

The Relevance of a Freedom of Information Act

By Cushrow Irani

Given the general climate of secrecy in this country a Freedom of Information Act in India is likely to be saddled with an intimidating list of exceptions where publication can be held to be an offence under the Act itself. Watch out.

The Constitution and the Right to Information

The Constitution of India underpins the citizen's right to information but only indirectly. The stress upon the Right to Freedom of Speech and Expression in Article 19(1)(a) and the seven contingencies in which reasonable restrictions may be imposed, under Article 19(1)(b), has however been interpreted by the courts to assume that a right to receive information, as distinct from the right to hold and impart it, does exist as a concomitant right. It follows that if it is desired to introduce a specific Freedom of Information Act, there is nothing in the Constitution to prevent it.

The Official Secrets Act

Statute law, as distinct from the string of Supreme Court decisions buttressing the right to information, is however, only what remains after the Official Secrets Act has done its worst. The Act is left over from colonial days and, as one would expect, zealously safeguards the right of officialdom to go about its business free of accountability, fairness and responsibility. Mercifully, in practice, the draconian measure is rarely enforced except when Government wish to make an example of some inconvenient bureaucrat, a rare species these days.

Freedom of Information Act

Every now and then a debate erupts over whether we should have a Freedom of Information Act. The argument on first principles is beyond question. A fully functioning democracy rests on the willing consent of the governed and it is axiomatic that citizens can make decisions only when they are properly and fully informed. Unfortunately it is not as simple as that. Any Freedom of Information Act must contain a list, however short, of exceptions; Governments are entitled to secrecy on matters of national security, defence and a few others. This is true of the American, Swedish and similar legislation on the subject wherever it exists. The crux of the argument therefore centres round the list of exceptions of subjects or documents which must remain secret and are specifically exempted from the Freedom of Information Act. Given the general climate of secrecy in this country, and this is the point, it will hardly be possible to agree on a manageably short list of exceptions.

Intimidating List of Exceptions

Here are some examples which suggest why. Not so long ago a minister in the state of Bihar refused to divulge in answer to a question in the Legislative Assembly, the total quantity of shellac, used for making sealing wax, produced in the state. He said it should not be disclosed because those manufacturing substitutes would take advantage! A former Central Minister, an otherwise agreeable politician, once claimed the right of secrecy for all government activity, except what the minister chose to make public. Journalists know how difficult it is to obtain information on even mundane matters from official sources. It is a different matter altogether that such information as is provided is often misleading. One way and another a Freedom of Information Act in India is likely to be saddled with an intimidating list of exceptions where publication can be held to be an offence under the Act itself.

The Sugar Scandal

Let me give a fairly recent example. You will remember the major scandal that erupted in Delhi over sugar. The Minister steadfastly refused the pleas of his Secretary as regards shortfall in production in the season already begun. He stalled, in a variety of ways not excluding deception and double talk, and even disregarded a specific order to import from a Cabinet Committee presided over by Prime Minister himself. His colleague, the Commerce Minister, wondered aloud after the event, who would make up the difference between the imported price and the soaring domestic price instead of acting on the Cabinet's decision, which it was his plain duty to do.

If the Commerce Minister was serious about his reservations he could have cleared them by a simple reference to the Finance Minister. He did not. To head off appropriate action against ministers involved, the Prime Minister appointed an Inquiry Committee to investigate, fix responsibility and report to him. When no action was taken on the Report for over seven months the matter was raised in Parliament. The Prime Minister blandly refused to table the Report, which would have made it a public document, saying it was a report to him and he had not had the time to read it.

I went to see the Prime Minister and told him that I had a copy and would do our duty by the public but gently suggested that it would be better if he were to change his mind and table it himself. He promised to think about it but did nothing. Meanwhile fortified by the Prime Minister's refusal, a major newspaper in Delhi published a story prominently, saying the Inquiry Committee had exonerated the Minister and indicted the bureaucrats. This, to my knowledge was untrue. We published the Report.

Inquiry Committee Reports

The point I am making is that in any foreseeable Freedom of Information Act in India, it is to be expected that Reports of Inquiry Committees will be held to be secret until tabled. On the specious argument, often advanced in similar contexts, that it is for Government to decide if and when a Report should be tabled in Parliament. My argument is simple. At present there is no impediment to publication as we have shown, what is needed is the will to do one's duty. Why should the profession of journalism and the people's right to know proceed under entirely avoidable constraints? It should be noted for the purpose of this argument that the Commissions of Inquiry Act could easily have provided that Reports shall be routinely tabled as soon as they are presented to Government.

There was a debate on this question while the Bill was being piloted through the House. The provision was deliberately left out. The present position therefore is that it is for the Government to prove that by publishing this Report we have endangered national security; to be fair the Government have not even made such an attempt. However, a Freedom of Information Act would have provided for such a penalty for breach of the injunction not to publish anything covered by the exceptions.

Non-disclosure due to the Act

It is not as if a Freedom of Information Act always works. I recall a time when the Emergency was revoked and the Government of Morarji Desai was in power. The Chairman of the one-man Inquiry Commission under the Commissions of Inquiry Act was required to go into excesses committed during the Emergency under the terms of reference. He recorded an event when for the first time in the history of independent India a capital expenditure was incurred without approval of the Public Investment Board. It concerned the purchase of three Boeing aircraft. The Chairman with characteristic understatement, found that there had been unseemly haste in placing the order apart from obvious departures from the rules of government business. The Prime Minister's elder son, then a junior pilot in Indian Airlines had sat in on a hurried meeting in the Ministry to finalise the order. The chief executive of the Airlines had taken the precaution of asking for permission to bring along "an expert witness".

I smelt a rat and made my own inquiries. Narrowing down the dates I filed an application in the US under the Freedom of Information Act. I was due to be there within the two weeks allowed to answer the requisition. This was a time when Americans were coping with the aftermath of the Lockheed scandal alleging payment of bribes by Lockheed to Japanese buyers. In evidence before Congress the three major aircraft manufacturers joined hands, a rare enough occurrence, to urge that the law be modified so as not to require disclosure of individual payments but only a consolidated figure. Otherwise they urged they would get no business “east of Suez”.

Domestic Business Interests First

Whatever lip service is paid to principles, every government protects its own domestic business interests. Word had been passed to authorities administering the Freedom of Information Act that until Congress decided, they should not be in a hurry to supply the documentation requisitioned. The embarrassed official relented to the extent of showing me the entry but not giving me a copy of it.

I hope the point is made that a Freedom of Information Act is serious business and it may well be counter-productive to introduce it unless the climate of openness and accountability is well entrenched. First things must be first.

Only months ago, the Minister for Urban Development announced that he would throw open official files in his ministry to the public and copies of whatever the citizen wanted would be furnished on payment of a small fee to cover clerical costs. There was an outcry from the bureaucrats. Every conceivable argument was thrown up, including wastage of time, additional work involved, even the risk of confidential plans for Urban Development being given out too early. The Minister was unrelenting. The Cabinet Secretary quickly stepped in to say that one Minister could not make such changes on his own and must await a Cabinet decision for the whole Government. He issued a written order stalling the Minister's move. Needless to say the Government as a whole does not even have the item on its agenda.

Willing Newspapers

I have suggested that newspapers so minded have not had any difficulty in finding out what the Government will not make public. In the case of the sugar scandal the reader will have noted the willingness of another newspaper to go along with the view handed down by guilty ministers and allow itself to be used to publish what suits the Prime Minister and the Food Minister and the Commerce Minister - that adds up a lot of ministers! - and misrepresent the Report. It needs to be said that the overwhelming majority of the thousands of newspapers in the country are on that side of the fence. It makes for an easy and more prosperous life.

Self-censorship, Worst Censorship

This raises a fundamental question. Of all forms of censorship known to us, self-censorship is the worst. Because there is no complaint, no redress and no record. Newspapers have no business criticising men and affairs if their own conduct does not bear scrutiny. While there is no overt attempt by Government to influence or control, the attractions of being understanding, and being willing to carry official handouts disguised as news or obliging a bureaucrat or politician are very high. Then there is the occasional prostitute. Such a paper will spend its time blackmailing advertiser or politician and will suddenly see the other point of view but not before a deal has been struck.

Then there are papers which are owned by economic offenders or those under investigation for serious economic offences. They discover a sudden passion for human rights. Yet other papers are started by

politicians to embarrass or upstage their political opponents. There is room for all of these and more. If every paper took the same stand it would make for a very boring world!

A Little Crime, A Little Pregnancy

All such malpractices can succeed only under cover of darkness. Out in the open, they do not stand a chance, not in the long run. And not if the readership is discriminating and cares for standards of behaviour. This raises the larger question of education and instilling a sense of values. I remember an event I would like to forget. In the context of brazen abuses of power to protect those alleged to have committed serious offences, I once remember saying that if a PM lied and lied repeatedly to Parliament this was a crime worse than murder. I was greeted with mild protests. After all our legislatures were full of people with criminal records so what point was being made, I was asked! That it needs to be spelt out is bad enough. A little crime is like a little pregnancy - it keeps growing.

The Importance of Education

Nobel Laureate Amartya Sen stresses repeatedly that the forgotten factor is the human factor. That development is meaningless unless all citizens have access to primary education. And quickly thereafter have the opportunity to learn a trade or vocation to make his way in the world. He is absolutely right. The converse is not true. Absence of primary education does not lead to the inference that those so handicapped should be denied the franchise. All experience shows that education helps to flower the innate potential of man. It is not however, a substitute for character and independence of mind. That is an environment conducive to Freedom of Information legislation. Lastly if everyone in this country could read and write, abuses of power and of the legal process would be less prevalent. The simple reason is that given the hunger for knowledge in this land, the necessary task of creating a climate of openness and accountability is easier. If this need can be met, the rest will follow

Conclusion

In my view, in the prevailing Indian political culture, a Freedom of Information Act is likely to be counter-productive. A climate of openness and accountability is an essential prerequisite.

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