactions. Because the LokPal Bill is focused on increasing transparency to eliminate corruption, and accomplishes this through investigations into cases of

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69 Prevention of Corruption Act 1988 Chapter IV Section 18.

70 Prevention of Corruption Act 1988 s. 3 and 4.

71 Prevention of Corruption Act 1988 s. 5.

72 The Lokpal Bill, 2011 Available at:

<http://www.prsindia.org/uploads/media/Lokpal/The%20Lok%20Pal%20Bill%202011.pdf>

<sup>73</sup> Lokpal Bill, 2011 s. 1(2).

corruption, the privacy principles speak to the investigative powers under the Bill. Under the Bill, the LokPal can directly, through its own investigative wing<sup>74</sup>, or indirectly<sup>75</sup>, through another investigative agency, make inquiries into complaints and allegations of corruption. In its current draft the LokPal Bill addresses the principles of oversight, purpose limitation, openness, access and correction, notice, collection limitation.

### ***The Public Interest Disclosure and Protection to Persons Making the Disclosures Bill, 2010***<sup>76</sup>

The Public Interest Disclosure and Protection to Persons Making the Disclosures Bill, 2010 establishes a mechanism to receive complaints related to corruption or misuse of power against public bodies. The Bill seeks to protect individuals issuing complaints against public bodies from victimization, and protect public officials from undue exposure or harassment. The scope of the Bill extends to public servants which includes any corporation established by or under any Central Act or State Act, Government Companies, and Societies or Local Authorities owned or controlled by the Central Government or the State Government.<sup>77</sup> The Bill offers protections to both witnesses and individuals making complaints of malpractice. The principles of notice, choice & consent, collection limitation, and access & correction will not apply, as the focus is on the issuance of public disclosures by individuals, and investigation by the designated body. Aspects of the current version of the Bill speak to the principles of oversight, disclosure, and security.

## **PRACTICES AND PROJECTS**

### ***Whistle-Blowers***

Corporate and Governmental transparency can be brought through legal provisions and through public disclosures that expose corruption and abuse. The need for a whistle-blower policy has been voiced in India for many years. Influencing the drafting of the 2010 Bill (discussed earlier in this chapter) was a 2001 recommendation from the Law Commission that a legal mechanism for whistleblowers to issue complaints should be established. In 2003 the Securities and Exchange Board of India considered and reviewed a whistle blower policy for corporates. Through a proposed amendment to section 49 of the Companies Act, the SEBI looked to make it mandatory for all listed companies to create a mechanism for employees to report concerns about any unethical behavior, fraud, or violation of the code of conduct. SEBI also had asked companies to put in place a mechanism that would safeguard individuals against victimization if they reported misconduct. The need for a whistle blower policy was highlighted by the many deaths that resulted from individuals exposing corporate scams. Despite the many whistle blowers and RTI activists that have been murdered the corporate sector strongly opposed the section 49 amendment, and the amendment was not passed.<sup>78</sup> Simultaneous to the proposed amendment in the Companies Act, in 2003 the Law Commission of India in its 179<sup>th</sup> Report drafted a Public Disclosure

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74 Lokpal Bill, 2011 s. Chapter VIII s. 27.

75 Lokpal Bill, 2011 s. and 32.

76 The Public Interest Disclosure and Protection to Persons Making the Disclosures Bill, 2010. Available at: <http://www.prsindia.org/uploads/media/Public%20Disclosure/Whistleblower%20Bill%202010.pdf>

77 The Public Interest Disclosure and Protection to Persons Making the Disclosures Bill, 2010, Definition of 'public servant'.

78 Mathew, George. SEBI Forced to Review Whistle blower policy. Indian Express. Dec 17<sup>th</sup> 2003.

<http://www.indianexpress.com/oldStory/37371/>. Last Accessed on Dec 24<sup>th</sup> 2011, Dhoot, Vikas. Satyam had a whistle-blower policy since 2005. The Financial Express. March 29<sup>th</sup> 2009.

<http://www.financialexpress.com/news/satyam-had-a-whistleblower-policy-since-2005/440221/0>. Last Accessed on Dec 27<sup>th</sup> 2011.



Bill.<sup>79</sup> In 2004 the Supreme Court ordered for machinery to be put in place that would act on complaints from whistle blowers. In response to these recommendations, under resolution No.89, and in response to the murder of whistle bower Satyendra Dubey, the Central Vigilance Commission was appointed as the designated agency in charge of receiving complaints from Whistle blowers.<sup>80</sup> In 2007 the Second Administrative Reforms Commission also recommended that a designated legislation be passed with respect to whistleblowers.<sup>81</sup> The scope of the Bill extended to public companies and public persons and did not apply to private companies. In 2010 a new version of the whistle-blower legislation was proposed, but still has yet to be passed.<sup>82</sup>

## CONCLUSIONS

In many countries, transparency laws share the common goal of making governments and corporate bodies more transparent and accountable to the people they serve through disclosure of information that concerns the public and that uses public funds. Standard data protection (collection, storage, security, access, disclosure, and deletion) regulations apply to the way any information should be handled – there are specific standards that can be established to help governments, corporates, and law enforcement find the nuanced and needed balance between transparency and privacy.

Principle	Included	Missing
Accountability		
Openness		***
Security		***
Disclosure	**	*
Access and Correction		*
Purpose Limitation	*	*
Collection Limitation		
Choice and Consent		
Notice		*
Penalty/Offenses/Liability/Remedy		
Oversight	*	*
Quality/Verification		

<sup>79</sup> The Public Interest Disclosure (Protection of Informers) Bill 2002. Available at:

<http://lawcommissionofindia.nic.in/reports/179rptp2.pdf>

<sup>80</sup> Ministry of Personnel, Public Grievances and Pensions. Department of Personnel and Training April 21<sup>st</sup> 2004. <http://cvc.nic.in/whistleblow.pdf>

<sup>81</sup> PRS. Legislative Brief: The Public Interest Disclosure and Protection to Persons Making Decisions Bill 2010. Available at: <http://www.prsindia.org/uploads/media/Public%20Disclosure/Legislative%20Brief%20-%20Public%20Interest%20Disclosure%20Bil.pdf>. Last Accessed: September 6th 2012.

<sup>82</sup> Ministry of Personnel, Public Grievance and Pensions. Department of Personnel and Training. Resolution, New Delhi 2004. <http://netindian.in/news/2010/08/26/0007630/govt-introduces-bill-protect-whistleblowers-lok-sabha>