

Right to Information Act- Analysis of amendments being discussed - Submission I - further nuancing of the argument

October 27, 2009

Dear friends,

Yesterday we sent you an analysis of two issues that are being discussed in the context of amendments to the Right to Information Act (RTI Act). We would like to share with you another facet of our analysis of the first topic namely, "amending the law to exclude 'file notings' now renamed as 'information about discussion and consultations of officers'". This point was not brought out in sufficient detail in the original analysis.

Access to information about discussion and consultations of officers is crucial in order for citizens to know the basis of all decisions made and the action taken by a public authority. This arises from a fundamental principle embedded in Art. 14 of the Constitution - "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India." In several judgements the Supreme Court of India has explained the meaning of this principle behind this fundamental right. Guaranteeing equality means ensuring equal treatment. (Unequals must be treated unequally if equity is also to be ensured.) For example, if the government wishes to procure a commodity or service for use it cannot choose to favour a supplier or service provider at the expense of others. A competitive and transparent bidding process must be adopted so that the lowest bidder fulfilling the technical requirements and other qualifications may be awarded the contract. In fact this principle has been upheld in the context of people's right to know as well (***Secretary, Ministry of Information and Broadcasting, Govt. of India and others Vs. Cricket Association of Bengal and Othrs.*** AIR 1995 SC1236).

Given this requirement, it is important for all decisions to be based on reasoning that is legally defensible and meets the equality test. For decisions to be taken in this manner, consultations within a public authority are a must. Pros and cons will be weighed - a certain course of action may be favoured by one officer while a diametrically opposite view may be recorded by another officer. These inputs are essential for the decision-making process. The final decision taken at the end of this process must have an identifiable rationale. This rationale may not always be conveyed in the text of the decision itself. It is useful to illustrate this with the help of a couple of examples:

1) The minimum support price for common paddy in the year 2006-07 was INR 580. In 2008-09 the support price has been pegged at INR 850 (+bonus wherever applicable). These rates would have been fixed on the basis of some reasoning. 'File notings' now renamed as 'information about discussion and consultations' contain this reasoning. The reasoning would have been supplied not only by officers of the Ministry of Agriculture but also by those from the Ministry of Finance and even the Prime Minister's office. So when the concerned Minister signs off on the final figure it would have been arrived on some rational basis which may not accompany the text of the actual decision when publicised. Surely, every paddy selling farmer would like to know the rationale behind these rates and be able to ascertain for oneself why INR 850 was chosen but not any other number. This reasoning would be of interest to the rice consumer as well who would like to know what effect these rates may have on the retail market where she/he buys food grains.

2) Or take the example of the government commissioning a thermal power plant. Several decisions are required to be made before the construction can even begin. Feasibility studies, environmental impact assessment, cost-benefit analysis, land acquisition, payment of compensation, rehabilitation plans and many more such steps must be

undertaken- all essential and obligatory processes under the law. Officers involved in the decision-making process record their opinion on the relevant files at every stage of the movement of the file. People whose livelihoods are uprooted by the process of land acquisition have the right to know the reasons behind the choice of their lands over that of their neighbours. They also have the right to know whether the extent of land acquired was adequate for or in excess of the actual requirement of the project. If it was in excess then the rationale for such acquisition would be recorded on file. The rate and quantum of compensation determined to be paid to those dispossessed will also have some rationale behind it. People whose lands are acquired have the right to know this rationale. Similarly, people living in the area affected by the power plant have a right to know what objections were raised in the context of its impact on the environment and whether these matters were given serious consideration when the final decision was taken.

These are but a few examples to demonstrate the importance of transparency in the decision-making process. India is a democracy. RTI Act seeks to strengthen democracy and accountability in decision-making. For accountability in decision-making to be strengthened, people should have access not just to decisions, but also to the basis of such decisions. The RTI seeks to provide such information even at the highest level of decision-making, namely the Cabinet. Section 8(1)(i) of the Act states that after a decision has been taken by the Cabinet and the matter is complete and over, the decision, the reasons behind those decisions and their material basis must be disclosed. There is no justifiable reason why a different standard should apply to the bureaucracy which exists to serve the people.

I thank democratic spirited senior officers for encouraging me to highlight this aspect of transparency in decision-making. I am glad that the first email despatch on this topic reached them although they wish to remain anonymous.

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Thanks

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