

Before the Central Information Commission

CIC Bhawan, Baba Gangnath Marg, Munirka, New Delhi – 110 067

Second Additional Submission relating to
Second Appeal-cum-Complaint Case No. CIC/DODEF/A/2018/152701

In the matter of
Venkatesh Nayak
vs
1) Ministry of Defence
&
2) Indian Army

Date of submission: 11/03/2020

Index of Contents

<u>No.</u>	<u>Item</u>	<u>Page</u>
1.	Second Additional submission with prayers	2-12

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&

2) Indian Army

Additional Submissions with Prayers

Date of submission: 11/03/2020

I. Preliminary :

1. It is respectfully submitted that on 02/03/2020, this Appellant-cum-Complainant received the Interim decision of this Hon'ble Commission, dated 26/02/2020 and authenticated by the Dy. Registrar on 27/02/2020, in the second appeal-cum-complaint matter whose details are captioned above. This additional submission is being filed on the 9th day of the receipt of the said decision which is within the time limit stipulated therein;

II. Additional Prayers :

This Appellant-cum-Complainant humbly prays that this Hon'ble Commission may be pleased to:

1. **record its verbal directions to the Respondent Public Authorities given during the dated 18/02/2020, in its subsequent order remaining to be issued in the instant case;**
2. **rectify para #1 recorded on page #4 of its Interim decision, case for reasons explained at para #4 below;**

3. **take into consideration the arguments presented in favour of disclosure of the information sought at para #5 of the instant RTI application on grounds described at paras #6 onwards below;**
4. **give its ruling on every prayer specified in the second appeal-cum-complaint submitted in the instant case on 24/08/2018; and**
5. **issue any other appropriate order or direction or recommendation as may be appropriate in the instant case.**

III. Additional submissions:

It is respectfully submitted:

1. that during the hearing conducted by this Hon'ble Commission in the instant case on 18/02/2020, this Appellant-cum-Complainant distinctly remembers the assurance repeatedly provided by the Hon'ble Information Commissioner that the Respondent Public Authorities would be directed to submit an affidavit affirming their claim that neither Public Authority has in its custody, information sought at paras #1-2 of the instant RTI application. This Appellant-cum-Complainant has not been able to locate any such direction in this Hon'ble Commission's Interim Decision dated 26/02/2020. ***This Appellant-cum-Complainant humbly urges this Hon'ble Commission to require both Respondent Public Authorities to submit an affidavit affirming the non-existence of the information sought at paras #1-2 of the instant RTI application and furnish a copy of the same to him within such deadline as may be stipulated by this Hon'ble Commission, in its subsequent order remaining to be issued in the instant case;***
2. that during the said hearing the Respondent Public Authorities verbally averred before this Hon'ble Commission that the information sought at para #3 of the instant RTI application is "Raksha Mantri" or the Hon'ble Union Minister of Defence. This Appellant has not been able to locate a reference to such verbal averment in this Hon'ble Commission's Interim decision of said date. ***This Appellant-cum-Complainant humbly urges this Hon'ble Commission to record the said averment in relation to the information sought at para #3 of the instant RTI application or direct the Respondent Public Authorities to furnish a written reply to the same to him, in its subsequent order remaining to be issued in the instant case;***

3. that during the said hearing this Hon'ble Commission verbally directed the Respondent Public Authorities to furnish the information sought at para #4 of the instant RTI application. This Appellant has not been able to find a mention of such verbal direction to the Respondent Public Authorities in this Hon'ble Commission's Interim decision of aforementioned date. ***This Appellant-cum-Complainant humbly urges this Hon'ble Commission to include a specific reference to this direction to the Respondent Public Authorities vis-à-vis the information sought at para #4 of the instant RTI application in its subsequent order remaining to be issued in the instant case;***

4. that at para #1 on page 4 of its Interim Decision of said date, this Hon'ble Commission has recorded as follows:

"Respondent #3 submitted that information sought at para 5 of the RTI application is exempt from disclosure under Section 8(1)(a) of RTI Act, since files relating to the prosecution sanction will contain details of the operation, location and other confidential data and disclosure of the same may affect the security and strategic interest of the State.";

5. that with deepest respect to the wisdom, dignity and authority of this Hon'ble Commission, this Appellant-cum-Complainant humbly wishes to submit that to the best of his knowledge, the aforementioned para does not contain an accurate record of what transpired during the proceedings when the possibility of disclosure of information sought at para #5 of the instant RTI application was taken up for consideration at his express request. This Appellant-cum-Complainant distinctly recalls that the CPIO representing Respondent Public Authority No. 2 had already stated earlier during the proceedings that all files referred to the information sought at para #5 of the instant RTI application were available with Respondent Public Authority No. 1 in view of the practice of single-file system of decision making adopted by them. **Neither Respondent Public Authority gave any written reply at the RTI application stage or at the first appeal stage claiming the protection of Section 8(1)(a) of the RTI Act to such information. The basic ground on which the instant second appeal-cum-complaint has been submitted to this Hon'ble Commission is that each Respondent Public Authority has claimed that the other holds custody of all the information sought in the instant RTI application, thereby contradicting each other.** In fact it was this Hon'ble Commission which raised the applicability of Section 8(1)(a) of the RTI Act, when its

attention was drawn to the information sought at para #5 of the instant RTI application by this Appellant-cum-Complainant towards the end of the said hearing. Thereupon this Appellant-cum-Complainant made a verbal request that the applicability of Section 8(2) of the RTI Act, namely disclosure of the said information in the larger public interest may please be considered by this Hon'ble Commission. Thereafter, this Hon'ble Commission agreed to receive an additional submission in this regard volunteered by this Appellant-cum-Complainant and verbally permitted the Respondent Public Authorities to file a rejoinder within the time limit now specified in the Interim Decision portion of its decision dated 26/02/2020. This Appellant-cum-Complainant humbly believes, the aforementioned is a true description of the last part of the proceedings of the hearing on 26/02/2020 in the instant case. ***This Appellant-cum-Complainant prays that this Hon'ble Commission may please rectify para #1 on page 4 of its Interim decision, accordingly;***

6. that for reasons stated at para #5 above, this Appellant-cum-Complainant believes, it is a contravention of the express procedure provided in Section 19(5) of the RTI Act to require him to make a submission as to why the information sought at para #5 of the instant RTI application must be disclosed in the larger public interest under Section 8(2) of the RTI Act. According to Section 19(5) of the RTI Act, the onus of proving that a denial of information is justified lies on the CPIO of the public authority that holds the information requested in its custody. A perusal of the prayers contained in the present second appeal-cum-complaint case and the grounds described therein, will clearly indicate that neither the CPIO nor the First Appellate Authority of either Respondent Public Authority claimed the protection of any exemption permissible under the RTI Act at any stage. Nor did the representatives of these two Respondent Public Authorities claim such exemption during the hearing conducted by this Hon'ble Commission in the instant case on 18/02/2020, to the best of this Appellant-cum-Complainant's knowledge. If they have submitted any such pleading to this Hon'ble Commission in writing either before or after the said hearing, this Appellant-cum-Complainant has not received a copy of the same. Therefore, in light of the aforementioned facts, it is difficult for this Appellant-cum-Complainant to comprehend as to how security and strategic interests of the State protected under Section 8(1)(a) of the RTI Act are attracted by the information sought at para #5 of the instant RTI application;
7. further, a perusal of the bare language of para #5 of the instant RTI application makes it amply clear that the purpose of this Appellant-cum-Complainant is not to unravel the operational matters or any other "confidential" information pertaining to the Respondent

Public Authorities' appointed functions and responsibilities. The information sought at para #5 of the instant RTI application wholly and squarely concerns with the allegations of offences that are said to have been committed by certain defence personnel operating in the erstwhile State of Jammu and Kashmir for which the concerned government had sought sanction for prosecution. Even if it were to be contended by the Respondent Public Authorities that the said files relating to the request for sanction for prosecution contained such "confidential" information that may attract the protection provided under Section 8(1)(a) of the RTI Act, which incidentally, they did not at any stage of any proceeding under the RTI Act, to the best of this Appellant-cum-Complainant's knowledge, this Hon'ble Commission has the "power-coupled-with-duty" of testing that claim by summoning the said files for in-depth examination. In fact by admitting this second appeal-cum-complaint this Hon'ble Commission has in effect taken cognizance of this express prayer submitted at paras #3-6 of the instant second appeal-cum-complaint. ***This Appellant-cum-Complainant fails to understand the basis on which this Hon'ble Commission has directed him to make a submission under Section 8(2) of the RTI Act vis-à-vis the information sought at para #5 of the instant RTI application without admitting such a formal claim from the Respondent Public Authorities and examining its veracity in light of the contents of the files referred to at para #5 of the instant RTI application;***

8. further, even if this Appellant-cum-Complainant were to temporarily concede for the sake of argument that the files whose inspection has been sought under para #5 of the instant RTI application contain "confidential" information relating to the operations and other functional matters of the Respondent Public Authorities, this Hon'ble Commission has the power-coupled-with-duty to examine the possibility of severing such information under Section 10 of the RTI Act. This Appellant-cum-Complainant humbly submits that this possibility has also not been explored by this Hon'ble Commission before arriving at its interim decision. Therefore this Appellant-cum-Complainant humbly reiterates the prayers contained at paras #3-6 of his second appeal-cum-complaint and urges this Hon'ble Commission once again to summon the concerned files by invoking its powers under Section 18(3) of the RTI Act, for indepth examination;
9. further, if this Hon'ble Commission, after acting in the manner prayed for at paras #3-6 of the instant second appeal-cum-complaint arrives at the determination that all the information contained in the files referred to at para #5 of the instant RTI application

attracts the exemption provided for in Section 8(1)(a) of the RTI Act, the following grounds seeking disclosure of information in the larger public interest may please be taken into consideration before arriving at its final decision in this matter;

10) first, even though this Appellant-cum-Complainant is not a party that is directly affected by the requests for sanction for prosecuting defence personnel for the alleged commission of certain offences, he believes that as a member of society he has the "right to know the truth" about the details of the 47 cases in which the Government of India refused to grant sanction for prosecuting defence personnel. The right to seek and obtain information under Article 19(1)(a) of the Constitution to which the RTI Act gives effect, is not only an individual right but it also a collective right of the citizenry to demand transparency and accountability for the actions and omissions of the Government and its instrumentalities. This collective dimension of the people's fundamental right to know which is deemed to be a part of the fundamental right to freedom of speech and expression guaranteed under Article 19(1)(a) of the Constitution of India has received recognition by the Hon'ble Supreme Court of India in a case pertaining to numerous instances of extra-judicial killings of civilians by armed forces personnel in the country. In the matter of ***Extra-Judicial Execution Victim Families Association (EEVFAM) & Anr., vs Union of India & Anr.***, [AIR 2016 SC 3400] the Hon'ble Supreme Court made the following observations:

"3. The right to know the truth has gained increasing importance over the years. This right was articulated by the United Nations High Commissioner for Human Rights in the sixty-second session of the Human Rights Commission. In a Study on the right to the truth, it was stated in paragraph 8 that though the right had its origins in enforced disappearances, it has gradually extended to include extra-judicial executions. This paragraph reads as follows:

"With the emergence of the practice of enforced disappearances in the 1970s, the concept of the right to the truth became the object of increasing attention from international and regional human rights bodies and special procedures mandate-holders. In particular, the ad hoc working group on human rights in Chile, the Working Group on Enforced or Involuntary Disappearances (WGEID) and the Inter-American Commission on Human Rights (IACHR) developed an important doctrine on this right with regard to the crime of enforced disappearances. These mechanisms initially based the legal source for this right upon articles 32 and 33 of the Additional Protocol to the Geneva Conventions, of 12 August 1949. Commentators have taken the same approach. However, although this right was initially referred to solely within the context of enforced disappearances, it has been gradually extended to other serious human rights violations, such as extrajudicial executions and torture. The Human Rights Committee has urged a State party to the International

Covenant on Civil and Political Rights to guarantee that the victims of human rights violations know the truth with respect to the acts committed and know who the perpetrators of such acts were.”

It is necessary to know the truth so that the law is tempered with justice. The exercise for knowing the truth mandates ascertaining whether fake encounters or extra-judicial executions have taken place and if so, who are the perpetrators of the human rights violations and how can the next of kin be commiserated with and what further steps ought to be taken, if any.” (emphasis supplied)

11) further, in his Annual Report of 2013, the United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression whose earlier work on the right to know the truth, the Hon’ble Supreme Court cited in its judgement referenced immediately above, postulated the “collective dimension” of the right to access information and the right to know the truth in the following words:

“29. In addition, in the context of serious human rights violations, there is a particular obligation which requires States to inform not only the victims and their families but also society as a whole of what has happened.

30. In this context, the pursuit of judicial investigations into human rights violations is a core responsibility of the State and a major starting point for the realization of the right to truth. The judicial investigation of individual cases is not sufficient in itself, however; the right to truth implies not only the clarification of the immediate circumstances of particular violations, but also the clarification of the general context, the policies and the institutional failures and decisions that enabled their occurrence. Beyond this, the realization of the right to truth may require the dissemination of information on violations in order to restore confidence in State institutions and ensure non-repetition.

31. Global and regional bodies for the protection of human rights have addressed the right to truth both from an individual perspective (the rights of victims and their families to know the truth about violations affecting their lives) and from a collective perspective (the right of society as a whole to know and the obligation of States to inform society of past violations).

32. The Inter-American Court has repeatedly recognized this right. In addition, the Basic Principles on Reparations and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law include, as a measure of satisfaction, verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm to the victims, as well as inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels (General Assembly resolution 60/147, annex, paras. 22 (b) and (h)).” (emphasis supplied)

12) further, in his concluding recommendations, the said UN Special Rapporteur made the following observations:

"88. Over the past three decades, the right to truth has most often been invoked in situations relating to the failure of the State to ensure accountability for systematic violations of human rights and to provide appropriate reparations. It has also commonly been related to the right of victims and their relatives to demand investigations and information as a first step in achieving justice. As international jurisprudence has evolved, it has become evident that the right to truth has also a clear, collective dimension. There is a shared interest in the clarification of human rights violations and in the dissemination of information on the context in which they occurred, especially so as to re-establish trust in State institutions and to ensure non-repetition of the violations. The realization of the right to truth, at both the individual and the collective levels, requires access to and, often, also the dissemination of information on human rights violations." (emphasis supplied)

This 2013 Annual Report of the UN Special Rapporteur on Freedom of Opinion and Expression may be accessed at: http://ap.ohchr.org/documents/dpage_e.aspx?si=A/68/362. Given this emphasis on citizens' right to know the truth by the highest court in the land and also by the Special Rapporteur of the United Nations of which India is a founder member, there is no justifiable reason why the bare-bone information pertaining to the request for sanction for prosecuting defence personnel cannot be made public.

13) Further, the Hon'ble Supreme Court of India has time and again emphasised impartial investigation as a *sine qua non* of fair trial in criminal cases. In the matter of ***Dharam Pal vs State of Hayrana & Ors.***, [(2016) 4SCC 160], the Apex Court observed as follows:

"20. Be it noted here that the constitutional courts can direct for further investigation or investigation by some other investigating agency. The purpose is, there has to be a fair investigation and a fair trial. The fair trial may be quite difficult unless there is a fair investigation....

21. ...It can never be forgotten that as the great ocean has only one test, the test of salt, so does justice has one flavour, the flavour of answering to the distress of the people without any discrimination. We may hasten to add that the democratic setup has the potentiality of ruination if a citizen feels, the truth uttered by a poor man is seldom listened to. Not for nothing it has been said that Sun rises and Sun sets, light and darkness, winter and spring come and go, even the course of time is playful but truth remains and sparkles when justice is done. It is the bounden duty of a Court of law to uphold the truth and truth means absence of deceit, absence of fraud and in a criminal investigation a real and fair investigation, not an investigation that reveals itself as a sham one. It is not acceptable. It has to be kept uppermost in mind that impartial and truthful investigation is imperative. If there is indentation or concavity in the

investigation, can the 'faith' in investigation be regarded as the gospel truth? Will it have the sanctity or the purity of a genuine investigation? If a grave suspicion arises with regard to the investigation, should a Constitutional Court close its hands and accept the proposition that as the trial has commenced, the matter is beyond it? That is the "tour de force" of the prosecution and if we allow ourselves to say so it has become "id'ee fixe" but in our view the imperium of the Constitutional Courts cannot be stifled or smothered by bon mot or polemic. Of course, the suspicion must have some sort of base and foundation and not a figment of one's wild imagination. One may think an impartial investigation would be a nostrum but not doing so would be like playing possum. As has been stated earlier facts are self-evident and the grieved protagonist, a person belonging to the lower strata. He should not harbor the feeling that he is an "orphan under law". (emphasis supplied);

14) further, in the matter of ***E. Sivakumar vs Union of India & Ors.***, [(2018) 7SCC 365] a 3-Judge Bench of the Hon'ble Supreme Court of India reiterated its emphasis on the imperatives of impartial criminal investigations and the revelation of the truth to instil public faith and confidence in the entire process in the following words:

"11. In the case of ***Dharam Pal Vs. State of Haryana and Ors.***, this Court has underscored the imperativeness of ensuring a fair and impartial investigation against any person accused of commission of cognizable offence as the primary emphasis is on instilling faith in public at large and the investigating agency...." (emphasis supplied);

15) further, in the matter of ***Romila Thapar vs Union of India & Ors.***, [(2018)10SCC 753] the majority opinion of the Court reiterated the position taken by the same Court in both *Dharampal* and *E. Sivakumar*. Justice D. Chandrachud also reiterated the Court's earlier views in his dissenting judgement and said:

"34...The above observations are a significant reminder of the function of this Court, as the protector of the fundamental rights of citizens. These rights must be safeguarded particularly when there is a possibility that failure to take a position may lead to a denial of justice." (emphasis supplied);

16) further, the purpose of citing the above rulings of the Supreme Court is to impress upon this Hon'ble Commission that neither Respondent Public Authority has volunteered to place detailed information about cases where sanction was sought for prosecuting defence personnel in relation to their alleged commission of heinous offences such as murder, rape, disappearance of civilians, torture and killing, abduction etc. The Government of India has placed only statistics and numbers pertaining to such matters on the table of Parliament. One such action formed the basis of the instant RTI application, as already argued before

this Hon'ble Commission and the Respondent Public Authorities. Parliament was informed that the sanctioning authority, namely the 1st Respondent Public Authority in the present case did not find *prima facie*, sufficient evidence to grant sanction for prosecution in 47 out of 50 such matters that occurred between 2001 and 2018 and which were placed before it. In effect while the investigating agencies in Jammu and Kashmir gathered evidence which they deemed adequate for launching prosecution of the accused personnel and sought sanction for such prosecution under Section 7 of the *Armed Forces (Jammu and Kashmir) Special Powers Act, 1990*, the Government of India found the evidence to be lacking in adequacy. Nevertheless, at least 47 individuals have either been done to death or suffered other grievous physical and psychological harm for which nobody has been held accountable. **There cannot be a greater public interest than society's right to know the truth such as the facts and circumstances of these cases, as collected by the investigating agencies in J&K and how they were reviewed, weighed and measured by the sanctioning authority in the Government of India;**

17) further, in the matter of *Kishanbhai vs State of Gujarat* [(2014) 5SCC 108] the Hon'ble Supreme Court of India ruled that every acquittal in a criminal case should be should be understood as a failure of the justice delivery system, in serving the cause of justice. The Apex Court stated further as follows:

"Likewise, every acquittal should ordinarily lead to the inference, that an innocent person was wrongfully prosecuted. It is therefore, essential that every State should put in place a procedural mechanism, which would ensure that the cause of justice is served, which would simultaneously ensure the safeguard of interest of those who are innocent." (emphasis supplied)

18) although the aforementioned case arose from a purely civilian context, there is no justifiable reason why the same principle must not apply to the context in which the defence personnel operate in J&K. The purpose of the present RTI application is to ascertain the details of each case where sanction for prosecution of accused defence personnel has been refused. It is obvious that no further action is ordinarily possible under the law in such matters. However society in general, and this Appellant-cum-Complainant in particular, have the right to know the details of every such case in light of the arguments made above. Further, the objectives of transparency as spelt out in the preamble of the RTI Act are to ensure the development of an "informed citizenry" and to enable them to hold the government and its instrumentalities accountable for

their actions and omissions. Demanding accountability in the absence of access to adequate information is well-nigh impossible. This Appellant-cum-Complainant firmly believes that this is also another justification for transparency of information sought at para #5 of the instant RTI application;

19) further, shrouding details of the 47 cases, in which sanction for prosecuting defence personnel was denied under a cloak of secrecy, only gives rise to doubts and suspicion in the minds of the citizenry. There is no doubt that *prima facie* there are facts and evidence which necessitated action on the part of the Government of J&K to investigate these matters and escalate the matters to the Government of India by seeking sanction for prosecution. That fact is undeniable. However the details of the cases are not widely known in the public domain. This secrecy has in effect reduced public confidence in the authorities who were involved in the decision making process. Disclosure of the details of all such cases on the other hand (without compromising the security and strategic interests of the State) will go a long way in restoring people's faith in the ability of the authorities to make decisions in an impartial manner. So the imperative of instilling public confidence in the impartiality of the decision making process in such cases is a major public interest that will be served by the disclosure of the information sought at para #5 of the instant RTI application. This Appellant-cum-Complainant firmly believes that this public interest ground also outweighs the harm done to the protected interests as envisaged under Section 8(2) of the RTI Act. In fact by severing such portions that relate to operational matters of the defence personnel deployed in J&K as per the provisions of Section 10 of the RTI Act will completely obviate any harm to the interests protected under Section 8(1)(a) of the RTI Act. This Appellant-cum-Complainant humbly urges this Hon'ble Commission to consider all the aforementioned public interest grounds while arriving at its decision vis-à-vis the information sought at para #5 of the instant RTI application.

2. I hereby verify that the aforementioned facts are true to the best of my knowledge. I affirm that I will transmit a scanned copy of this submission to the Respondent Public Authorities after submission to this Hon'ble Commission.

Signature of the Appellant-cum-Complainant:

(Venkatesh Nayak)