

CENTRAL INFORMATION COMMISSION
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Decision No. CIC/SM/A/2011/000308/SG/13000
Appeal No. CIC/SM/A/2011/000308/SG

Relevant Facts emerging from the Appeal:

Appellant : Mr. Dharambir Khattar,
Sal Dham, 2, Khel Gaon Marg,
Opposite- Siri Fort Auditorium
Hauz Khas, New Delhi- 110016

Respondent : Mr. Jagroop S. Gusinha,
AIG (P) & CPIO,
Central Bureau of Investigation,
Policy Division, North Block,
New Delhi

RTI application filed on : 31/05 /2010
PIO replied on : 05/08/2010
First Appeal filed on : 09/08/2010
FAA order of : 09/09/2010
Second Appeal received on : 21/09/2010

Information sought:

1. Regarding interception of phone numbers:

- (a) When you first received the information regarding aforementioned phone number and the mode of information.
- (b) What information you received regarding aforementioned phone number.
- (c) From which source you received information regarding aforementioned phone number.
- (d) Initially who has received information against the aforementioned phone number (name of officer).
- (e) After receiving information regarding aforementioned phone number, what investigation you made. Copy of investigation report be supplied.
- (f) What incriminating material was found against the aforementioned phone number?
- (g) After receiving initial information in how many days you applied for permission for interception for aforementioned phone number.
- (h) Kindly supply a copy of the request / proposal sent to the Home Ministry.
- (i) At the time the request for interception was applied to the Home Ministry, in whose name aforementioned phone number was registered.
- (j) What material you sent along with request letter to the ministry of Home for obtaining interception order.
- (k) Kindly supply a copy of the note portion of the file in which request / proposal for getting permission for interception were processed in your office.
- (l) Who is the competent authority in the CBI to direct for getting / processing the file for orders for interception?
- (m) By which mode of communication (by hand or by post) the proposal I request for interception of aforementioned phone number was sent to the Home Ministry.

- (n) Kindly supply a copy of acknowledgement I receipt of communication mentioned in pan (m) of this application.
- (o) To whom the orders are sent by the Ministry in Top Secret cover.
- (p) Whether the alleged orders of the Home Secretary were obtained, please supply the copies of the same.
- (q) Whether those orders were reviewed by the high level Review Committee appointed by the Government of India.
- (r) Please supply the copies of the minutes of the meeting of the Review committee which must have been received in the CBI because without review of the orders of the committee within the stipulated period, as prescribed under the Indian Telegraph Act (Rule 419-A) the cases could not be made out or registered against any one by the CBI. Therefore, these documents are most important for the applicant. Now there is no secrecy because the cases are in the Court of law and every document has become a public document and there is no question of hiding the said information from the public/applicant.

Reply of Public Information Officer (PIO):

Please refer to your RTI request dated 31.5.20120 regarding interception of phone numbers 56008084, 56008085, 56002727, 56000067 and 55655200, on the subject cited.

2. The required information/documents in respect of point at SI. No. 1 sub para (a) to (r) of your RTI application are denied as the same are covered under the exemption under Section 8(1) (a), (g) &(h) of the RTI Act, 2005.

Section 8(1) (a) reads as “Information”, disclosure of which would prejudicially affect the sovereignty of India, the security, strategic, scientific or economic interests of the State, relation with foreign State or lead to incitement of an offence”.

Section 8(1) (g) reads as “Information”, the disclosure of which would endanger the life or physical safety of any person or identify the source of information or assistance given in confidence for law enforcement or security purposes”.

Section 8(1)(h) reads as “Information”, which would impede the process of investigation or apprehension or prosecution of offenders”.

3. The interception by CBI is done with the approval of the Competent Authority as per the provisions of Sec. 5(2) of the Indian Telegraph Act, 1885 for the reasons of occurrence of any public emergency, or in the interest of the public safety, in the interest of sovereignty and integrity of India, the security of State, friendly relations with foreign States or public order or for preventing incitement to commission of offence.

Grounds for First Appeal:

Denial of information not justified.

Order of First Appellate Authority (FAA):

6. The CIC has observed in its Order dated 5th May, 2006, in State Vs. S.C. Sharma, that the orders of interception of telephones u/s 5(2) of the Indian Telegraph Act, 1885, were themselves sensitive for national security, sovereignty & integrity. Therefore, these are firmly within the ambit of Section 8(1)(a) of the RTI Act, and cannot, thus, be disclosed. The process of review of a matter connected with any top secret interception order must stand on the same footing as the main order itself and by inference be exempt from disclosure requirement u/s 8(1)(a) of the RTI Act. It would be both imprudent and improper to apply the criteria of severability and to determine one part of the process as classified and other as open. The entire process of telephone interception is one and indivisible and thus, not liable for disclosure. Therefore, the information as sought by the Appellant in his RTI request attracts exemption under Section 8(1)(a), (g) & (h) of the RTI Act. In any case, the deliberations of the Review Committee are maintained with the Ministry of Home Affairs and, therefore, the CBI is not the custodian of such information. The CPIO is directed to transfer the application under Section 6(3) of the RTI Act within 5 working days from

issue of this order in respect of information sought by the appellant vide para 1(o), (q) & (r) of the application.

Grounds for Second Appeal:

Information sought not exempt.

Relevant Facts emerging during Hearing on 10 May 2011:

The following were present:

Appellant: Mr. Dharambir Khattar;

Respondent: Mr. Jagroop S. Gusinha, AIG (P) & CPIO.

“The Appellant had sought information on a very large number of queries but states that he would be satisfied if he is given the following two points of information:

- 1- The proposal sent to MHA for permission to intercept the phone numbers.
- 2- The minutes of the review committee and the review committee report on this.

The PIO states that information at point 2 is not held by the Department.

The Commission will therefore consider whether information on point-1 should be disclosed to the Appellant. The PIO has claimed exemptions under Section 8(1) (a), (g) & (h) of the RTI Act. The PIO claims that revealing the proposal is likely to have an impact on the safety and security of the Nation, disclose the sources of information and impede the process of prosecution. The Appellant states that this claim is not true and states that if necessary some information can be severed under Section 10 of the RTI Act. Both sides are arguing for their view points. It is difficult for the Commission to decide on this matter without looking at the actual proposal. The Commission therefore directs the PIO to bring the proposals to the Commission on **25 May 2011 at 05.30 PM.**

The Commission will look at the records on 25 May 2011 at 05.30 PM and decide whether the exemptions apply to the information sought at point-1 above.”

Relevant Facts emerging during Hearing on 25 May 2011:

The following were present:

Appellant: Mr. Prashant Singh, Advocate on behalf of the Appellant;

Respondent: Mr. Saurabh Tripathi, PIO & AIG (P), Mr. Dinendra Kashyap, SP (CBI) SU and Mr. Jagroop SG, ASP/ SU.

At the hearing held on 25/05/2011, the Appellant was not allowed to participate initially. The Commissioner asked the Respondents to show the relevant records/ information. The Respondents produced a file in which there were handwritten notings on green coloured noting sheets for each proposal. Below each proposal was the approval.

On careful perusal of the same, the Commission noted that the information contained in the proposals were broad statements to the effect that the accused had connections with government servants holding high positions including the judiciary. The proposal also mentioned that the accused was indulging in bad practices and hence permission should be granted to tap his phone.

The Information Commissioner could not find anything which could remotely be connected with any matter of security or anything with names of persons or anything specific which was being revealed. The Commission therefore asked the Respondents to identify any words, phrases or lines for which the exemptions of Section 8 (1)(a), (g) or (h) of the RTI Act would apply. They were unable to identify any material which they could claim would harm the security of the country or impede the process of prosecution. The only specific claim they made was that if the names of officers who made the proposal was disclosed, it might endanger their safety. Despite repeated prodding by the Commission to identify

any material for which exemption was being claimed under Section 8(1) of the RTI Act, the Respondents did not identify anything in the proposals ‘which would prejudicially affect the sovereignty and integrity of India, the security, strategic, scientific or economic interests of the State, relation with foreign State or lead to incitement of an offence;’ or anything ‘which would impede the process of prosecution’- (since the investigation is over). The respondents did not even make any attempt to point out anything to the Commissioner, because there was nothing. There was nothing specific in the proposals which were shown to the Information Commissioner.

The Information Commissioner told the Respondents that he could not see anything in the proposals which could be claimed to be protected under Sections 8(1)(a) or (g), nor were they able to point out any material in support of their contention. The proposals contained generic statements and had nothing which was specific or disclosed anything which could be claimed to be sensitive or specific. The Respondents only stated that the matter must be looked at in a holistic manner.

After this, the Appellant was called in and both sides argued the matter with a lot of heat. The PIO argued that names of officers who made/ processed the reports and the file notings should not be revealed. They also argued that revealing the information would reveal the modus operandi and methods that they use to investigate offenders. They also gave written submissions and claimed that since the Appellant had sought the same information in the trial court and High Court, which was denied, the Commission should not ask for the information to be revealed. The Commission decided that it would go through the written submissions before arriving at a decision.

The Appellant contested the Respondent’s claim that the trial court and High Court have denied the information being sought in the RTI application. The Respondent claimed that this was mentioned on pg. 53 and 54 of the submissions provided to the Commission. The Appellant stated that what has been shown by the Respondent mentioned only that the Court will not direct the prosecution to furnish copies of documents other than that which it proposed to rely upon or which had already been sent to the Court during investigation at the pre- charge stage. The Respondent also stressed that at pg. 70 (v), it was stated that “*in terms of Section 207 (v) read with Section 173 (5) (a), CRPC the prosecution is obliged to furnish to the accused copies of only such documents that it proposes to rely upon as indicated in the charge sheet or of those already sent to the court during investigation*”. The Appellant stated that the order should be read as a whole. The Appellant stated that the arguments being proposed by the Respondent did not restrict themselves to the exemptions of Section 8(1) of the RTI Act. The Respondent stated that releasing the information would affect its chances of a fair trial.

The Appellant stated that he was not aware that the Respondent would file a 100- page submission. The Appellant stated that he would like to submit written submissions before the Commission. The Commission gave both sides an opportunity to file their written submissions before the Commission **before June 6, 2011**, which were required to be delivered to the Deputy Registrar of the Commission directly at his office.

Decision announced on 21 June 2011:

Both parties were given an opportunity to submit written submissions to the Commission before 06/06/2011. However, no written submissions were received from the Appellant. The Respondent had submitted certain written submissions to the Commission at the hearing held on 25/05/2011 (enclosing submissions dated 10/05/2011) and furnished additional written submissions on 06/06/2011. Therefore, the Commission shall decide the matter based on the arguments raised before it and on perusal of the written submissions submitted.

At the hearing held before the Commission on 10/05/2011, it was established that the Appellant was seeking only the proposal sent to MHA for permission to intercept the phone numbers. The main

contention of the Respondent is that disclosure of this information was exempted under Sections 8(1)(a), (g) and (h) of the RTI Act.

In this regard, the Respondent has placed reliance on the decision of the Commission in S. C. Sharma v. Ministry of Home Affairs CIC/AT/A/2006/00056 dated 05/05/2006. In the *S. C. Sharma Case*, the Commission held that it was an accepted fact that the orders of interception of telephones under Section 5(2) of the Indian Telegraph Act, 1885 were themselves sensitive for national security, sovereignty and integrity. Therefore, these were firmly within the ambit of Section 8(1)(a) of the RTI Act and cannot, thus, be disclosed. The Commission accepted the appellate authority's argument that the process of review of a matter connected with any top secret interception order must stand on the same footing as the main order itself and by inference be exempt from disclosure requirement under Section 8(1)(a) of the RTI Act. It would be both imprudent and improper to apply the criterion of severability and to determine one part of the process as classified and other as open. The Commission had agreed with the appellate authority's view that the entire process was one and indivisible and thus not liable for disclosure.

The Respondent has also relied on another decision of the Commission in S. P. Singh v. Ministry of Home Affairs CIC/AT/A/2006/00379 dated 27/11/2006. The Commission relied on its decision in the *S. C. Sharma Case* and noted that in the said decision, the Commission had taken a view that matters connected with interception of telephones were governed by the provisions of the Indian Telegraph Act, 1885 and were distinctly related to the security of India. Any matter, except the most obvious such as the officer designated to authorize interception of messages and the organisation so authorized, must therefore be construed to be security related. In that sense disclosure of the category of information required by the applicant necessarily attracted the provisions of Section 8(1)(a) of the RTI Act. The Commission further observed that the character of the information will not be altered if the charges subsequently brought against the person were not for violation of any security related law but under the provisions of an anti-corruption law. It was held that the information sought by the applicant related to security and strategic interest of the state and must therefore be exempted from disclosure under Section 8(1)(a) of the RTI Act.

On perusal of the decisions cited above, this Commission noted that in the said decisions, the applicant(s) had sought from MHA copies of interception order(s) and/ or reports on the basis of which interception order(s) were issued and note sheets where the reports were processed and decision to sanction interception of phones was taken. Disclosure under the RTI Act of proposals received by MHA from an investigating agency such as CBI seeking permission for interception of phones (consequent to which a review committee may be set up and on the basis of the review committee's report, an interception order may be passed by MHA) was not the subject-matter of discussion before the Commission in both *S. C. Sharma Case* as well as the *S. P. Singh Case*. Given the fact that the Appellant in the present matter is not seeking the review committee report/ minutes of the review committee, this Commission does not find the decisions cited above relevant.

As mentioned above, at the hearing held before the Commission on 25/05/2011, the Respondent produced the file notings in which the proposal sent to MHA was present. On careful perusal of the same, the Commission noted that the information contained in the proposal were broad statements to the effect that the accused had connections with government servants holding high positions including the judiciary. The proposal also mentioned that the accused was indulging in undesirable practices and hence permission should be granted to tap his phone. There was no specific mention of anybody, or any specific actions or anything which could be construed as specific. There was no description of any modus operandi in the proposals shown to the Commission.

In other words, the information contained in the proposal was in the nature of generic statements and without any specific and concrete allegations against the accused. The information contained in the proposal was general and certainly did not reveal any mechanism by which intelligence was being gathered by the Respondent. Given the same, the Commission does not understand how disclosure of such

information would have any prejudicial effect on the sovereignty, security, integrity and economic interest of India and may lead to incitement of an offence, as stipulated under Section 8(1)(a) of the RTI Act. Moreover, reliance placed by the Respondent on the decision of the Supreme Court of India in Union of India v. Tulsiram Patel (1985) 3 SCC 398, which elucidates the expression “security of the State” does not appear to provide any additional support to Respondent’s argument. In view of the same, the contention of the Respondent that the information sought was exempted under Section 8(1)(a) of the RTI Act is rejected.

Before proceeding to the other exemptions claimed by the Respondent, it is pertinent to note that the Respondent has brought to the Commission’s notice the decision of the High Court of Delhi in Dharambir Khattar v. CBI CrI. M. C. 1980/2006, CrI. M. C. 6476/2006 and CrI. 3657/2007 dated 11/03/2008. The said decision pertains to the trial of the Appellant in four corruption cases filed against him by the CBI. It was held by the High Court that in terms of Sections 207 (v) read with Section 173 (5) (a) Cr. P. C., the prosecution was obliged to furnish to the accused copies of only such documents that it proposed to rely upon as indicated in the charge sheet or of those already sent to the court during investigation.

The Respondent has not established the relevance of the decision of the High Court to the instant case. Moreover, on perusal of the decision of the High Court, the Commission noted that in paragraph 12.4, it was held:

“... At the pre- charge stage, there is no requirement for mirror images of the entire hard discs to be made available to the accused for this purpose. It is made clear however, that this will not foreclose the right of the accused, at the stage of the trial, for the purposes of cross- examining the witnesses of the APFSL to have access to the hard discs.” (Emphasis added)

Further, as per the written submissions dated 06/06/2011, the Court of Special Judge CBI, Rohini, Delhi vide order dated 20/05/2011 has directed the CBI/ Respondent to produce the records pertaining to the proposals pursuant to which orders/ permissions for interception of phones were issued. The Respondent has argued that since the order of the Special Judge was sought to be challenged by it, if the Commission issued a direction for supply of documents, it would frustrate the legal right of the Respondent to appeal against the order of the Special Judge. However, the Respondent has failed to establish before the Commission how the argument raised by it would come within any of the exemptions mentioned in Section 8(1) of the RTI Act. The RTI Act codifies the citizens’ fundamental right to information. It is established that information may be exempted from disclosure in accordance with Section 8 and 9 only and no other exemptions can be claimed while rejecting a demand for disclosure. If the Commission were to accept the argument of the Respondent, it would imply reading in an additional exemption in Section 8 of the RTI Act, which was hitherto not envisaged by the Parliament. In view of the same, the argument of the Respondent cannot be accepted by the Commission.

Additionally, the Respondent has argued that the matter is *sub- judice* before the Court and if the information was directed to be disclosed, it would adversely affect the right of the Respondent. This argument of the Respondent cannot be accepted by the Commission. Section 8(1)(b) of the RTI Act exempts from disclosure “*information which has been expressly forbidden to be published by any court of law or tribunal or the disclosure of which may constitute contempt of court*”. From a plain reading of Section 8(1)(b) of the RTI Act, it is clear that it does not include sub- judice matters. As mentioned above, information may be exempted from disclosure in accordance with Section 8 and 9 only and no other exemptions can be claimed while rejecting a demand for disclosure. Hence, disclosing information on matters which are sub- judice cannot constitute contempt of Court, unless there is a specific order forbidding its disclosure. The mere claim that a matter is sub- judice cannot be used as a reason for denying information under the RTI Act.

Further, the Respondent has argued that the information sought by the Appellant was exempted under Section 8(1)(h) of the RTI Act. The Appellant was an accused in four CBI cases related to corruption which were under trial and by obtaining the information at the given stage of trial, he was attempting to subvert the process of prosecution/ trial. In this regard, the Respondent has cited paragraphs 16- 18 and 21 of the Commission's decision in Anita J. Gursahani & Anr. v. Cotton Corporation of India CIC/MA/A/2007/00386 and CIC/MA/C/2008/00032 dated 24/06/2010. This Commission has perused the relevant paragraphs of the said decision.

Section 8(1)(h) of the RTI Act exempts disclosure of information which would impede the process of investigation or apprehension or prosecution of offenders. Merely because the process of investigation or prosecution of offenders is continuing, the bar stipulated under Section 8(1)(h) of the RTI Act is not attracted; it must be clearly established by the PIO that disclosure of the information would impede the process of investigation or apprehension or prosecution of offenders. Ravindra Bhat, J. of the High Court of Delhi in Bhagat Singh v. CIC W.P. (C) No. 3114/2007 has observed as follows:

“13. Access to information, under Section 3 of the Act, is the rule and exemptions under Section 8, the exception. Section 8 being a restriction on this fundamental right, must therefore be strictly construed. It should not be interpreted in manner as to shadow the very right itself. Under Section 8, exemption from releasing information is granted if it would impede the process of investigation or the prosecution of the offenders. It is apparent that the mere existence of an investigation process cannot be a ground for refusal of the information; the authority withholding information must show satisfactory reasons as to why the release of such information would hamper the investigation process. Such reasons should be germane, and the opinion of the process being hampered should be reasonable and based on some material. Sans this consideration, Section 8(1)(h) and other such provisions would become the haven for dodging demands for information.” (Emphasis added)

It is clear from the ruling of Ravindra Bhat, J. that the PIO, who is denying information under Section 8(1)(h) of the RTI Act, must show satisfactory reasons as to why disclosure of such information would impede the process of investigation or apprehension or prosecution of offenders. These reasons must be relevant and the opinion of the PIO that by disclosing the information prosecution of offenders shall be impeded should be reasonable. The opinion of the PIO must be based on some material and cannot be a mere apprehension not supported by any evidence.

In the instant case, the argument raised by the Respondent to justify the denial of information on the basis of Section 8(1)(h) of the RTI Act appears to be nothing more than a mere apprehension. As mentioned above, the information contained in the proposal was in the nature of generic statements and without any specific and concrete allegations against the accused. The Respondent has failed to establish how disclosure of this information would impede the process of investigation or prosecution of the Appellant. The Commission has come to the conclusion after reading the said proposals that there is nothing in them, which could qualify for exemption under Section 8 (1) (h). In other words, the Respondent has not been able to discharge the burden placed upon him under Section 19(5) of the RTI Act to prove that the denial of information under Section 8(1) (h) of the RTI Act was justified. Given the general nature of the information contained in the proposal, the reason for its non- disclosure does not appear to meet the criteria laid down in Section 8(1)(h) of the RTI Act. Since this Commission is rejecting the contention of the Respondent on factual grounds, the decision of the Commission in Anita J. Gursahani Case becomes irrelevant to the instant case.

Furthermore, the Respondent has claimed Section 8(1)(g) of the RTI Act for non- disclosure of information and argued that the identity of the source and officials handling and processing the information would be revealed, who work in confidence that their identity would not be revealed considering the sensitive nature of their job. The disclosure of the information sought by the Appellant

would endanger their physical safety. The Commission is of the opinion that there may be some merit in the contention raised by the Respondent. Disclosing the names/ identity of the officers mentioned in the proposal may attract the exemption contained in Section 8(1)(g) of the RTI Act.

Section 10(1) of the RTI Act provides as follows:

“10. Severability.- (1) Where a request for access to information is rejected on the ground that it is in relation to information which is exempt from disclosure, then, notwithstanding anything contained in this Act, access may be provided to that part of the record which does not contain any information which is exempt from disclosure under the RTI Act and which can reasonably be severed from any part that contains exempt information.”

Under Section 10 of the RTI Act, it is possible to sever certain portions of the information before disclosing it to an applicant to ensure that information that is exempt from disclosure under the RTI Act is not disclosed. Therefore, this Commission has decided to apply Section 10 of the RTI Act to the proposal sought by the Appellant. The Respondent is directed to provide to the Appellant the proposal sent to MHA by omitting the names/ designation of the officers mentioned therein.

The Appeal is allowed.

The PIO is directed to send attested photocopies of the proposals sent to MHA for permission to intercept the phone numbers after severing any names in the proposals. The information will be sent to the Appellant **before 15 July 2011**.

Notice of this decision be given free of cost to the parties.

Any information in compliance with this Order will be provided free of cost as per Section 7(6) of RTI Act.

Shailesh Gandhi
Information Commissioner
21 June 2011

(In any correspondence on this decision, mention the complete decision number.)(HA)