

केन्द्रीय सूचना आयोग
Central Information Commission
बाबा गंगनाथ मार्ग, मुनिरका
Baba Gangnath Marg, Munirka
नई दिल्ली, New Delhi – 110067

File No : CIC/DODEF/A/2018/152701

Venkatesh Nayak

....अपीलकर्ता/Appellant

VERSUS

बनाम

CPIO,
D(GS-1/IS),
Ministry of Defence,
South Block,
New Delhi – 110011

CPIO,
Under Secretary (AG),
Ministry of Defence,
Room No. – 108, B – Wing,
Sena Bhawan, New Delhi – 110011

CPIO
RTI Cell,
Addl. DG MT (AE),
G – 6, D – 1 Wing, IHQ of MoD(Army),
Sena Bhawan, Gate No. – 04,
New Delhi – 110011

....प्रतिवादीगण /Respondent(s)

RTI application filed on	:	12/02/2018
CPIO replied on	:	22/02/2018; 26/02/2018; 01/03/2018; 28/03/2018 & 16/04/2018
First appeal filed on	:	15/03/2018
First Appellate Authority order	:	11/04/2018
Second Appeal dated	:	24/08/2018
Date of Interim Decision	:	26/02/2020
Date of Final Decision	:	05/06/2020

सूचना आयुक्त : दिव्य प्रकाश सिन्हा
INFORMATION COMMISSIONER : DIVYA PRAKASH SINHA

Information sought:

The Appellant sought information through 5 points regarding reply to unstarred question no. 1463 tabled in the Rajya Sabha on 01.01.2018. He specifically sought for procedure followed while deciding whether or not to grant sanction for prosecuting any member of the defense forces for actions committed under the Armed Forces (Jammu & Kashmir) Special Powers Act, 1990 etc.

Grounds for the Second Appeal:

The CPIO has not provided the desired information.

Relevant Facts emerging during Hearing on 18.02.2020:

The following were present:-

Appellant: Present and assisted by Shri Wajahat Habibullah; Shri Sanjoy Hazarika, Commodore Lokesh K. Batra (Retd.) and Ms Shikha Chhiber in person

Respondent (1): Not present.

Respondent (2): Ajay Kumar V.R, US & CPIO, T.D. Prashanth Rao, US & CPIO, O/o.Under Secretary (AG), Ministry of Defence, Sena Bhawan, New Delhi present in person.

Respondent (3): Lt. Col. Jagdish Prasad, GSO1(Legal) & Rep. of CPIO and Lt. Col. Vishal Singh, Dir(DV-1), IHQ of MoD(Army), New Delhi present in person.

Appellant stated that he is not satisfied with the reply of the Respondents. He further stated that given the context of seeking the information he believes that the same should have been proactively disclosed by the Ministry of Defence as per the provisions of Section 4(1)(b), (c) and (d) of RTI Act.

Respondent No.2 referred to his written submission dated 11.02.2020 wherein it has been stated with respect to para 1 & 2 of the RTI Application that there are no official records containing details of procedure or the norms, criteria and standard that is required to be followed by the Ministry while deciding the evidence submitted by Jammu & Kashmir Government in prosecution sanction cases. He further stated that the process varies on a case to case basis. As regards, para 3 of

the RTI Application, CPIO stated that the Defence Minister is the competent authority for taking decision on sanction/denial to prosecute the accused army personnel.

Appellant interjected to state that there ought to be a Standard Operating Procedure for processing the prosecution sanction cases.

Appellant furthermore stated that information sought vide para 4 & 5 are substantial issues as it has been gathered that out of the 50 cases received by the Union Government from the Jammu & Kashmir Government for prosecution sanction, 47 cases have been denied and urged that the copy of communication sent to the Jammu & Kashmir Government as sought at para 4 of the RTI Application should be provided and inspection of records related to the denial of sanction for prosecution should also be provided.

Appellant also pointed out that he is aggrieved with the fact that the RTI Application was transferred within the Ministry initially and later it was transferred to Army Headquarters, thus dodging the responsibility of providing a definitive reply. He remarked at the role of Army Headquarters in the matter in as much as the information was sought relating to the details of a reply tabled by Department of Defence through its parent Ministry, Ministry of Defence in the Rajya Sabha. Further, as understood from the provisions of the AFSPA, 1990, the authority competent to make a decision on requests for sanction for prosecution of members of the defence forces is the Department of Defence and not the Indian Army, therefore it was for the RTI Cell, Ministry of Defence to have accessed the information from within its departments or to determine whether or not to disclose the information sought in the RTI Application.

At this point, Respondent No.2 clarified that the cases of prosecution sanction are processed by the Ministry in a single file system originating from Army Headquarters and all the files in which cases of prosecution were processed are in the custody of AHQ.

Respondent No.3 did not refute the submissions of Respondent No.2 and agreed to abide by the order of the Commission.

Appellant urged that Respondent No.3 may be directed to facilitate inspection of every file relating to the denial of sanction for prosecution of members of the defence forces as sought at para 5 of the RTI Application.

Respondent No.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.

Appellant objected to the exemption claimed by Respondent No.3 and prayed that he may be allowed time to submit his contentions in this regard.

Interim Decision on 26.02.2020

In view of the hearing proceedings, Commission reserves the final decision in the matter and directs the Appellant and Respondent No.3 to send their written submission with respect to the exemption of Section 8(1)(a) of RTI Act claimed for information sought at para 5 of the RTI Application within 15 days from the date of receipt of this order.

The appeal is reserved for final order.

Proceedings of Final Decision

Commission received written submission of both the parties.

Respondent No.3 has submitted that the cases under reference pertain to alleged death/injuries caused during operations by the Armed Forces. That, the investigation report of these cases, which are part of various case files, include operational information in terms of unit, their location, strength of columns which has participated in the operations, drills, tactics and weapons used during the operation. That, these details are very sensitive in nature and their disclosure to public scrutiny will have adverse impact on future operations, therefore it is strongly prayed that inspection of the subject case files may not be allowed in the best interest of the nation.

Appellant in his written submissions, at the outset, has pointed out certain proceedings of hearing that have not been included in the Interim Decision, this

includes, *inter alia*, certain directions that were announced in open chamber for the Respondents. Commission is not analyzing these contentions separately, as suffice to say that the directions are reserved for the final decision. Followed by these objections, Appellant has also expressed his apparent dissatisfaction with the narrative of the proceedings mentioned in the Interim Decision, particularly the part where he contends that Section 8(1)(a) of RTI Act was not claimed by the Respondents either in writing or during hearing, until the Commission made an observation to that effect. He has further relied on Section 8(2) of the RTI Act to urge that disclosure of the information is in the larger public interest while asserting the collective right of the citizens to demand transparency and accountability for the actions and omissions of the Government and its instrumentalities. Appellant has emphasized that *'the 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 the recognition of the Apex Court. In support of this averment, Appellant has relied upon the judgment of Hon'ble Supreme Court in the matter of Extrajudicial Executions Victim Families Association (EEVFAM) & Anr. Vs. Union of India & Anr. [AIR 2016 SC 3400] pertaining to instances of extra-judicial executions carried out by the Manipur Police and the armed forces of the Union, including the Army, wherein the following was held:*

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.”

In furtherance of his argument on the collective right to access information, Appellant has cited the Annual Report of 2013 of UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, wherein the recommendations included inter alia-

“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.”

In addition to this, Appellant has relied on several other judgments of the Hon’ble Supreme Court in matters like *Dharam Pal vs. State of Haryana & Ors.*; *E. Sivakumar vs. Union of India & Ors.*; *Romila Thapar vs. Union of India & Ors.* to emphasize that the Court has upheld the imperativeness of impartial criminal investigations and the revelation of truth to instill public faith and confidence. In this context, Appellant has pointed out that Government of India has only placed statistics and numbers pertaining to the cases where sanction was sought for

prosecution of defence personnel in relation to their alleged commission of heinous offences such as murder, rape, disappearance of civilians etc. but no details have been shared. That, MoD has informed Parliament that it did not find *prima facie* sufficient evidence to grant sanction for prosecution in 47 out of 50 cases that occurred between 2001-2018. Appellant has remarked that *'in effect the investigation agencies in Jammu & Kashmir gathered 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 & Kashmir) Special Forces Act, 1990, the Government of India found the evidence to be lacking in adequacy. Nevertheless, atleast 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 Government of India.'* Lastly, Appellant has asserted that shrouding the details of the 47 cases under a *cloak of secrecy* only gives rise to doubts and suspicion in the minds of the citizens. Appellant has also urged that operational details of the cases can be masked by invoking Section 10 of RTI Act.

Observations

Commission has considered the detailed arguments of the Appellant and the stance of Respondent No.3 as regards the denial of information on Para 5 of the RTI Application under Section 8(1)(a) of RTI Act. While, admittedly, Appellant has raised quite valid arguments expounding larger public interest citing the Hon'ble Supreme Court judgment in the matter of *Extrajudicial Executions Victim Families Association (EEVFAM) & Anr. Vs. Union of India & Anr.*, however, we ought to appreciate the fact that the instant case hinges on an extremely sensitive aspect of the Kashmir conundrum. Given the limited jurisdiction of the Commission under RTI Act, the bench is neither adjudging the merits of the violation of human rights argument of the Appellant in relation to the alleged victims or their families nor the conjecture and surmises associated with the denial of prosecution sanction in the 47 cases referred hereunder. Rather, the facts of the instant case necessitate a dynamic attribution to the meaning of larger public interest within the framework of RTI Act by associating non-disclosure with larger public interest.

In other words, whether larger public interest lies in non-disclosure of the averred case details needs to be ascertained in the instant matter.

In this pursuit, it may be noted that the context in which the information has been sought pertains to a security landscape which is rife with intense geo-political as well as socio-political conflicts for decades together and in the face of the recent unrest stirred by the abrogation of Article 370 in the State of J & K, the sensitivity ascribed to a disclosure of this magnitude cannot be emphasized enough. The import of “sensitivity” in the facts of the instant case is understood from two important perspectives, one being the operational details which Respondent No.3 has pointed out and the other perspective emanates from the actual act of alleged victimization. Commission is in complete agreement with Respondent No.3 that disclosure of the elaborate aspects of the Army Operations will impact future operations. The disclosure of operational details will gravely impact the security and strategic preparedness of the Armed Forces, which by common knowledge is vital to the State’s diaspora. The other aspect of sensitivity lies in the inevitable vulnerability of this subject matter to speculations cutting across national and international borders; perhaps even trial by media that will emanate from such disclosure. **As a cumulative effect, these eventualities may further compound the situation of unrest and instigate festering emotions in the State, in addition to the international ramifications.**

Commission concedes with the argument of Respondent No.3 regarding the sensitive nature of information sought based on the Preamble of RTI Act which provides as under:

“And whereas revelation of information in actual practice is likely to conflict with other public interests including efficient operations of the Governments, optimum use of limited fiscal resources and the preservation of confidentiality of sensitive information; And whereas it is necessary to harmonize these conflicting interests while preserving the paramountcy of the democratic ideal;....”

And, the Apex Court has in a catena of judgments related with the implementation of RTI Act emphasized on striking a balance between conflicting interests as set out in the Preamble of RTI Act. As in the matter of *Institute of Chartered Accountants of India v. Shaunak H. Satya and Others* (2011) 8 SCC 781, the Supreme Court held as under:-

*“24. One of the objects of democracy is to bring about transparency of information to contain corruption and bring about accountability. **But achieving this object does not mean that other equally important public interests including efficient functioning of the governments and public authorities, optimum use of limited fiscal resources, preservation of confidentiality of sensitive information, etc. are to be ignored or sacrificed.** The object of the RTI Act is to harmonise the conflicting public interests, that is, ensuring transparency to bring in accountability and containing corruption on the one hand, and at the same time ensure that the revelation of information, in actual practice, does not harm or adversely affect other public interests which include efficient functioning of the governments, optimum use of limited fiscal resources and preservation of confidentiality of sensitive information, on the other hand. While Sections 3 and 4 seek to achieve the first objective, Sections 8, 9, 10 and 11 seek to achieve the second objective.” **Emphasis Supplied***

The aforesaid dictum of the Court brings us to the primary question framed earlier which is that whether facts of the instant case warrant non-disclosure in larger public interest. Since the Preamble of RTI Act allows stipulation on these lines, the information sought and the arguments put forth by the Appellant have to be weighed on the scale of relativity of larger good, i.e the relativity of larger good between the alleged victims and that of the entire State. **Indisputably, the larger public interest of the State (vis-à-vis its susceptibility to unrest) prevails over that of the alleged victims.**

Conjointly, the aforesaid considerations answer most of the components of the exemption of Section 8(1)(a) in the affirmative. In other words, Commission is convinced that providing *“Inspection of every file including all papers, correspondence, file notings and emails, if any, relating to the denial of sanction for prosecution of members of the defence forces as per the list annexed to the reply to the said Unstarred Question and photocopies of the relevant papers and electronic files...”* as sought at para 5 of the RTI Application 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;...**’*

As regards, the contention of the Appellant that Section 10 of RTI Act can be invoked to sever the operational details, Commission finds the argument far fetched given the nature and form of information sought. Identifying and severing

such intricate details from the papers, correspondence, file notings, emails as desired in the RTI Application will invariably cause disproportionate diversion of the resources of the public authority as per Section 7(9) of RTI Act.

FINAL DECISION

1. Adverting to the aforesaid discussion, Commission is not in a position to order any relief on **para 5** of the RTI Application. Yet, keeping in view the Appellant's contention in his written submission that Respondents have not claimed Section 8(1)(a) of RTI Act for denial of information on para 5 of RTI Application till date, **Commission directs Respondent No.3 to provide a copy of their written submission (sent in compliance of Interim Decision) dated 17.03.2020 to the Appellant, free of cost.**
2. Now, with respect to the proceedings of hearing (held on 18.12.2020) for **paras 1 & 2** of the RTI Application, **Commission directs Respondent No. 2 to file an appropriate affidavit stating that there are no official records containing details of procedure or the norms, criteria and standard that is required to be followed by the Ministry while deciding the evidence submitted by Jammu & Kashmir Government in prosecution sanction cases. The said affidavit should be sent to the Commission with a copy duly endorsed to the Appellant.**
3. Further, as regards **para 3** of the RTI Application, although the submission of Respondent No.2 has been recorded in the Interim Decision stating to the effect that the Defence Minister is the competent authority for taking decision on sanction/denial to prosecute the accused army personnel, however, Appellant has expressed his objection that the same has not been recorded in writing. In view of this, **Commission directs Respondent No.2 to resend a copy of his written submission dated 11.02.2020 (sent prior to the hearing of 18.02.2020) free of cost to the Appellant wherein relevant inputs have been recorded.**
4. Furthermore, **Commission directs Respondent No.2 to provide a copy of the communication sent by the Ministry to the Government of J&K denying sanction for prosecution as sought at para 4 of the RTI Application to the Appellant, free of cost.** In doing so, if the information needs to be accessed from any other record holder, Respondent No.3 will procure the same and provide it directly to the Appellant.

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5. The aforesaid directions should be complied by Respondent No.2 & 3, respectively, within 15 days from the date of receipt of this order and a compliance report to this effect be duly sent to the Commission.

The appeal is disposed of accordingly.

**Divya Prakash Sinha (दिव्य प्रकाश सिन्हा)
Information Commissioner (सूचना आयुक्त)**

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