

# DROP THE IRON CURTAIN

Private players dispute RTI covering them in public-private JVs, even though it involves public funds. It's time to come clean on this.



A PRABHAKAR RAO

## Sebastian PT

**T**RY FINDING OUT THE DIFFERENT sources of revenue for the month of, say, August of the Delhi International Airport (DIAL), the consortium modernising the Capital's airport. It could be revenues from its joint ventures, for instance. Chances are you will hit a wall. As per the 2006 public private partnership pact, DIAL is required to pay to the public

sector Airports Authority of India (AAI) an annual fee of 45.99% of its gross revenues. With AAI having a 26% stake in DIAL and the latter providing public services, a citizen may want to know. AAI may provide details of the concession agreement and what not; but may have no clue about the different revenue streams. And, DIAL does not think it comes under the Right to Information (RTI) Act, 2005. For all the might of the



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RTI, there are grey (some would call it dark) areas when it comes to public private partnership projects.

The Central Information Commission (CIC) held that the DIAL was a ‘public authority’ as defined under the RTI Act, but the latter got a stay from the court this May. This is just one example. The list of PPP entities unwilling to divulge information to the public, though functioning as quasi-government bodies, is growing longer by the day—from the UTI Asset Management to the Mumbai International Airport (MIAL).

Undoubtedly, in the country’s template for growth, harnessing private sector investment and operational efficiencies to provide public assets and services is the way forward. But opaqueness could make it a platform for looting resources through the unholy political-business-bureaucracy nexus. There are more than 800 PPPs in various stages and in diverse segments, including roads, ports, education, hospitals and so on. The Department of Economic Affairs puts the estimated costs at above ₹383,300 crore as of July 2011. And, 50% of PPP funding during the XII Plan is expected to come via the private



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route. Surely, the idea of transparency and accountability can’t be taken lightly.

“All PPPs should be fully RTI compliant. The world is moving towards larger transparency and private players need to come out of their cocoon,” says former Finance Minister Yashwant Sinha.

### Public Funds

The main argument for getting private players under the RTI purview is that they come under the definition of ‘public authority’ as per Section 2(h) of the Act. Here, this includes “non-government or-

ganisation substantially financed, directly or indirectly by funds” provided by the government. “Whenever a government gives something, it is a partnership. It could be in the form of public funding or giving of monopoly or land or rights,” says Information Commissioner Shailish Gandhi. The various concessions and the viability gap funding that a PPP gets receive can amount to substantial financing, says Venkatesh Nayak of Commonwealth

Human Rights Initiative.

That aside, PPPs are subject to the audit of the Comptroller and Auditor General (CAG) of India. They are not considered as the outcomes of any privatisation policy in the CAG’s auditing guidelines. Rather, para 1.5.1 says the main difference between PPP and privatisation is that in the former there is no permanent transfer of ownership of the assets to the private partner. The responsibility and accountability to deliver the goods and services efficiently remains with the public sector, and is not diluted by the PPP arrangement. “There is no harm in PPPs coming under the RTI Act,” says Arup Roy Choudhary, who wears the hats of NTPC Chairman and Chairman of SCOPE. He points out all listed companies are accountable to their shareholders, and this logic is extendable to the RTI Act too.

### Drive for Profit

The ‘profit drive’ of the private sector should be leveraged for the public good, not profiteering. One reason some private entities shy away from public disclosure could be that the revenue models are skewed heavily in their favour. It could be through corruption, or just inexperience and inefficiency on the part of government officials in drafting proper pacts. “The revenue sharing should be available to the public,” says G Raghuram, who teaches at IIM Ahmedabad. He points to two instances. The GMR-led consortium was clearly doing nothing illegal when some revenue was routed to its associate companies via sub-contracts. Though it may have dented the government’s share,

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DIAL just interpreted the contract in its way. In fact, the CAG termed the revenue sharing model between DIAL and AAI as “defective”, due to which the latter was losing out on revenue. Similarly, a port terminal given in the PPP mode was with the clear understanding that the facilities would be available to all, and revenues shared. However, the private player monopolised the entire terminal by giving priority berthing to its parent. “This is

highway robbery,” says Gandhi.

To avoid scenarios of questionable pacts, the Planning Commission has come out with model concession agreements for different PPPs. But it still needs much clarity. A more legitimate fear of many private players is that divulging of information could affect their commercial interests. It could compromise their competitive edge. Choudhary feels these are misplaced fears: “The RTI Act should not be looked at as something draconian.”

Section 8(d) of the Act clearly prohibits divulging information regarding “commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party, unless the competent authority is satisfied that larger public interest warrants the disclosure of such information.” However, private companies use this section to stay opaque.

“We have no problem with whatever we share with the government being made available to the public,” says Ashok Kheny, Managing Director of Nandi Infrastructure Corridor Enterprises (NICE), which is the country’s first public-private partnership in the road segment. Kheny has had many run-ins with politicians. “Vested interests misuse the Act. Frivolous RTI appeals can delay projects,” he says. About half the NGOs “blackmail” and demand money, he says. Many a time government officials are in cahoots, too. Officials may give only partial information, which may appear to skew facts, or just claim that the file is missing (this way they will not be

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There may be nothing to verify it.

So, when private entities deny information, the matter goes to the Central Information Commission on the question of ‘public authority.’ More often, companies don’t accept the CIC order. “Our judicial system can’t deliver on time. Anyone who has money and power can drag on a case for decades,” says Gandhi. On the other

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penalised under the Act). “Several times we have produced the documents from our side to the courts. NICE won its 570th court case this October,” he says.

Gandhi agrees that all is not well in many government departments. Files are not maintained as mandated. He was once told a PPP agreement, where a private player was given land and assets, was missing. “I was horrified,” says Gandhi, as whatever the private company says would stand. “What if the private company produces a brand new document?” says Gandhi.

hand, the Commission does not have the wherewithal, nor does the ordinary petitioner. “Every SPV may claim that it does not come under the definition of public authority and litigations will mount,” says Chief Information Commissioner Satyananda Mishra. And this is a major worry.

### The Way Out

Mishra points to the letter he sent to the Planning Commission this January wherein he made three proposals. One, every PPP proposal, including the

draft agreement, should be published for inviting public comments and objections before finalising it. Two, the PPP agreement should include a necessary condition that the Special Purpose Vehicle or any other entity that comes into being as a result of the PPP would be a public authority and RTI complaint. This could avoid litigations. Third, alternately enabling the Central Public Information Officer of the government arm to secure all information from the PPP entity.

“In my personal opinion, the concessionaire [the entity actually implementing the PPP] should come under the RTI,” says Montek S Ahluwalia, Deputy Chairman of the Planning Commission. But this is seen as inadequate. “It is very unfortunate the Planning Commission feels the interest of private partners as more important than the public,” says Gandhi. Predictably, the plan panel passed the buck to the Law Ministry. And, reports indicate the government being wary of bringing private players wholly under the RTI.

That said, the Department of Economic Affairs has in October published a Draft National PPP Policy on its website for comments. Nayak says government processes need to be transparent with proper monitoring and regulation of PPPs. “All PPP project-related clearances and approvals from the assessment stage and all payments made must be publicly disclosed. Importantly, it should have a people-oriented approach,” he says.

The Draft Policy also allows for modifications of a PPP contract after it has been awarded to a private entity under specific conditions. Kheny, however, feels there should be no interruption till a project is completed. Having executed many projects in the US such as the Central City Tunnel in Philadelphia and the Detroit People Mover, Kheny says: “There, I signed only a single-page agreement.” He says all studies regarding a project are done before a contract is signed; and, action against any discrepancy would be strictly taken—but after a project is completed. Perhaps the need is to be simple and clear in rules, and transparent in dealings. RTI would just be the way out. “Basically, apprehensions exist because we are yet to get used to it,” says Choudhary. The moment that happens, perhaps it will be less talked about.

Email us at [business@outlookindia.com](mailto:business@outlookindia.com) ■