

PUBLIC REPRESENTATIVES

and

The Right to Information Act, 2005

Submitted by

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August 2008

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Introduction

The CIC has issued a public notice on 31 July, 2008 seeking people's views on a matter arising out of a few complaints received from citizens under the Right to Information Act (RTI Act). The text of the public notice is reproduced below:

"WHEREAS Central Information Commission has received complaints from Shri Girish Chandra Mishra, Kanpur, Shri Sartaj Ahmad, New Delhi, Dr. Awadesh Mishra, Sultanpur (UP) & Shri Radhey Shyam, Banda (UP) wherein they have stated that their request for information under the RTI Act has not been responded to by Ms. Sonia Gandhi, MP, Shri Sahib Singh Chauhan, MLA, Smt. Sunita Sharma, Municipal Councillor, Shri Rahul Gandhi, MP; and

WHEREAS the Central Information Commission has decided to hear above mentioned complaint petitions with a view to decide whether the information sought by these applicants from public representatives mentioned above, can qualify as information sought under RTI Act, 2005 and if so, whether the public representatives from whom information is asked for, qualify as public authorities, and as such obliged to provide the information under the RTI Act.

Now therefore, it is notified for general information that all interested parties/persons or organizations may, if they so desire, file duly verified written submissions before this Commission so as to reach on or before 11.00 a.m. of 30th August, 2008."

CHRI congratulates the CIC for electing to consult people before arriving at a decision on such an important matter.

Executive summary of CHRI's submission:

The sum and substance of CHRI's submission, given below, is that public representatives are holders of public office and perform public duties. This qualifies them to be deemed as 'public authorities' within the meaning of the term as defined in section 2(h) of the RTI Act. However care will have to be taken to ensure that some of the implementation related problems are overcome in order to ensure the smooth flow of information from public representatives to citizens.¹

International practice with regard to coverage of public representatives under the respective information access laws is provided in the Annexe to the main submission.

¹ CHRI would like to thank Shri L R Singh, Advocate-on-Record, Supreme Court of India for providing valuable guidance during the preparation of this submission.

General

The RTI Act has been enacted by the Parliament of India with the avowed objectives of engendering transparency in government, making the government and its instrumentalities accountable to the governed and containing corruption. Above all the preamble to the Act recognises that an informed citizenry is indispensable to a functional democracy. Therefore the Act creates a binding obligation on most State agencies (with a few exceptions mentioned in section 24) covered by this law. They are obliged to provide access to information held in their custody or under their control unless exemptions mentioned in the Act are attracted and withholding access serves the public interest better than disclosure. While governments at the Central and the State level have the primary responsibility for implementing the law, actual decisions of granting or withholding access to information are made by public authorities through their representatives such as the public information officers (PIOs) and appellate authorities (AAs). Unlike in the UK, Canada and Ireland where access laws also enumerate the public bodies that are covered in a separate schedule to the main legislation, the RTI Act in India does not contain an exhaustive list of public authorities. Instead, the definitions section contains a set of criteria that may be used for determining whether a body is a public authority or not. No authority has been empowered by the RTI Act to prepare a comprehensive list of public authorities in any jurisdiction. Where the identity of a body is in doubt with regard to coverage under the Act, the relevant Information Commission upon receipt of a complaint has adjudicated on the matter by applying the criteria defined in section 2(h). The Central Information Commission has delivered several such decisions identifying bodies as public authorities if they matched one or more of the criteria mentioned in the Act.

Public Representatives and the RTI Act

The current issue, according to the public notice, is about the coverage of the Act vis-à-vis public representatives such as Members of Parliament (MPs), Members of Legislative Assemblies and Municipal Councillors. To this list may be added other similarly placed elected representatives of the people namely, Members of the Legislative Councils (MLCs), elected members and elected Chairpersons of Panchayats at all three levels (village, district and intermediary where applicable), elected members of urban local bodies (municipalities, municipal corporations and metropolitan councils) and elected members of district and regional councils in autonomous districts and autonomous regions, respectively, [under Articles 244(2) and 275(1) read together with the Sixth Schedule of the Constitution of India].

Is information about public representatives otherwise accessible under the RTI Act?

Before examining the main questions posed by the CIC it is important to assess whether any information about the activities of these public representatives is already accessible under the RTI Act from other bodies whose identity as public authorities is not in doubt. It will be shown below that a wealth of information about the official activities about people's representatives and also some personal information is already available with other public authorities and can be accessed under the RTI Act by making applications to such bodies. Some important categories of information pertaining to the activities of public representatives are listed below.

Information about activities in the House:

a) Speeches of public representatives:

Every public representative performs the role of placing the views, concerns and aspirations of the people he/she represents on the floor of the body to which he/she has been elected. In the case of the Lok Sabha and the Rajya Sabha the complete text of the proceedings of the Houses are available in the public domain through their websites. Every speech made by an MP is recorded and reproduced verbatim in the form of printed reports of the deliberations of the Houses. These reports are accessible at the Parliamentary library. They are also accessible under the RTI Act as they fit the definition of the terms 'information' and

'record'. The scope of the term - 'right to information' adequately covers them. In other words every word uttered by an MP unless expunged by the presiding officer of the House is accessible under the RTI Act. Parliament being a public authority in its own right has designated PIOs in the secretariats of both Houses who are responsible for providing access to information. Furthermore proceedings in both Houses are televised live, so everything that an MP says on the floor of the House is available in the public domain. In the context of secret sittings (a rare occurrence) a record of proceedings may not be available in the public domain. Even if MPs were made public authorities they cannot not be compelled to disclose what went on in the secret deliberations as that would amount to breach of privilege of Parliament – a legitimate ground for non-disclosure under section 8(1)(c) of the RTI Act.

The same situation is true of speeches made by members of legislative assemblies and councils in the States. Even though all daily proceedings of all these Houses may not be accessible on their websites, printed versions of the speeches made by people's representatives are easily accessible from the respective libraries or the secretariats in the form of records of daily proceedings. State Legislatures are also clearly public authorities under the RTI Act and access to such information can be obtained from the respective secretariats and libraries. Designated PIOs are available to service the information requests from citizens in this regard. In those rare instances where such officers have not been appointed or Rules for the implementation of the Act have not been notified by the competent authorities, that is primarily due to a mindset of resistance rather than a lack of clarity regarding the applicability of the Act. Many state legislatures have started televising their proceedings live, so almost everything said by a legislator is accessible in the public domain. In the context of secret sittings (a rare occurrence) a record of proceedings may not be available in the public domain. Even if legislators were made public authorities they cannot not be compelled to disclose what went on in the secret deliberations as that would amount to breach of privilege of Parliament – a legitimate ground for non-disclosure under section 8(1)(c) of the RTI Act.

In the context of Panchayats, municipal bodies, autonomous district and regional councils, speeches of members made in every sitting or meeting may not be recorded verbatim. Nevertheless the minutes of these meetings are recorded and held by the secretariat responsible for servicing such bodies. In the context of the Gram panchayats which do not have multi-member bodies to service them the minutes register is available with the Secretary or the Sarpanch. In any case these bodies are clearly public authorities as they match the criteria listed in section 2(h). The records of deliberations and/or minutes of the meetings of these bodies fall within the definition of the terms - 'information', 'record' and 'right to information' mentioned in the Act and are accessible though the respective PIOs of these bodies.

b) Record of votes cast by representatives:

The parliamentary form of government at the Union and State level in India is closely modelled on the Westminster style of government. Where the majority of the ruling party or political combine is not in question, Bills and proposals are carried through the Houses by a voice vote in both Parliament and State Legislatures. On the rare occasion where a member seeks division of the voting, then the numbers are clearly displayed and it is not difficult to trace a vote back to an individual member. Unlike in the US where information about how a Congressman or Senator voted is kept secret, in India this information is accessible unless a secret ballot has been resorted to. Where the voting does not happen by secret ballot, the information about how an MP, or an MLA or an MLC voted can be theoretically accessed under the RTI Act from the secretariat of the respective House. In the context of secret ballots the voting record of individual members may not be accessible even if public representatives were made public authorities because it will attract the exemption granted under section 8(1)(c).

The situation with regard to access to information about votes cast by individual members in other local bodies is not clear. A record of total votes is likely to be maintained in the official record and can be accessed from the secretariat or the official concerned under the RTI Act. Where votes are cast by a show of hands or by voice vote it is unlikely that every individual vote will be recorded separately. Therefore such information may not be available with an individual member of the body even if he/she is declared to be a public authority. A requestor will have to take the member's word for granted as to how he/she voted on any issue.

Information about activities in the Committees of the House:

All categories of public representatives mentioned above, become members of some committee or the other at some point of time during their tenure. These committees could be specific to one House such as the Business Advisory Committee or they could be joint Committees such as Department-related Standing Committees that scrutinise budgets and the working of various departments or special joint committees set up to probe an issue of immense public importance (eg., Joint Parliamentary Committee on the procurement of 155mm Howitzer Guns and the Joint Parliamentary Committee that looked into the Office of Profit issue recently.) The deliberations of these committees are recorded verbatim. The submissions made before such committees by representatives of government and members of the general public are also recorded. Access to this information is denied before the report of the Committee is submitted to the presiding officer of the House as it would constitute breach of privilege of the Committee. However, after the report has been submitted, all information relating to the report should be accessible under the RTI Act theoretically speaking, unless section 8(1)(c) is invoked in a particular case. The information withheld by invoking 8(1)(c) by the PIO of the secretariat of the House concerned, may not be accessible from an individual members of such a committee even if he/she were made a public authority under the RTI Act. Such disclosure would amount to breaching the privilege of the Committee or the House.

Similarly in the rural and urban local self-governing bodies like Panchayats and Municipalities, elected representatives sit on various committees. All deliberations are not likely to be recorded verbatim. However the resolutions and minutes of such meetings and sitting are maintained as official records and are accessible under the RTI Act from the respective secretariats or the official concerned.

Information about other official activities:

Other activities of public representatives create records and documents which are also available from some public authority or the other. For example, every MP and state legislator is entitled to free travel by train and/or air for a limited number of times during the year. The expenditure incurred on such travel for each representative is maintained in the secretariat of the respective House and is accessible under the RTI Act. Similarly, information about rent paid for availing official accommodation, charges paid for supply of electricity, water, telephone and internet services, purchase of laptops for MPs and legislators etc. are available with the secretariat of the respective Houses which can be accessed under the RTI Act. Where official transport has been provided to representatives, the log books of such vehicles are also accessible from the offices responsible for keeping a record of these travels. All such offices are either public authorities in their own right or happen to be offices connected to some public authority or the other. Any citizen can seek and obtain information from these public authorities about the expenditure incurred on the people's representatives under the RTI Act. Access will have to be provided unless it can be shown that one or more exemptions mentioned in section 8(1) are applicable.

Information about use of constituency development funds:

A recent trend that has come in for much criticism is the allocation of specific sums of money to every MP, MLA and MLC for the purpose of undertaking developmental work in his/her constituency in the name of Local Area Development Scheme. This facility has been

extended to municipal councillors as well, in some states like Delhi. This fund is administered by the Secretariat of the House concerned. Disbursements are made primarily through the District Collector (also known as Deputy Commissioner in some States). The Planning and Statistics Department of the State government also keeps track of the expenditure on this account. Theoretically speaking, the MP or legislator is expected to perform only an advisory role in the decision-making process. He/she is not required to handle the actual allocation and disbursement of funds. That task is handled by the office of the implementing or executing agency at the ground level. In practice several studies have found serious problems in the implementation of these schemes the most serious being corruption in the manner of allocation and spending of funds. Nevertheless any and all information held in the official records of the House secretariat, the department of the State Government overseeing the implementation and the offices of the district administration and the implementing agencies are accessible under the RTI Act directly through their respective PIOs.

Personal Information about public representatives:

Two path-breaking judgements of the Supreme Court of India handed down in 2002 and 2003 have made it mandatory for every candidate contesting elections to Parliament or the legislature of a State to declare on an affidavit details of one's movable and immovable property, criminal antecedents, if any and educational qualifications.² Property related details should also include assets owned by the spouse and three dependents of the contestant. This information is filed along with the nomination papers of the candidate. The Supreme Court has given a mandate to the Election Commission to make this information available on the notice boards of the Returning Officers in every constituency and also on its own website. This information continues to be accessible on the website of the Election Commission long after the completion of elections. In other words a lot of personal information about contestants including their PAN number is available in the public domain and can also be accessed by any citizen under the RTI Act by submitting an application to the PIO of the Election Commission.

Even though the Supreme Court order relates to elections to Parliament and State legislatures only, several civil society groups have succeeded in ensuring that similar disclosure becomes the norm in the panchayat and municipal body elections. For example, in Madhya Pradesh all candidates contesting elections to all level of panchayats are required to make similar information about their financial and educational status and criminal antecedents available on affidavit to the State Election Commission. This trend is spreading to other States as well. A wealth of personal information about representatives can be accessed under the RTI Act from the State Election Commission where such information is being maintained. It is only a matter of time before such disclosures become the norm in all local body elections around the country.

What kinds of information are not accessible about public representatives?

At least three categories of information relating to the activities of public representatives are not accessible under the RTI Act from any public authority.

a) petitions submitted to MPs and legislators by their constituents:

Voters do not look upon MPs merely as their representatives who will voice their concerns and aspirations on the floor of the House, make laws and hold the executive accountable for its actions. They are almost always seen as the link or mediators between the constituents and the executive. Many a sitting MP or legislator has lost an election because of the poor condition of civil amenities such as

² *Association for Democratic Reforms v Union of India*, JT 2002(4) SC501 and *People's Union for Civil Liberties v Union of India*, JT 2003(2) SC528

roads, lighting, water supply etc. even though providing such utilities is strictly speaking within the domain of the executive. As the bureaucracy is not always responsive to people's needs as much as they are to the concerns and issues raised by elected representatives, voters through their MP or MLA seeking solution to some of their problems. A problem may be as individualised as seeking a recommendation for employment in a government office or it may be an issue affecting the larger community such as the poor state of roads or the dysfunctional public distribution system. In many instances it could be in the form of a grievance such as illegal arrest of a person by the law enforcement authorities or it could be in the form of personal favours such as a public servant seeking transfer to a choice posting or seeking cancellation of a transfer order. In almost all such instances it is common practice to hand over a written petition to the public representative.

The MP or legislator may or may not take action on the petition he/she receives. Often action may be taken which leaves no paper trail, for example, a phone call made to the appropriate authority to get a job done will leave no paper based evidence of the action taken by the MP. In other instances a written recommendation may be sent by the representative. As these recommendations are addressed to some government office or the other, information about these documents and action taken by the officials can be accessed from those public authorities under the RTI Act. However a considerable number of petitions may exist in limbo without the MP or legislator taking any action on them. Such petitions may never be brought on the record of any public authority including the Secretariat of the House to which the representative has been elected. The petitioner has a right to know what happened to his/her petition and the only person whom he/she can approach is the MP or legislator concerned. As the petitioner approached the elected representative and requested him/her to take action in an official capacity it is necessary to make the elected representative answerable to the petitioner. This is based on the principle of accountability of the elected representative to his/her voters. Therefore it appears that there is an important category of information that will be accessible only from the MP or legislator concerned.

The same principle holds true for elected members of other local self-governing bodies. In metropolitan cities like Delhi, Mumbai, Bangalore, Chennai and Kolkata, councillors wield considerable influence on the executive. The same is true of smaller towns and district and Taluka headquarters. It appears that these representatives will also possess certain kinds of information that may not be accessible from any other public authority.

b) communication with the corporate sector:

As mentioned above, elected representatives are very influential people not only in the political arena but also in the economic sphere. The nexus between business and politicians is too well known to be explained here with the help of footnotes and references. Often correspondence is exchanged between elected representatives and companies and business houses in the corporate sector for securing favours or making changes in the public policy or bringing in a whole new policy altogether. The elected representative may use his/her official stationery in such correspondence with the private bodies but may or may not transmit a copy of the same to any public authority covered by the RTI Act. As this correspondence is conducted by the MP or legislator in his/her official capacity people have a right to access this information from him/her.

c) documents and papers relating to the local area development scheme not brought on the record of any public authority:

Given the size of the funds allocated under the local area development scheme several voters and groups approach an MP or legislator with suggestions and requests for their utilisation. These requests may also be in the form of written petitions. Unless the MP or legislator sends a copy of the same to a public authority responsible for implementing the scheme these papers are likely to remain with him/her. The petitioners have a right to know what decision was taken by the MP or legislator on their suggestions and requests. This is based on the principle of accountability as the MP exercises discretion in the selection of projects for recommendation given the limited nature of the resources. Citizens have a right to know from their elected representatives what criteria were applied for selecting a few projects for implementation and why other suggestions and requests were not recommended to the implementing authorities. This information can be provided only by the MP or legislator concerned if records explaining the rationale behind such decisions are not maintained by any other public authority.

d) Immovable property returns of elected representatives:

To the above list of documents may be added two other very important documents that are created by a public representative, namely, immovable property returns and returns of income. MPs and legislators are by law required to submit a declaration of assets and liabilities returns to the presiding officer of the House within 90 days after taking oath³. These documents are covered within the definition of 'information' and 'record' found in section 2 of the RTI Act. However access has been denied by public authorities under the pretext that they violate the privacy of the individual and also because they are held by the authorities in a fiduciary capacity. The same holds true of returns of income of MPs and legislators as the Income Tax Department has refused to provide access to these documents under the RTI Act. If MPs and legislators are made individually responsible for providing information under the RTI Act citizens will be able to have access to both categories of information directly from the public representative without attracting any of the exemptions invoked by other public authorities. An individual MP or legislator could not possibly violate his/her own privacy by disclosing income and property related information voluntarily. In any case most of this information is required to be disclosed at the time of contesting elections. Furthermore as holders of public office, elected representatives have to prove to their constituents that they are indeed worthy of representing them. So if no hesitation is felt upon earning income and acquiring property, an elected representative ought not to have any hesitation about disclosing details of the same to citizens. It is not enough if Caesar's wife is above suspicion, Caesar himself should be above suspicion. Transparency is an ideal way of securing the confidence of one's constituents.

Aforementioned papers not public documents:

It must be pointed out here that the categories of papers and documents mentioned above as being available with the MP or legislator do not qualify to be deemed as public documents. The terms 'public document' and 'private document' are defined in the *Indian Evidence Act, 1872*.⁴

³An assets and liabilities declaration form is available on the website of Parliament: http://164.100.24.208/ls/templates/Rules_L_A_2004_E.pdf Due to paucity of time we have not been able to verify this position from the provisions of laws relating to panchayati raj institutions and municipal bodies.

⁴ Sections 74 and 75.

“74. Public documents.- The following documents are public documents:-

- 1) documents forming the acts, or records of the acts-
 - i) of the sovereign authority,
 - ii) of official bodies and tribunals, and
 - iii) of public officers, legislative, judicial and executive, [of any part of India or of the Commonwealth], or of a foreign country;
- 2) Public records kept [in any State] of private documents.

75. Private documents.- All other documents are private.”

Although Parliament is a sovereign authority an individual MP wields that power only as part of the collective and not in isolation. As an MP or legislator is also not a public officer although he/she holds public office and performs public duties, the correspondence he/she undertakes using official stationery will have to be categorised as private documents.⁵ These definitions are part of a law that is antiquated even though it had been amended a few times after independence. Parliamentary tradition and systems had not yet been established in India at the time of the enactment of this law under the colonial regime. This might have been the reason behind the omission of papers maintained by MPs and legislators from the definition of public documents.

The definition of the term ‘public document makes it clear that it refers to documents and records created by a functionary of the State. MPs, MLAs, MLCs and elected representatives of local self-governing bodies are clearly functionaries of the State. Therefore access to their official papers must be provided for under the law, if not the *Indian Evidence Act*, then certainly under the RTI Act.

Are elected representatives covered under the definition of the term ‘public authority’?

It has been established above that certain categories of information held by public representatives are not accessible from any public authority covered by the RTI Act. The next question to determine is whether such information can accessed directly from the public representative under the Act. According to section 2(j) a citizens’ ‘right to information’ is applicable only to information held by or under the control of any ‘public authority’. Therefore it is important to make a determination as to whether a public representative is covered by the definition of the term ‘public authority’ mentioned in the Act. Section 2(h) of the RTI Act states:

“(h) “public authority” means any authority or body or institution of self-government established or constituted—

(a) by or under the Constitution;

(b) by any other law made by Parliament;

(c) by any other law made by State Legislature;

(d) by notification issued or order made by the appropriate Government,

and includes any—

(i) body owned, controlled or substantially financed;

⁵ According to Section 2(17) the *Civil Procedure Code, 1908* public officers are judges or any officer of the executive or law enforcement or prison authorities or any other officer who is in the service or pay of the Government. The public representative is therefore not a public officer within the meaning of this definition.

*(ii) non-Government organisation substantially financed,
directly or indirectly by funds provided by the appropriate Government;*

For an elected representative to qualify as a 'public authority' two criteria will have to be satisfied:

- a) his/her status as an authority, body or institution of self government and
- b) the law under which such status has been acquired

It is clear that a public representative is a part of a body or an institution of self government such as Parliament, State legislatures, panchayats, municipal bodies and district and regional councils and not the body or the institution itself in isolation. A public representative always performs his/her duties as part of the collective and not in isolation. For example, an MP or legislator may cast a vote in favour or against a Bill. For that vote to have effect, it must become part of the total number of votes cast on the floor of the House. Therefore it is clear that an elected representative does not meet two of the three sub-criteria contained in the first criterion.

The next issue that needs to be examined is whether an elected representative is an 'authority'? We have not come across any law which establishes conclusively that an MP or legislator is an 'authority' in his/her own right. Parliament, State legislatures and self governing bodies (to a limited extent) are clearly 'authorities' as they have the power to command and give directions that must be enforced. However such powers are exercised by the elected representatives collectively and never in isolation. But the authority of constitutional jurisprudence is available to argue that a public representative such as an MP or legislator can be deemed to be 'authority' based on the dimension of the 'public duty' he/she undertakes. In *Anadi Mukta Sadguru Shree Mukta Jeevandasswami Suvarna Jaya v V R Rudani and Others*⁶ a constitution bench of the Supreme Court has held that for the purpose of Article 226 of the Constitution of India, the term 'authority' includes any person or body performing a public duty.

"The words "any person or authority" used in Article 226 are, therefore, not to be confined only to statutory authorities and instrumentalities of the State. They may cover any other person or body performing public duty."⁷

Another constitution bench of the Supreme Court clearly indicated, in a judgement relating to a case concerning the prosecution of certain MPs for corruption in Parliament, that MPs and MLAs were holders of public office and performed public duties⁸:

"In a democratic form of Government it is the Member of Parliament or a State legislature who represents the people of his constituency in the highest law making bodies at the Centre and the State respectively. Not only is he the representative of the people in the process of making the laws that will regulate their society, he is their representative in deciding how the funds of the Centre and the States shall be spent and in exercising control over the executive. It is difficult to conceive of a duty more public than this or of a duty

⁶ AIR 1989 SC 1607.

⁷ Ibid.

⁸ *P V Narasimha Rao v State (CBI/SPE)*, AIR 1998, SC2120

in which the State, the public and the community at large would have greater interest.”⁹

However while the Court established that for the purpose of prosecution for corruption, MPs and legislators were ‘public servants’ it stopped short of making a definitive statement as to whether a writ of mandamus could be issued against them. The Court observed:

“It may be - we express no final opinion - that the duty that a Member of Parliament or a State legislature performs cannot be enforced by the issuance of a writ of mandamus but that is not a *sine qua non* for a duty to be a public duty.”¹⁰

MPs are protected from court action in respect of anything that they say or any vote cast by them on the floor of the House.¹¹ Similarly immunity from court proceedings is available to legislators in respect of anything said or vote cast on the floor of the legislature.¹² In-depth research into the constituting laws is necessary to establish whether elected representatives of local self-governing bodies also possess similar immunities. However the text of the 73rd and the 74th amendments to the Constitution and the Sixth Schedule do not provide them with any immunity from court proceedings in respect of anything said or vote cast in the House. Nevertheless it is clear that members of such local bodies are also occupants of a public office and perform public duties.

Even though the matter as to whether a writ of mandamus can be issued against public representatives has not been settled, it is clear from a combined reading of the two judgements that all elected representatives of public bodies may be said to be ‘authorities’ thereby satisfying the first criterion.

Now that it has been established that there is a case for considering MPs, legislators and elected representatives of self-governing bodies as ‘authorities’ mentioned in section 2(h) of the RTI Act, the second criterion is easy to match. The bodies to which these representatives are elected have themselves been established by the Constitution. The notification of the constitution of the new Lok Sabha or Legislative Assembly after an election is issued by the Election Commission under the *Representation of the People Act*. Similarly the notification of the newly elected members of panchayats is issued by the respective State Election Commissions. Members of urban bodies and district and autonomous councils are similarly constituted either under the Constitution or some State legislation or the other governing such bodies. **Therefore there remains little doubt that elected representatives of public bodies are public authorities within the meaning of that term under the RTI Act.**

Are public representatives obliged to provide access to information under the Act?:

As it has been established above that all elected representatives fall within the category of ‘public authorities’, the citizens’ right to access information will extend to the information held in their custody or under their control as understood in section 2(j) of the RTI Act. A citizen will have the right to seek and obtain information relating to any one or all four categories of information discussed above that are held by an elected representative but not accessible from any other public authority.

⁹ Ibid., para 62.

¹⁰ Ibid.

¹¹ Article 105(2), Constitution of India.

¹² Article 194(2), Ibid.

Problems of implementation:

A law is only as good as its implementation. Merely identifying someone as a public authority is not adequate for the purpose of securing compliance with the provisions of the Act. Certain implementation problems need to be smoothed out if citizens are required to meaningfully exercise their right to access information from public representatives. Some of these problems are listed below:

1) Manifold increase in the number of public authorities covered by the Act:

By deeming public representatives as public authorities in their own right, the number of public authorities under the RTI Act will increase manifold. The following statistics provide a bird's eye view:

Public Authority	Total number (approx.)
Members of the Lok Sabha	545
Members of the Rajya Sabha	235
Members of the Legislative Assemblies	4,120
Members of Legislative Councils (six states)	475
Members of Panchayats	28,28,779 ¹³
Members of Municipal bodies	50,000
Members of autonomous district and autonomous regional councils	500 ¹⁴
Total	28,84,654

Increase in the number of public authorities will imply increase in the burden placed on Information Commissions. As a large majority of these newly identified public authorities happen to be semi-literate or unlettered (at the panchayat level), it is highly likely that the number of disputes relating to access to information will go up astronomically due to their ignorance of the provisions of the RTI Act. However this is likely to be a temporary phenomenon. With more training and sensitisation the number of disputes is likely to come down.

2) Lack of office infrastructure:

Unlike in advanced democracies, public representatives are provided with few facilities in India. Members of panchayats and municipal bodies have almost no infrastructure to depend upon except the small group of officials who service them. In order to be able to perform their duties under the RTI Act they must be provided adequate staff and infrastructure facilities.

3) Difficulty in giving effect to certain rights and obligations:

As individual public representatives will be performing the role of public authorities without adequate office infrastructure, some serious problems with regard to information access systems and procedures are likely to arise. For example:

¹³ Source: *Sixth Report of the Second Administrative Reforms Commission on Local Self Governance*, New Delhi, 2007, p.8

¹⁴ Rough estimate as actual figures are not available.

- i) Designation of PIOs, APIOs and Appellate Authorities: The scheme of the RTI Act envisages multi-member bodies as public authorities. For example, a public authority should have adequate staff for designating PIOs, APIOs and Appellate Authorities (AAs) to deal with information requests and grievances. As most public representatives do not have offices of their own and also do not have staff who can be treated as officers of the MP's or legislator's office, designation of PIOs, APIOs and AAs will pose problems. Perhaps a way out is to make the public representative his/her own PIO. As there is no senior officer to be appointed as the AA, if a requestor has a grievance against the elected representative he may directly approach the relevant Information Commission with a complaint. This system can be implemented without making any amendments to the RTI Act.
- ii) Provision of certified copies of documents: A citizen's right to information includes the right to seek and obtain certified copies of documents from a public authority. Certified copies of documents can be provided only by gazetted public officers. Elected representatives do not qualify to be considered as officers who have the authority to issue certified copies of documents. Therefore elected representatives will have to be provided with access to at least one gazetted public officer who can certify documents in the custody of the elected representative as true copies of the original.
- iii) Collection of fees: To the best of our knowledge no elected representative maintains receipt books. Therefore special provisions will have to be made for collection of fees. The Fee Rules issued by the competent authority will have to clearly indicate only such modes of fee payment that will ensure that the elected representative is able to realise the fee amount. For example, payment in cash, or through IPO or DD drawn in favour of the elected representative will ensure that he/she will be able to realise the value of such instruments. However if payment is made in the form of non-judicial stamps or court fee stamps or treasury challan the revenue will go to the State treasury, not the individual public representative. This is also likely to lead to an increase in the fee payment related disputes. There is a strong possibility that some requestors will knowingly pay fees through a mode that is not realisable by the public representative and insist upon obtaining access to information.
- iv) Responding to summons of Information Commissions before and during the session of Parliament or State Legislature: One of the privileges enjoyed by MPs and legislators is the freedom from being summoned by a court in any civil matter 40 days before and 40 days after a particular session of the House. Even process in criminal matters cannot be issued to an MP or legislator without the approval of the presiding officer of the House. As MPs and legislators are busy for long periods in the sittings of the House at least three times a year the relevant Information Commission will have to schedule hearings in information disputes relating to the elected representatives with deference to the sessions of the House. This problem will be compounded when MPs and legislators are required to attend committee meetings which carry the same immunities. Notice to attend hearings of the Information Commission cannot be served on them during these meetings. These restrictions are likely to place a considerable burden on the staff of the Information Commissions who are responsible for scheduling hearings in complaints cases.

Advantages of deeming public representatives as public authorities:

From the above discussion it is clear that there are peculiar obstacles that need to be overcome if public representatives are deemed as public authorities. However these problems are not insurmountable if the willingness to share information exists and if citizens do not unduly burden the public representative with information requests. One advantage of deeming public representatives as public authorities under the RTI Act will be the provision of necessary office infrastructure which has been lacking even before the enactment of the RTI Act. Public representatives will be able to perform their duties better. A second advantage of deeming public representatives as public authorities under the RTI Act will be the empowering of voters to scrutinise their actions between elections. It is hoped that increased levels of scrutiny will make many an errant public representative to take one's duties and obligations seriously.

Public Representatives and Information Access Laws: International Practice

Access legislations around the world follow two distinct models for defining public authorities covered:

- (1) Explicit; and
- (2) Implicit.

Under the implicit model the legislation typically acts as the authoritative regime governing access to information in the country, whereas the explicit model often appears to be complementary to existing legislation. This is not to say that this is always the case; however, in countries such as the United Kingdom, New Zealand and Canada, there exists other legislation (e.g., environmental legislation and local government legislation) under which it is possible to request information from public authorities.

Additionally, under the explicit model the legislation enumerates the “public authorities” that are covered under the Act, and may or may not provide a list of public authorities covered in a Schedule. The implicit model is more open-ended and non-exhaustive in its coverage.

INTERNATIONAL ACCESS REGIME

1. Explicit Models

To some extent, elected representatives are covered through coverage of the legislature. But, unlike other public employees, whose official acts would be considered as acts of their public employers, and of an administrative nature, elected representatives are a bit different. To the extent that acts which should be caught by the RTI regime are not considered acts of the elected body itself, it is arguable that elected representatives should themselves be considered to be public bodies.

a. Countries where Parliament Included

In the **United Kingdom**, the *Freedom of Information Act, 2000*, is styled as, “[a]n Act to make provision for the disclosure of information held by public authorities or by persons providing services for them”. Public authorities are defined at section 3(1):

- (1) In this Act “public authority” means—
 - (a) subject to section 4(4), any body which, any other person who, or the holder of any office which—
 - (i) is listed in Schedule 1, or
 - (ii) is designated by order under section 5, or
 - (b) a publicly-owned company as defined by section 6.

Schedule 1 of the UK Act explicitly provides that any government department, the House of Commons, the House of Lords, the Northern Ireland Assembly, and the National Assembly for Wales are considered public authorities under the Act.

At the outset it is important to distinguish the threshold question of whether and to what extent elected representatives are *prima facie* covered by the access legislation and the separate question of what, in light of legitimate exceptions to the right of access, they are actually required to disclose. While MPs are not expressly mentioned in the Schedule of the

UK law or otherwise within the text of the Act, the Act has nevertheless been used to request information concerning MPs from the Secretariats servicing these bodies.¹⁵

The website of the UK Parliament states clearly that MPs are not responsible for providing information directly under the FOI Act.¹⁶

Anyone who wants information about the activities of their MPs or councillors is entitled to such information only if it is held by or on behalf the authority concerned. Elected members of local authorities (including municipalities and town councils) also have a dual role to this end:

- (1) They are part of the decision-making process of the authorities. Information they hold in this capacity is subject to the Act and the authority is responsible for disclosing such information. A request to a councillor for such information would accordingly have to be answered by the authority. This would be true even if the only copy of the information was physically held by the councillor (e.g., the only copy of a report, which the councillor had prepared on behalf of the authority, but which had not yet been submitted to it.)
- (2) They act on behalf of individual constituents in trying to resolve complaints. In this case, the information they have (e.g., information the constituent has provided to the elected member about a problem) is held on behalf of the authority itself, as the authority has no control over it. This information likely would not be subject to the Act.

It should also be noted that in 2007, the *Freedom of Information (Amendment) Bill* was introduced, in part, to ensure that correspondence of MPs would exempt from FOI requests. The most revealing aspect of the introduction of this Bill, and this goes directly to the comments in the preceding paragraphs, is that at the time of the Bill's introduction it was accepted that correspondence of MPs was presumed subject to FOI requests.

It should equally be noted that there was a concerted opposition to these proposed changes in the UK House of Commons during the debate of this Bill. The then leader of the Liberal Democrats, Sir Menzies Campbell, said there should not, "be one law for MPs and a different law for everyone else," and that it looked like "Parliament has something to hide".¹⁷ Labour MP David Winnick, an opponent of the bill, said: "Exempting MPs from the Freedom of Information Act can only bring the House of Commons into disrepute".¹⁸

After leadership of the Labour Party, and effectively the UK Parliament, changed from Tony Blair to Prime Minister Gordon Brown, the PMO refused to block the controversial move by MPs to escape the ambit FOI Law.¹⁹ However, while the Bill met approval on three readings

¹⁵ Times Online, "59 things that would have stayed secret", 7 March 2007, <http://www.timesonline.co.uk/tol/global/article1471409.ece>, retrieved 26 August 2008.

¹⁶ UK Parliament
Website: http://www.parliament.uk/parliamentary_publications_and_archives/foi_introduction.cfm,
retrieved 26 August 2008

¹⁷ BBC News, "Blair 'no comment' on info bill", 25 April 2007, http://news.bbc.co.uk/1/hi/uk_politics/6591933.stm, retrieved 26 August 2008.

¹⁸ BBC News, "MPs to debate info exemption bill", 27 April 2007, http://news.bbc.co.uk/2/hi/uk_news/politics/6598759.stm, retrieved 26 August 2008.

¹⁹ BBC News, "Brown will not block secrecy bill", 18 May 2007, http://news.bbc.co.uk/2/hi/uk_news/politics/6667431.stm, retrieved 26 August 2008.

in the House of Commons, it proceeded no further than its 21 May 2007 first reading in the House of Lords.²⁰

In **Scotland**, under the *Freedom of Information (Scotland) Act, 2002*, coverage is provided for public bodies over which the Scottish Parliament, rather than United Kingdom Parliament, has jurisdiction, fulfilling a similar purpose to the UK-level *Freedom of Information Act, 2000*. The Scottish Act similarly provides under Schedule 1, Part 1, that (2) the Scottish Parliament and (3) the Scottish Parliamentary Corporate Body are covered by the Act.

In **Ireland**, under the *Freedom of Information Act, 1997*, “public bodies” are required to be construed in accordance with the First Schedule. Schedule 1 includes “Office of the Houses of the Oireachtas”. This arguably has the same effect as the Schedules of the UK *Freedom of Information Act, 2000* and the Scottish *Freedom of Information (Scotland) Act, 2002*; however, while parliament is not excluded from the scope of the FOI Act altogether, a wide range of parliamentary records are excluded or exempt.

First, “private papers” are excluded under sections 46 and 22 of the Act. This is to say, information submitted by or to the Houses of Parliament for “consideration” is also exempt under sub-clause 22(1)(c)(ii)(I) of the Act. This category covers opinions, advice, recommendations, or the results of consultations, considered by:

- (1) The Houses of Parliament or by any member of either House or by a member of the staff of the Office of the Houses of Parliament for the purposes of the proceedings at a sitting of either such House; or
- (2) A committee appointed by either House of Parliament where the information has been considered for the purposes of proceedings at a meeting of such a committee.

Section 22 is unlike most other exemptions in that: (a) it is mandatory and must be applied where an FOI request seeks material coming within; (b) its parameters; (c) there is no application of an injury test before it can be invoked; and (d) there is no public interest override.²¹

Two restrictions in the exemption are worthy of note: firstly the material must consist of a record described above, rather than broadly relate to such matters; and secondly, before this exemption applies, the material involved must have been considered by one of the following:

- (1) the Ceann Comhairle;
- (2) the Leas Ceann Comhairle;
- (3) the Cathaoirleach of the Seanad;
- (4) the Leas Cathaoirleach;
- (5) the Dail or Seanad;
- (6) an Oireachtas committee;
- (7) a Member; or

²⁰ UK Parliament Website, “Bills and Legislation – Freedom of Information (Amendment) Bill 2006-07”, http://www.publications.parliament.uk/pa/pabills/200607/freedom_of_information_amendment.htm, retrieved 27 August 2008.

²¹ Government of Ireland (Department of Finance), “FOI Manual Index Part 6”, <http://www.finance.gov.ie/Viewprnt.asp?fn=/documents/foi/foiman06.htm&StartDate=1+January+2008>, retrieved 28 August 2008.

(8) a member of staff of the Office of the Houses of the Oireachtas.²²

Section 22 of the Irish Act links with section 46. That section excludes from FOI access any record held, or created by the Attorneys General, other than one relating to the general administration of that Office. It also excludes from the scope of the Act a record relating to the private papers of a Member of either House, as well as an official document of the Houses which is required by the rules or standing orders to be treated as confidential. Clause 46(1)(e) of the Act makes reference to private papers, “within the meaning of Article 15.10 of the Constitution,” though Article 15.10 of the Irish Constitution does not provide any further elaboration on what “private papers” might entail.

Finally, records given to Ministers in connection with proceedings of the Houses of Parliament, including question time are also excluded under clauses 19(1)(a) and 20(1)(a), as are records relating to the costing of any proposal of a political party carried out for or on behalf of that party. Where material consisting of advice, etc., on proceedings has not been developed to the point of submitting it for consideration by one of the authorities enumerated above, protection for such records can be sought under section 20.²³

Thus, the private papers of Members of Parliament and of local government representatives are excluded from the scope of the Act and in addition records created for or held by Government Ministers or the Attorney General are exempt where they relate to the functions and activities of political parties or to their own functions and activities as Members of the Parliament or of political parties.

Apart from these exceptions, information about the official activities of MPs and local government representatives are covered by the Act. The Information Commissioner has found that none of these exceptions cover details of expenses paid to Members of Parliament.

In **Trinidad and Tobago** under the *Freedom of Information Act*, both Parliament and Tobago House of Assembly are included in the exhaustive definition of “public authorities”. Similarly, in **Antigua and Barbuda**, under *The Freedom of Information Act, 2004*, the exhaustive definition for “public authority” provided under section 3(1) includes (a) the Government and (c) the “Barbuda Council”. The Trinidad and Tobago law would arguably capture the activities of MPs in the way that they are captured in the UK and Ireland as described above. However, it is unclear how far the drafters of the Antigua and Barbuda law intended “Government” to extend, and whether this would include activities of MPs.

In **Moldova**, under the *Law on Access to Information*, Article 5 expressly provides that “information providers” includes (2)(a) Parliament and (2)(c) individuals and legal entities that, under the law or contract with public authorities, are empowered to provide some public services and to collect, select, preserve and hold official information, including data with private character. Following the models described above in the UK, Scotland and Ireland, by expressly listing Parliament as an information provider, it appears that information produced by MPs but held by other authorities, such as Parliament, is accordingly included under the Act.

In **Peru**, under the *Law of Transparency and Access to Public Information*, Article 2 of the Act provides that “public administration entities” are “understood as the ones mentioned in Article 1 of Preliminary Law number 27444, *Law of General Administrative Procedures*.”

²² *Ibid.*

²³ *Ibid.*

Additionally, Article 7 provides that, “[e]very individual has the right to request and receive information from any branch of Public Administration.”

While the terminology provided under the English translation of the Act is one of “administration”, Article 1 of the *Law of General Administrative Procedures* enumerates the following so-called administrative entities (though it should be borne in mind that this is not an official English translation of the Peru Act):

- (1) *El poder Ejecutivo, incluyendo Ministerios y Organismos Públicos Descentralizados* [i.e., The Executive power, including Departments and Decentralised Public Agencies]
- (2) *El poder Legislativo* [i.e., The Legislative power]
- (3) *El poder Judicial* [i.e., The Judicial power]
- (4) *Los Gobiernos Regionales* [i.e., The Regional Governments]
- (5) *Los Gobiernos Locales* [i.e., The Local Governments]
- (6) *Los Organismos a los que la Constitución Política del Perú y las leyes confieren autonomía* [i.e., The Agencies to the ones that the Political Constitution of Peru and the laws confer autonomy]
- (7) *Las demás entidades y organismos proyectos y programas del estado, cuyas actividades se realizan en virtud de potestades administrativas y, por tanto se consideran sujetas a las normas comunes de derecho público, salvo mandato expreso de ley que las refiera a otro régimen* [i.e., The other companies and agencies projects and programs of the state, whose activities are carried out by virtue of administrative legal authorities and, therefore they are considered you hold to the norms communes of public right, save mandate I express of law that refer them to another state]
- (8) *Las personas jurídicas bajo el regimen privado que prestan servicios públicos o ejercen funciones administrativa, en virtud de conseción, delegación o autorización del Estado, conforme a la normativa de la material* [i.e., The legal people under the regimen private that lend public utilities or exercise administrative functions, by virtue of concession, delegation or authorization of the State, according to the regulation of the matter]

While it is uncertain whether “the Legislative Power” includes individual MPs, it is also worth noting that Article 2(5) of the Constitution of Peru specifically refers to “any public entity”. Indeed, an unofficial English translation of Article 2(5) guarantees the citizens’ right:

To request without expression of cause the information that require and to receive it of any public entity, in the legal time limit, with the cost that suppose the order.... (emphasis added)

In **Sweden**, Chapter 2 of *The Freedom of the Press Act* concerns public access to information and includes the Riksdag (i.e., Swedish Parliament) within its ambit. Article 1 provides that, “[e]very Swedish subject shall have free access to official documents.” Article 5 provides, “...the Parliament, the General Assembly of the Church, and any local government assembly vested with powers of decision-making shall be equated with a public authority.”

Sweden's *The Secrecy Act* contains provisions on what is to be kept secret in state and municipal activities, and the duties of secrecy which supersede the right to communicate information are listed in *The Secrecy Act* rather than *The Freedom of the Press Act* itself.²⁴

In principle, all Swedish citizens and aliens are entitled to read the documents held by public authorities. However, this right is restricted in two ways. Firstly, the public only enjoy the right to read such documents that are regarded as official documents. Not all documents of a public authority are in fact considered to be official documents. Thus, for example, a draft of a decision, a written communication or the like in a matter is not an official document if the draft is not used when the matter is finally determined. Secondly, a number of official documents are secret. This means that the public is not entitled to read the documents and the public authorities are forbidden to make them public.²⁵

The Swedish Parliament, however, proactively discloses information in a number of forums. The Riksdag Protocols (transcripts) are available at the Riksdag web site. The public can subscribe to press releases, decisions in brief etc. in order to keep up to date with parliamentary business. The Riksdag webpage also (www.riksdag.se) contains the Chamber's agenda and information relating its activities. The journal "Från Riksdag & Department" (<http://www.rod.nu>) offers news, information, research and opinion on Riksdag issues.²⁶

The Office of Information and Knowledge Management is the Swedish body responsible for promoting increased openness and access to information and factual background material about the Riksdag, its work and the EU. The various divisions of the Office of Information and Knowledge Management are responsible for addressing the public's, media's, private sector's and organisations' need for information. They also provide background material and monitor local, national and international developments for members and employees of the Riksdag in order to ensure a high level of quality in the decision-making process.²⁷

In **Turkey** under *Law No. 4982 on the Right to Information*, Article 2 provides, "this law is applied to the activities of the public institutions and the professional organisations which qualify as public institutions." Article 3(a), in a circular fashion, defines "institutions" as being "all the authorities that can be included under article 2 of this law." "Institutions" and "public institutions" are not further defined in the Act, and nothing is otherwise provided to restrict the scope of the coverage of the Act in this respect. Arguably, Parliament would be considered a public institution within the meaning of this Act, and for the reasons stated throughout this section, the activities of individual MPs should equally be covered absent an express directive from Parliament that these activities should not.

In the **Ukraine** under the *Law on Information*, is an interesting law in that it does not concern merely public access to government information, but rather defines relationships between everyone within the Ukraine, and then elaborates on those relationships with respect to information.

²⁴ Ministry of Justice, Sweden, Public Access to Information and Secrecy with Swedish Authorities, (Tryck: Edita Stockholm, December 2004), www.sweden.gov.se/content/1/c6/03/68/28/b8e73d81.pdf, retrieved 28 August 2008.

²⁵ *Ibid.*

²⁶ Freedominfo.org, "Legislative Transparency in Sweden", <http://www.freedominfo.org/features/leg-sweden.htm>, retrieved 28 August 08.

²⁷ *Ibid.*

Article 3 of the Ukraine Act provides, “[t]his Law shall apply to information relationships in all spheres of life and activities of society when receiving, using, disseminating, and storing information.” Article 7 then provides, “[t]he following shall be subjects of information relationships: citizens of Ukraine; juridic persons; the state,” which would presumably include the Ukraine Parliament (or equivalent body). Article 10 further provides, “[t]he right to information shall be secured by: [inter alia] executive, local, and regional self-government authorities being under the obligation to inform about their performance and decisions.”

Article 43 of the Ukraine Act provides, “[e]ach such participant, in order to secure his/their right, freedoms, and lawful interests, shall have the right to receive information concerning: activities of bodies of state authorities; activities of People's Deputies [MPs]; activities of local and regional self-government authorities and local [state] administrations; personal/private aspects.” While Article 21, on Information Provided by Central State Organs and Local and Regional Self-government Authorities, is not expansive, it is clear that under Article 43 the activities of MPs are caught under the ambit Act.

b. Countries where MPs Expressly Excluded

The activities of MPs, and indeed any documents generated by MPs, can be expressly excluded from an access regime. As noted above, while MPs are arguably caught under the access law of Ireland, sections 22 and 46 of the Irish *Freedom of Information Act* excludes papers generated by them.

In **Australia**, under sections 4(3)(a) and (b) of the *Freedom of Information Act*, MPs are expressly excluded:

- (3) *A person shall not be taken to be a prescribed authority:*
 - (a) *by virtue of his or her holding:*
 - (i) *an office of member of the Legislative Assembly for the Australian Capital Territory;*
 - (ii) *an office of member of the Legislative Assembly of the Northern Territory or of Administrator or of Minister of the Northern Territory; or*
 - (iii) *an office of member of the Legislative Assembly of the Territory of Norfolk Island or of Administrator or Deputy Administrator of that Territory or an executive office created pursuant to section 12 of the Norfolk Island Act 1979 ; or*
 - (b) *by virtue of his or her holding, or performing the duties of:*
 - (i) *a prescribed office;*
 - (ii) *an office the duties of which he or she performs as duties of his or her employment as an officer of a Department or as an officer of or under a prescribed authority;*
 - (iii) *an office of member of a body; or*
 - (iv) *an office established by an enactment for the purposes of a prescribed authority.*

Similarly, in **South Africa** MPs are expressly excluded under section 12(c) of the *Promotion of Access to Information Act*, where it is stated, “[t]his Act does not apply to a record of...an individual member of Parliament or of a provincial legislature in that capacity.”

On the other hand, an Act may expressly list those bodies that are covered within the scope of the Act, thereby excluding any bodies not listed therein. Under **Canada's** *Access to Information Act*, only “government institutions” as defined by Act and included in Schedules are subject to Act. Neither the House of Commons nor Parliament are mentioned in

Schedules or otherwise mentioned in Act as “government institutions” and are therefore not subject to the ambit of the Act. This is also the case under provincial legislation, such as Nova Scotia’s *Freedom of Information and Protection of Privacy Act*.

Along the same lines, in **Jamaica** under the *Access to Information Act*, a “public authority” is exhaustively defined to include a Ministry, department, Executive Agency or other agency of Government, and any other body or organization specified in an order under section 5(3). Neither the Senate nor Parliament are mentioned in Act, nor are MPs expressly mentioned. Similarly, in **Hong Kong** under the *Code on Access to Information*, all government departments to which the Code applies are listed at Annex A. Neither Parliament nor the Legislature are listed at Annex A and the Code does not otherwise make provision for MPs.

In **Thailand** under the *Official Information Act, B.E. 2540*, section 4 exhaustively defines a “state agency” to mean the central administration, provincial administration, local administration, a State enterprise, a Government agency attached to the National Assembly, the Court only in respect of the affairs unassociated with the trial and adjudication of cases, a professional supervisory organisation, an independent agency of the State, and such other agency as prescribed in the Ministerial Regulation.” This exhaustive definition refers to a “government agency attached to the National Assembly” and not the “National Assembly” itself, which is evidently excluded.

The *Official Information Act 1982* in **New Zealand** law was passed to “make official information more freely available, to provide for proper access by each person to official information relating to that person, to protect official information to the extent consistent with the public interest and the preservation of personal privacy, to establish procedures for the achievement of those purposes”. “Members” are defined as being persons both elected and appointed to positions within organizations listed in the First Schedule.

Under the New Zealand law, Ministries, Departments, the Parliamentary Council Office, and the Legislative Department all covered, while Parliament is not specifically listed in Schedule 1 or the schedules of any related Acts.

As noted above, there is typically existing legislation that allows for the disclosure of information (e.g., environmental legislation and local government legislation), prior to the passage of a dedicated access law. Thus, it becomes discretionary whether, in drafting an access law, it should override the existing, piecemeal access regime, or if should be complimentary to the existing legislation. To draw once again on the example of Canada, under the *Access to Information Act*, the Canadian Parliament expressly provides at subsection 1(1) the purpose of the Act is, “to extend the present laws of Canada to provide a right of access to information in records under the control of a government.” Subsection 1(2) further provides, “[t]his Act is intended to complement and not replace existing procedures for access to government.”

2. Implicit Models

a. Countries where Parliament Impliedly Included

An example of Parliament being impliedly included is found in **Finland** under section 4(2) of the *Act on Openness of Government Activities*, which, without including Parliament itself or members there, states that “authorities” includes Parliamentary agencies and institutions, state administrative authorities, state agencies and state institutions.

The principles behind the Finland Act are succinctly stated in section 1:

- (1) *Official documents shall be in the public domain, unless specifically otherwise provided in this Act or another Act.*
- (2) *There are specific provisions that apply to the right to attend Parliamentary plenary sessions, meetings of municipal councils and other municipal bodies, court hearings and meetings of ecclesiastical bodies. (emphasis added)*

Section 17 expressly provides that in keeping with the principles stated in section 1, along with the objectives stated in section 3, “an authority shall see to it... access to information on the activities of the authority is not unduly or unlawfully restricted, nor more restricted than what is necessary for the protection of the interests of the person protected, and that the persons requesting access are treated on an equal basis.”

The Finland Act’s entry into force in 1999 repealed the *Act on the Publicity of Official Documents* (83/1951), which applied to parliamentary documents. Sub-section 37(3) of the Finland Act provides that, until such time as the *Parliament Act* (7/1928) is repealed, the *Act on the Publicity of Official Documents* would continue to apply to parliamentary documents, as provided in section 28 of that Act (the secrecy provisions contained in other Acts are also to be specifically repealed). Sub-section 37(4) additionally provides that the secrecy orders based on the *Act on the Publicity of Official Documents* shall remain in force (it is uncertain whether the *Parliament Act* remains in force on date of writing). It is understood that the *Parliament Act* was replaced by Finland’s present Constitution, which came into force on 1 March 2000.

In **Uganda** under the *Access to Information Act*, section 2 very broadly provides that the Act applies to all government unless exempted under Act. This definition does not distinguish between administrative or legislative bodies and by this definition alone it is difficult to ascertain whether Parliament was intended to be included within the scope of the law (though “government” would likely be held to imply executive or administrative branches of government rather than the legislative branch).

Greater insight can be found by examining the purpose of the Uganda Act, which is set out in section 3:

- (a) *to promote an efficient, effective, transparent and accountable Government;*
- (b) *to give effect to article 41 of the Constitution by providing the right of access to information held by organs of the State, other than exempt records and information;*
- (c) *to protect persons disclosing evidence of contravention of the law, maladministration or corruption in Government bodies;*
- (d) *to promote transparency and accountability in all organs of the State by providing the public with timely, accessible and accurate information; and*
- (e) *to empower the public to effectively scrutinise and participate in Government decisions that affect them.*

Like the Finnish Act, and similar to the purpose as it is stated in the Preamble of the Indian RTIA, it is evident that the purpose of the Uganda Act is to promote transparency and accountability and to scrutinise and participate in Government decision-making. This would logically extend to the legislative branch of government and further to the activities of individual MPs: offices where a great deal of Government decision-making is done.

Similarly, the **Portuguese** *Law no. 65/93 on Access to Administrative Documents* is also very broad in scope. Article 3 provides the Act applies to, “the State or the autonomous regions that perform administrative functions, by organs of either public institutes or public

associations, organs of the local authorities, organs of associations or federations of local authorities, as well as other entities that exercise public authority according to the law.” It should be noted, however, that it is unknown whether, in practice, MPs in either Uganda or Portugal actually respond to access requests or if they are direct applicants to other relevant authorities covered by the Act.

In **Germany**, under the *Act to Regulate Access to Federal Government Information*, section 1(1) provides that, in principle, “everybody has a right of access to official information from agencies of the federal government according to the terms of this Act.” The section also provides that the Act applies to other federal bodies and institutions to the extent that such bodies and institutions perform public administrative duties. Specifically, section 1(1) provides:

A person or legal entity is the equivalent of an agency within the meaning of this Act to the extent that an agency makes use of such person or entity in the performance of its public duties. (emphasis added)

While administrative duties (performed by “other federal bodies and institutions”) are clearly not legislative duties, the concept of public duties is sufficiently wide enough to encompass legislative duties. As such, an MP would clearly fall within the ambit of this definition under the German law.

Lastly, under **Romania’s** *Law no. 544 Regarding the Free Access to the Information of Public Interest*, an admittedly more tenuous example, Article 2(a) provides that “authority” or “public institution” “is understood [to include] any authority or public institution, as well as any state company (régie autonome), which uses public financial resources and carry on its activities on Romania’s territory, in accordance with the Constitution.” Similarly, the **Albanian** [Art. 2 of the *Law on the Right to Information for Official Documents*], **Estonian** [Art. 5(2) of the *Public Information Act*], and **Bulgarian** [Art. 3.2 of the *Access to Public Information Act*], define public authorities to include individual persons exercising public functions or being funded by the public. In **Armenia**, however, the *Law of the Republic of Armenia on Freedom of Information* defines an “information holder” as including “state bodies”, and this definition likely would not be construed to extend to individuals (e.g., individual MPs).

Again, as has been indicated, it is unknown whether, in practice, MPs in these countries actually respond to access requests or if they are direct applicants to other relevant authorities covered by the Act. These expansive definitions should logically extend to MPs, whose expenses and salaries are generally paid for out of the public purse, if it can be agreed that the activities of MPs are public functions.

b. Countries where Parliament Impliedly Excluded

While some Acts may not expressly exclude Parliament or members thereof from the ambit of the access regime, due to drafting particularities in the Acts, the legislative bodies are impliedly excluded.

For example, the various pieces of access legislation of a number of countries employ wide definitions of public bodies without narrowing the scope to particular aspects of government. One example is found in **Slovakia**, where, under Article I of *The Freedom of Information Act*, section 2(1) defines “obligees” as being:

The entities obliged to provide access to information under this Act shall be state agencies, municipalities, as well as legal entities and natural persons

that have been given the power by law to make decisions on the rights and responsibilities of natural persons or legal entities in the area of public administration, and that [obligation applies] only within the scope of their decision-making power.

Under the same Article of the Slovakia Act, section 5(1) outlines the mandatory disclosure requirements of “obligees”, while section 5(2) considers mandatory disclosures of National Council of the Slovak Republic. Since the drafters of the Slovakia Act did not include the National Council within the definition of “obliges”, and rather provided it with its own subsection, the National Council is impliedly not an “obligee” within meaning of Act.

In **the Netherlands**, under the *Act containing Regulations governing Public Access to Government Information*, section 1(a) provides the Act has application to Ministers and administrative authorities. This does not appear to include MPs, or the legislative power, and is more appropriately characterized as one applying to the executive power, concerning “administrative matters” (which, under the Act, are defined as matters “of relevance to the policies of an administrative authority, including the preparation and implementation of such policies”). However the rules and procedures of Parliament do provide access to information about the activities of MPs which is not otherwise accessible under Netherland’s RTI regime.

In **Belize**, section 9 of the *Freedom of Information Act, 2000* provides that, “every person shall have a right to obtain access in accordance with this Act to a document of a Ministry or prescribed authority.” Section 3(1) exhaustively defines “Ministry” to mean a Ministry of the Government, including a Minister, Minister of State and officers and servants of that Ministry (it should be noted that references to “Ministries” are taken to be references to “Departments of Government” under the Act). Similarly, section 3(1) exhaustively defines “prescribed authority” to mean: (a) a local authority (a city council, town council or a village council); (b) a public statutory corporation or body; or (c) a body corporate or an unincorporated body, established for a public Purpose, which may be prescribed by the Minister by Order published in the *Gazette*.

The Belize law also provides a number of exclusions. Section 4(a) provides a court, or the holder of a judicial office or other office pertaining to a court, in his capacity as the holder of that office, is not to be taken to be included in a Department. Section 4(b) provides a registry or other office of a court, and the staff of such a registry or other office in their capacity as members of that staff, shall not be taken to be part of a Department. Section 5 provides the Office of the Governor-General shall not be deemed to be a Department of Government.

However, there is no reference to Parliament in the Belize law, nor are there references to individual members of Parliament, and in the course of this review any Regulations made pursuant to the Act were inaccessible on the internet. There is furthermore no Schedule of Ministries or prescribed authorities provided for within the Act itself. It is accordingly presumed that the Belize law does not apply to the Parliament of Belize and is rather intended to apply solely to administrative aspects of governance..

A number of other European countries similarly have adopted laws that restrict access to bodies carrying out administrative functions. In **Macedonia** under Article 3 of the *Law on Free Access to Information of Public Character*, “information holders” are restricted to state administration bodies, to other such bodies and institutions as specified by law, and to natural persons performing public competencies and activities of public interest determined by law.

Similarly, in **Norway**, under the *Act relating to Public Access to Documents in the Public Administration*, application of the Act is restricted to “administrative agencies”, which would

presumably exclude Parliament. However, the Act, while applying to “such activities as are conducted by administrative agencies unless otherwise provided by or pursuant to statute”, under section 1 provides, “any central or local government body shall be considered to be an administrative agency.”

Furthermore, under the Norway law, “a private legal person shall be considered to be an administrative agency in cases where such person makes individual decisions or issues regulations.” The term “private legal person” implies juristic person but, if the definition is interpreted broadly enough to include natural persons, MPs are natural persons tasked with making individual decisions, and therefore would accordingly be included under the Act (if not already included within the central government body). At the same time, while MPs make individual decisions, the decision has effect only if it has the force of the majority backing it up. As has been stated above, it is important to know from practice whether MPs are targeted with and respond to information requests individually. As such, it remains difficult to gauge whether it is intended for the Parliament of Norway to be subject to the Act given the use of “administration” language (it should be noted this argument could equally apply to Macedonia and likely stems from issues with translating the text of the respective Acts into English).

About CHRI

CHRI is an independent, non-profit, non-partisan, international non-government organisation working for the practical realisation of human rights in the countries of the Commonwealth. CHRI is headquartered in New Delhi with offices in London, UK and Accra, Ghana.

CHRI was a member of the civil society committee that drafted the first draft text of what was later enacted by Parliament as the *Right to Information Act, 2005* (RTI Act). CHRI made several submissions to the Standing Committee of Parliament that had examined the RTI Bill in 2004-05. CHRI was invited by the Chairman of the Standing Committee to make a second round of submissions on specific issues involving relating to the Bill based on international best practice standards. CHRI had organised the first national conference on implementation of the RTI Act within two weeks of the Bill being passed by Parliament. Several representatives of the Central and State Governments, civil society and the media participated in the deliberations. International experts including the Federal Information Commissioner of Mexico, the Deputy Information Commissioner from the UK, the head of the Access to Information Implementation Unit from Jamaica, a senior official from the South African Human Rights Commission looking after RTI issues and a former official from the Canadian Information Commissioner's Office made presentations based on their countries' experience of implementing similar laws. Since then CHRI has conducted numerous training programmes for public information officers, assistant public information officers, first appellate authorities and staff of Information Commissions all over India. CHRI has published guidance notes on important implementation issues relating to the RTI Act. In 2007 CHRI had submitted a critique and specific recommendations to the Central Information Commission (CIC) for making its Management Regulations more user-friendly. CHRI also trains civil society groups and media representatives to make use of the RTI Act in the larger public interest for securing openness in government and accountability to the law and the people of India.

CHRI is also assisting the Government of Uganda with advice on implementing their Access to Information Act. CHRI's technical advice for improving information access legislation have been acknowledged, accepted and incorporated by the governments of Malta and the Cayman Islands. CHRI has also made several submissions for improving the quality of draft access legislation produced by either governments or civil society groups in Sri Lanka, Pakistan, Bangladesh, Kenya, Nigeria, Malawi, Sierra Leone, Ghana, Swaziland, Fiji Islands, Cook Islands and Indonesia. For more information about CHRI's work please visit our website: www.humanrightsinitiative.org
