

A quick analysis of the Delhi High Court Order on Judges' Assets Declaration **10 September 2009**

Dear all,

You are all aware of the landmark judgement of the Delhi High Court in the matter of *The CPIO, Supreme Court of India v Subhash Chandra Agarwal*, W.P. (C) 288/2009 which arose out of an application made by a citizen seeking to know whether judges of the Supreme Court and the High Courts were filing their assets declarations in accordance with the the 1997 Full Court resolution of the Supreme Court. This decision clarifies several issues and expands the understanding of the citizen's right to information. The treatment of some other provisions of the RTI Act in this judgement is cause for concern. I have provided below a quick list of such positive and worrisome aspects of the High Court decision.

Where RTI stands expanded and provisions clarified:

1) Information available with a public authority in material form is important- not how it was obtained: The petitioners in this case had argued that the assets declaration were not information at all because they were not filed by judges in the performance of a public duty. The petitioners claimed that there was no law that required judges to file assets declarations, they did it in response to two resolutions (1997 and 1999) which did not have binding value. So they argued that where information is not generated in the performance of a public duty (duty cast by a public law i.e., a law that governs or regulates the relationship between the State and individuals or private entities) it is not covered by the definition of 'information' under section 2(f). The Court has torn through this argument which was weak in any case and has held that the test must be whether or not the document/information is available in 'material' form with the public authority that has received the request. Judges file declarations in material form, so that makes them 'information' for the purpose of the RTI Act irrespective of how they were obtained- under a law or a binding convention like the 2 resolutions. The Court has held:

"Thus inter se correspondence of public authorities may lead to exchange of information or file sharing; in the course of such consultative process, if the authority borrowing the information is possessed of it, even temporarily, it has to account for it, as it is 'material' held."

This clarification comes as an eye-opener for many Information Commissions that have given decisions stating - "if a record is available with a superior public authority then such authority and not the records creating authority must make a decision regards granting access. For example, if a document has been presented to a court as part of a suit and a copy of the same is held by the public authority which filed the document before the court, it is for the court to make a determination about providing access and not the public authority. This is mischievous as there is no scope for such an interpretation under any provision of the RTI Act. Following the Delhi High Court's decision, now every public authority must make a decision regards access if it simply possesses the information in material form. Of course if a court has ordered that the document shall not be disclosed then section 8(1)(b) will be attracted and access may be denied.

2) All information available with a public authority is covered by the RTI Act: The Court has further clarified that even private information held by a public authority i.e. information held about private individuals and entities is covered by the RTI Act and a determination regards access must be made in the same manner as it would be made for information generated in the context of performance or observance of a public duty. At para #62 of the judgement the Court's use of the term 'public information' makes every bit of information held by a public authority 'information' for the purpose of section 2(f). *"The right to access public information, that is information in the possession of state agencies and governments in democratic societies*

is an accountability measure empowering citizens to be aware of the actions taken by such state "actors".

This pronouncement comes very close to the practice in countries like Sweden where any communication, letter or email sent by any person or entity to a public official is treated as a 'public document' so long as the agency possesses it. In India a 'public document' is defined not in the RTI Act but in the Indian Evidence Act and a 'public record' is defined in the Public Records Act. Both definitions restrict it to mean that if a document is created by a sovereign functionary or an officer of the legislative, judicial or executive branch of the State then it becomes a public document/record. The Court's treatment of the term 'public information' is entirely in tune with the letter and spirit of the RTI Act. It is now the responsibility of public authorities to appreciate the wisdom behind this interpretation and apply it while dealing with RTI applications.

3) Protection for the personal information of public officials could be lesser than the protection for the personal information of private individuals in specific circumstances:

While recognising that public officials are also entitled to the protection of their privacy just as private citizens are, the Court has held that in a given circumstance the protection for personal information of a public official may not be as high as that which is enjoyed by a private individual. This principle is also in the correctness of things - maintenance of probity and integrity in public life is a heavier burden on public functionaries- not so on private individuals. So if circumstances so demand, personal information of public officials could be disclosed in public interest. The Court lays down what appears to be three tests for making a determination regards disclosure:

"1) Whether the disclosure of the personal information is with the aim of providing knowledge of the proper performance of the duties and tasks assigned to the public servant in any specific case;

2) whether the information is deemed to comprise the individual's private details unrelated to his position in the organisation, and

3) whether the disclosure will furnish any information required to establish accountability or transparency in the use of public funds;"

RTI advocators will immediately recognise that the Court has pointed to two public interest tests at points #1 and #3 which must be used while making a determination regards disclosure of personal information.

4) Section 4 is overridden by the exemptions under section 8(1): The Court has held that the non-obstante clause in section 8(1) relating to exemptions to disclosure overrides the proactive disclosure provisions given in section 4. For example, while section 4(1)(b) requires voluntary disclosure of operational manuals used by a public authority. But can this provision be sued to compel atomic energy plants to disclose their operational manuals proactively. Such manuals may attract one or more exemptions under section 8(1), so they may not be proactively disclosed. This is useful advice for public authorities.

However a question may be raised regards the language of section 8(1) which states:

"Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen,..." [emphasis supplied]

Does 'give' mean - "in response to a formal request" to an applicant while the intention of section 4(1)(b) is not to give to any particular individual but furnish the information to the whole world. This is a moot point and must be taken up for detailed consideration when there is a compelling occasion to so do.

5) Merely labelling a document 'confidential' does not exempt it from disclosure: The petitioners had argued that the assets declarations were filed in confidence by the judges and that there is a duty to keep them secret under the 1997 resolution. Several public information officers use this excuse routinely. The author of this email has been denied some documents by Ministries in this manner and these matters are pending before the Central Information Commission. The Court has looked down upon such practice. The Court has held that the overriding effect of section 22 of the RTI Act is a much stronger provision than a mere label accorded to a document by a public official. So if non-disclosure cannot be justified under sections 8 and 9 of the RTI Act the information will still have to be disclosed irrespective of the security classification assigned to it.

Readers will remember that the Second Administrative Reforms Commission had recommended in its very first report that the security classification accorded to documents ('secret', 'top secret' and 'confidential') be reviewed in the light of section 8 of the RTI Act. The Government of India accepted this recommendation and said that it would issue instructions to all Ministries to accord security classification only to such documents that attract one or more exemptions under section 8(1). However readers will remember a recent media report that the PMO has not declassified a single record this year. This author has filed RTI applications with 15 public authorities recently to ascertain whether they are adhering to the declassification mechanism provided by the Public Records Act, 1993. Replies are awaited.

6) Everything labelled 'confidential' is not held in 'fiduciary capacity': Several public information officers around the country routinely use section 8(1)(e) which protects information shared in a fiduciary relationship, to deny access to information which is merely marked 'confidential'. Information Commissions have also faulted on this point on many occasions. The Court clarifies when a fiduciary relationship occurs and in what contexts. The Court has identified four situations where a fiduciary relationship may occur:

- 1) when one person places trust in the faithful integrity of another, who as a result (this is a typo - it should read "as a result") gains superiority or influence over the first;*
- 2) when one person assumes control and responsibility over another;*
- 3) when one person has a duty to act or give advice to another on matters falling within the scope of the relationship; and*
- 4) When there is specific relationship that has traditionally been recognised (this is a typo - it should read "been recognised") as involving fiduciary duties, as with a lawyer and a client, or a stockbroker and a customer."*

A list of such relationships is provided at para #56 which is useful to public authorities. Others will not qualify for the protection of this exemption.

7) Whether the Chief Justice of India (CJI) is a public authority distinct from the Supreme Court: A major point of contention during the proceedings before the Central Information Commission (CIC) in this case was whether the Chief Justice's office has an existence that is distinct from that of the Supreme Court as an institution. The CIC examined the issue and held that the CJI is part of the Supreme Court and cannot be treated as a distinct public authority. This position seems to have been reversed in the High Court decision. The Court has held that the CJI is a public authority but stopped short of holding that office to be distinct from the Supreme Court which is also a public authority. The effect of the Court's findings is that the CJI's office can be treated as a distinct public authority due to the numerous functions performed by the CJI in addition to the adjudicatory role of being the chief judge.

There should be no problem with either position so long as no document is kept out of the purview of the RTI Act. But this case is a pointer to the long standing demand of CHRI and other RTI advocates that a comprehensive list of public authorities must be prepared for the entire country. This is the job of the Ministry of Personnel being the administrative ministry for

this law under the Government of India. The Ministry has issued circulars to this effect and sent reminders to all Ministries. Yet we do not have a comprehensive list of public authorities under the Central Government. It is not enough to have only a list of public information officers. For the purpose of clarity regards compliance with section 4(1)(b) and for the purpose of use of section 6(3) this listing of public authorities is important.

Where there is cause for concern:

1) *locus standi* becomes important in the context of exemptions: The Court rightly states at para # 29 that access to information prior to the enactment of the RTI Act was closely linked to *locus standi* of the requestor - especially in the context of litigation. In other words it was necessary for the information-seeker to show why he/she wanted the information before a decision could be made to give or not to give. The Court has noted that the RTI Act changes this requirement in a big way. It abolishes the concept of *locus standi* as under section 6(2) of the RTI Act no reasons need to be given for seeking information. This is a clear and acceptable position.

Later in the same para the Court has held that the the bar on disclosure of reasons is relieved to some extent under section 8(1). This position is explained in paras #65 through #67. At para #65 the Court holds that for seeking personal information of any individual the applicant must disclose a 'sustainable public interest element for reelease of the information". Even this pronouncement is not problematic as it is common practice for appellate bodies to ask the applicant what is the public interest served by the disclosure of exempt information because that may not be immediately apparent by merely reading the appeal letter. This does not amount to giving reasons. However the Court's pronouncement in para #67 is problematic. The Court has held:

"the onus of showing that disclosure should be made, is upon the individual asserting it; he cannot merely say that as the information relates to a public official there is a public interest element. Adotping such a simplistic argument would defeat he objective of section 8(1)(j); Parliamentry intention in carving out an exception from the normal rule requiring no "locus" by virtue of section 6, in the case of exemptions, is explicit through the non-obstante clause"

With due regard and respect to the wisdom of the Court it must be said that this position does not take into account what is provided for in section 19(5) of the RTI Act. According to this section:

"In any appeals proceedings, the onus to prove that a denial of erquest was justified shall be on the CPIO or SPIO, as the case may be, who denied the request."

There is no reference to this crucial provision in the Court's decision. The removal of *locus standi* in section 6(2) goes hand in hand with the reversal of buredn of proof in section 19(5). In the absence of section 19(5), section 6(2) is toothless and there will be no effective right to information. Parliament's intention in providing for sections 6(2) and 19(5) was to ensure that access to information is enjoyed by a citizen as a fundamental right. Reasons need not be given for the exercise of a fundamental right- that is why they are called fundamental right. If this protection is available at the application stage it must be available at the appeals/complaints stage also. Hence the inclusion of section 19(5) placing the onus on the PIO to justify why information should be denied. This does not prevent the appellant from stating what public interest is served by disclosure of the exempt information. This is not same as saying that the appellant must justify why the information should be disclosed. **What the RTI Act provides for has been taken away in the Court's decision. As section 19(5) has not been taken into consideration in this case, it must be said with due respect to the wisdom of the Court that this pronouncement on *locus standi* is bad in law and must be treated *per incuriam* in all subsequent cases where this issue is contended.**

2) Teacher-pupil relationship is fiduciary in nature: The Court states at para #58 that a teacher-pupil relationship in a government school or college is fiduciary in nature. This is worrisome as it can harm the cases pending before the Supreme Court where High Court decisions relating to accessing evaluated answer scripts have been challenged. One decision from the Calcutta High Court (Pritam Roj v University of Calcutta matter) is pending before the Supreme Court and another decision of the Delhi High Court (UPSC) is pending before a division bench of the same Court. However as the teacher who taught the pupil does not evaluate answer scripts of the pupil in public examinations, this pronouncement may not do much harm. It could cause harm when answer scripts evaluated in house by an institution are requested.

3) Disclosure is the norm under section 6: The Court locates the norm of 'disclosure' in section 6 on more than one occasion. This is perplexing as the the maxim - 'disclosure is the norm' arises out of a combination of provisions - section 2(h) which defines 'information', section 2(j) which defines the scope of the 'right to information', section 3 which establishes the right of every citizen to access information and of course section 6(2) which states that reasons need not be given for seeking information. Most of section 6 contains procedural provisions about how an application must be made to and received by a public authority. So the assertion of the Court regards section 6 is difficult to understand. However I leave it to more knowledgeable RTI advocators to correct me if I am wrong.

4) No clarity on what accounts for assets and investments: This point is not a worrisome factor in the judgement, but the contention of the petitioners that there is no clarity on what constitutes assets and investments is difficult to digest. One merely has to look up the elaborate All India Services (Conduct) Rules, 1968 and the proformas attached to understand what all assets and investments are declared by public officials and in what manner. The wheel need not be reinvented for this sake.

All in all the Court's decision is a big victory for transparency in the judiciary. It is a mixed bag for the furtherance of RTI in general. Of course there are more plus points than negatives, so why crib too much?

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