

**CENTRAL INFORMATION COMMISSION**  
**B - Wing, 2<sup>nd</sup> Floor,**  
**August Kranti Bhavan, Bhikaji Cama Place,**  
**New Delhi - 110066**

**Appeal No.CIC/SS/A/2012/000051**

**PARTIES TO THE CASE:**

Appellant : Shri Subhash Chandra Agrawal (present in person  
alongwith Sh. Venkatesh Nayak, Ms. Suchismita  
Goswami and Ms. Nandita Sinha)

Respondent : Ministry of Home Affairs, North Block, New Delhi  
(through Shri J.L. Chugh, JS (Judl.) & CPIO and Shri  
S.P. Chauhan, JS & Appellate Authority)

Date of Hearing : 12/04/2012

**ORDER**

1. The present second appeal stems from the RTI Application dated 11/08/2011 filed by the Appellant to the CPIO of the President's Secretariat, Rashtrapati Bhawan, seeking information on the following 6 (six) points:

Point No. 1 files have Ministry after Mahender Nath	<i>Copy of complete correspondence/file-notings/documents etc relating to mercy-petitions of Afzal Guru and other convicts of death-sentence whose been forwarded to President's Secretariat by Union Home rejection of mercy petitions of Devindersingh Khullar and Dass by Honourable President of India</i>
Point No. 2 whose rejection of by	<i>Complete and detailed information together with correspondence/file-notings/documents etc including list of convicts of death-sentence mercy-petitions are decided by Honourable President of India after mercy-petitions of Devindersingh Khullar and Mahender Nath Dass Honourable President of India</i>
Point No. 3 governments	<i>Complete updated detailed list of pending mercy-petitions at any stage like at Union Home Ministry and President's Secretariat or with state-etc by persons convicted of death-sentence</i>
Point No. 4	<i>Complete updated list of mercy-petitions sent finally by Union Home Ministry with its recommendations/comments etc to President's</i>

Secretariat/Honourable  
also recommendations made by  
recommendations sent by Union Home

President of India for final disposal mentioning  
Union Home Ministry and dates of  
Ministry?

Point No. 5 Any other related details

Point No. 6 File-notings on movement of this RTI petition as well

2. The concerned CPIO of the President's Secretariat transferred the said RTI Application to the CPIO of the Ministry of Home Affairs, North Block ("MHA") vide letter dated 19/08/2011. Sh. J.L. Chugh, the concerned CPIO of the MHA replied to the said RTI Application vide his letter dated 30/09/2011 and the same is reproduced below:

Point No. 1 *This information cannot be disclosed under section 8(1),(a),(g) & (i) of RTI Act.*

Point No. 2 *Two mercy petition cases i.e. cases of Murugan, Santhan & Arivu of Tamil Nadu and Sattan & Guddu of Uttar Pradesh, have been decided after the decision of mercy petition case of Devender Pal Singh, Documents of the case of Murugan, Santhan & Arivu cannot be disclosed under section 8(1)(a),(b) & (g) of RTI Act. However, some pages of the mercy petition case of Sattan & Guddu can be furnished on the payment of Rs. 82/- for 41 pages (Rs. 2/- per page).*

Point No. 3 *List of the cases pending under Article 72 of the Constitution may be supplied to you on the payment of Rs. 8/- for 4 pages. Further, you may directly obtain the details of the cases pending with the State Governments from concerned State Governments.*

Point No. 4 *Recommendations made by Home Minister in the cases pending with President's Secretariat cannot be disclosed under section 8 (1) (i) of the RTI Act read with Article 74(2) of the Constitution*

Point No. 5 & 6 *Copy of the file noting of your application may be supplied on the payment of Rs. 2 for one page*

3. Not Satisfied with the CPIO's reply, the Appellant preferred first appeal dated 07/10/2011 which came to be disposed of by Sh. Satpal Chouhan, the concerned First Appellate Authority ("FAA") vide Order dated 09/12/2011. The FAA simply upheld the CPIO's reply and aggrieved henceforth, the

Appellant has approached this Commission by way of second appeal under the RTI Act.

4. The Commission has perused through the material placed on record and has heard both the parties at considerable length.
5. The information with regards to Query No.2 (partly provided), 3, 5 and 6 of the RTI Application has already been provided to the Appellant. It is clarified at this juncture that the copying charges to the tune of Rs. 92/- (i.e. Rs. 2/- per page for 46 pages in all) for providing information on the said queries of the RTI Application are hereby waived of in light of Section 7(6) of the RTI Act. The reason being that the CPIO of the MHA received the RTI Application from the President's Secretariat on 25/08/2011 and ought to have replied latest within 30 days thereof, i.e. by 25/09/2011; whereas the CPIO replied to the RTI Application on 30/09/2011. As the Appellant has pressed heavily on this aspect and has prayed for providing information free of cost on the abovementioned queries, the prayer is accordingly allowed.
6. Now, the controversy in this appeal lies primarily in regard to Query Nos. 1, 2 and 4 of the RTI Application. But before dealing with the issues involved with respect to the said queries, the Commission considers it apposite to appreciate the impact of Article 74 of the Constitution of India on the present case. Article 74 of the Constitution of India reads as follows:

“74. Council of Ministers to aid and advise President - (1) There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President who shall, in the exercise of his functions, act in accordance with such advice:

Provided that the President may require the Council of Ministers to reconsider such advice; either generally or otherwise, and the President shall act in accordance with the advice tendered after such reconsideration.

(2) The question whether any, and if so what, advice was tendered by Ministers to the President shall not be inquired into in any court.”

7. While drawing the inter-relationship between Article 74 of the Constitution and the provisions of the RTI Act, the Hon’ble Delhi High Court in its Judgment dated 30/11/2009 in the case of ‘***Union of India (UOI) thr. Director, Ministry of Personnel, PG and Pension and Ors. vs. Central Information Commission and Shri P.D. Khandelwal and Ors.***’ [Writ Petition (Civil) Nos. 16907/2006, 3607, 7304 of 2007, 4788, 6085/2008 and 7930, 8396 and 9914/200] has held that:

“23. Seven Judges of the Supreme Court in **S.P. Gupta and Ors. v. President of India and Ors. : AIR 1982 SC 149** have examined and interpreted Article 74(2) of the Constitution of India. The majority view of six Judges is elucidated in the judgment of Bhagwati, J. (as his lordship then was) in para 55 onwards. It was observed that the Court cannot embark upon an inquiry as to

whether any and if so what advice was tendered by the Council of Ministers to the President. It was further observed that the reasons which prevailed with the Council of Ministers, would form part of the advice tendered to the President and therefore they would be beyond the scope/ambit of judicial inquiry. However, if the Government chooses to disclose these reasons or it may be possible to gather the reasons from other circumstances, the Court would be entitled to examine whether the reasons bear reasonable nexus [See, para 58 at p.228, **S.P. Gupta** (supra)]. Views expressed by authorities/persons which precede the formation of advice tendered or merely because these views are referred to in the advice which is ultimately tendered by the Council of Ministers, do not necessarily become part of the advice protected against disclosure under Article [74\(2\)](#) of the Constitution of India. Accordingly, the material on which the reasons of the Council of Ministers are based and the advice is given do not form part of the advice. This has been lucidly explained in para 60 of the judgment as under:

60....But the material on which the reasoning of the Council of Ministers is based and the advice is given cannot be said to form the part of advice. The point we are making may be illustrated by taking the analogy of a judgment given by a Court of Law. The judgment would undoubtedly be based on the evidence led before the Court and it would refer to such evidence and discuss it but on that account can it be said that the evidence forms part of the Judgment? The judgment would consist only of the decision and the reasons in support of it and the evidence on which the reasoning and the decision are based would not be part of the judgment.

Similarly, the material on which the advice tendered by the Council of Ministers is based cannot be said to be part of the advice and the correspondence exchanged between the Law Minister, the Chief Justice of Delhi and the Chief Justice of India which constituted the material forming the basis of the decision of the Central Government must accordingly be held to be outside the exclusionary rule enacted in Clause (2) of Article 74.

24. Certain observations relied upon by the Union of India in the judgment of the Supreme Court in *State of Punjab v. Sodhi Sukhdev Singh* : AIR 1961 SC 493, were held to be mere general observations and not ratio which constitutes a binding precedent. Even otherwise, it was held that report of Public Service Commission which formed material on the basis of which the Council of Ministers had taken a decision, did not form part of the advice tendered by the Council of Ministers. When Article 74(2) of the Constitution applies and bars disclosure, information cannot be furnished. RTI Act cannot and does not have the ability and mandate to negate the constitutional protection under Article 74(2). The said Article refers to inquiry by courts but will equally apply to CIC.”

8. The communications exchanged between MHA and President’s Secretariat can, therefore, be classified into two categories: *Firstly*, the actual advice / opinion tendered by the Home Minister to the President of India and *Secondly*, the material and records on the basis of which such advice / opinion was tendered. As per the decision in ***P.D. Khandelwal*** (supra), the

first category of communications are entirely exempt from disclosure under Article 74 (2) of the Constitution and the RTI Act cannot snatch away the protection granted to such information by the Constitution of India. Therefore, the Commission cannot, in the first place, enter into determining the question as to whether certain advice / opinion / recommendation given by MHA to the President of India falls under any of the exemption provisions of the RTI Act.

9. However, the material on the basis of which certain advice / opinion / recommendations were made by the MHA to the President of India is not barred from disclosure under Article 74(2) of the Constitution and therefore, such material can be tested on the touchstone of Section 8 of the RTI Act while deciding whether the same maybe provided under the RTI Act or not.
10. The Commission shall now analyze the nature of information sought by the Appellant by way of Query Nos. 1, 2 and 4 of his RTI Application.
11. Mercy petitions are filed under Article 72(1)(c) of the Constitution of India to the President of India by persons sentenced to death. As such, the name of petitioner, date of filing the petition and the status of the petition – whether decided or not – for all such mercy petitions which have been taken into consideration by the Government of India should be disclosed since, such details pertaining to mercy petitions are not covered under any of the

exemption provisions of the RTI Act. Therefore, the Appellant is entitled to know such details for all such mercy petitions which have been filed after rejection of the mercy petition of Devinder Singh Khullar and Mahender Nath Dass, as sought by the Appellant in Query Nos.1 & 2 of his RTI Application.

12. However, in Query Nos. 1 & 2 of his RTI Application, the Appellant has sought complete correspondences / file notings / documents relating to mercy petitions of Afzal Guru and other convicts of death sentence whose mercy petitions have been filed after rejection of the mercy petitions of Devinder Singh Khullar and Mahender Nath Dass. Moreover, in Query No.4, the Appellant has categorically sought the recommendations / comments made by the MHA to the President of India in respect of such mercy petitions.

13. So far as Query No.4 is concerned, the Commission is of the view that in light of the decision in ***P.D. Khandelwal*** (supra), the disclosure of the recommendations / comments sent by the MHA to the President in relation to such mercy petitions is expressly barred by Article 74(2) of the Constitution of India and hence, such information cannot be disclosed under the RTI Act.

14. So far as Query Nos.1 & 2 are concerned, the Commission is apprised of its Order dated 01/09/2011 passed in the case of '**Mayilsamy vs. President's Secretariat & another**' [Complaint No.CIC/SM/C/2011/001068] wherein this Commission had analyzed the law laid down by the Hon'ble Delhi High Court in **P.D. Khandelwal** (supra) and had thereafter observed that those file notings and the correspondence, made in connection with the mercy petitions, which do not form part of the ministerial advice to the President of India should be disclosed under the RTI Act unless exempted from disclosure under Section 8 of the RTI Act. The relevant extract from the said Order are reproduced herein below:

"9. However, before giving any direction to the CPIO in this regard, we would like to take into consideration the objections made by the Respondents against such disclosure. They argued that the disclosure of such information is exempt under Section 8(1)(a) of the Right to Information Act. Section 8 (1)(a) reads as follows:-

*"8. (1) Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen,-*

*(a) Information, disclosure of which would prejudicially affect the sovereignty and integrity of India, the security, strategic, scientific or economic interests of the State, relation with foreign State or lead to incitement of an offence."*

Any information which, if disclosed, would adversely and prejudicially affect the sovereignty and integrity of India or its security or its relation with any foreign State or which will lead to incitement of an offence alone should not be disclosed. The file notings other than the advice of the Minister and the correspondence made from time to time in this regard strictly revolve around the mercy petitions. The file notings that we ourselves examined during the hearing did not appear to contain any such information which, if disclosed, could result in any of the effects listed in Section 8(1)(a). However, as far as the correspondence made in this case is concerned, we have not examined those. Ordinarily since the correspondence made in this regard does not form part of the ministerial advice to the President of India, it could be disclosed. We would leave it to the CPIO to examine the correspondence and to decide which to disclose and which not to. But in every case where he decides not to disclose, he has to pass a speaking order justifying the denial of information strictly in terms of exemption provision of Section 8(1)(a). In case, the CPIO decides to withhold part of the correspondence, the Complainant would be free to agitate the matter before the first Appellate Authority and seek urgent hearing in view of the 'life and liberty' issues involved in this case.

10. Respondents argued that this information should also not be disclosed as it is exempted under Section 8(1)(g). Section 8(1)(g) reads as follows:-

*"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 purpose"*

The file notings and the correspondence contain the names and identified of various public servants. The disclosure of the information would bring their identities in the public domain. Looking to the sensitivity of the matter and specially the background of the persons whose mercy petitions is the subject matter in this case, there is a lot of strength in the arguments of the Respondents that the disclosure of the identity of those recording the file notings and making the correspondence may indeed endanger their physical safety or, in some cases, identify the source of information or assistance given in confidence. Therefore, while disclosing this information, due care must be taken to remove all references which might expose the identity of the public servants concerned.

11. In the light of the above, we give the following directions to the CPIO:-

(i) Mercy Petitions:

He shall provide the copies of the Mercy petitions not only by the three persons themselves but by others on their behalf which have been taken into consideration from time to time.

(ii) File notings:

He shall disclose the copies of the file notings not forming part of the ministerial advice to the President of India after severing all the names and other references regarding the identities of the public servants regarding those file notings and making those correspondence.

(iii) Correspondence:

He shall also disclose the copies of the correspondence made from time to time in connection with the mercy petitions except those, which in his opinion should not be disclosed being exempt in terms of Section 8(1)(a) of the RTI Act. If he decides to withhold some of the correspondence, he shall pass a speaking order. Needless to say, the Complainant will be free to approach the Appellate Authority if he is not satisfied with the decision of the CPIO.”

15. The Commission is of the view that the ratio of its earlier decision in **Mayilsamy K** (supra) squarely applies to the facts of the present case. File notings and correspondence in relation to mercy petitions, as sought by the Appellant, reflect the material on the basis of which advice and recommendations are made by the MHA to the President of India and thus, fall under the category of information which is not barred by Article 74(2) of the Constitution of India. Information comprising of file notings and correspondences, as exchanged between MHA and President’s Secretariat in relation to mercy petitions, has to be tested on the touchstone of Section 8 of the RTI Act and it has to be assessed whether the disclosure of such information is exempted under any of the clauses of Section 8 of the RTI Act.

16. Apposite will it be to mention that the Commission has not perused the file notings and the correspondences which are particularly sought by the

Appellant in relation to the mercy petitions, as mentioned in his RTI Application. However, the Commission is of the view that applying the ratio of *Mayilsamy K* (supra) to the present case will not be out of place since the issue involved in that case was same as the present one and even the subject-matter in that case was mercy petitions alone. The Commission, therefore, directs the CPIO of the MHA to disclose the copies of the file notings not forming part of the ministerial advice to the President of India, as sought by the Appellant in Query Nos. 1 & 2 of his RTI Application, after severing all the names and other references regarding the identities of the public servants regarding those file notings and making those correspondence.

17. The CPIO is further directed to disclose the copies of the correspondence made by MHA to the President's Secretariat from time to time in connection with the mercy petitions, as sought by the Appellant in Query Nos. 1 & 2 of his RTI Application, except those correspondences, which in the CPIO's opinion are exempt from disclosure in terms of Section 8(1)(a) of the RTI Act. If the CPIO, however, decides to withhold some of the correspondences, then he shall pass a speaking order to that effect giving reasons thereof.
18. With the above observations and findings, the present Appeal stands disposed of.

(Sushma Singh)  
Central Information Commissioner  
26<sup>th</sup> Day of June, 2012

Authenticated True Copies

(D.C. Singh)  
Deputy Registrar

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