

Amendments to the RTI Act – the file notings issue- recollections from 2006 – June 18, 2009

Dear Friends,

You will recall that in 2006, less than a year of the RTI Act coming into force, the Government of India (GOI) had attempted to restrict its ambit and use. The then Cabinet had approved a set of proposals to amend the RTI Act. This was never officially circulated in the public domain. RTI advocates and activists managed to secure a copy of the proposals and circulated it widely. In addition to excluding file notings from the ambit of the Act the proposals sought to broaden scope of the exemption relating to Cabinet papers and add two new exemptions to the list mentioned in section 8. At that time the rationale for this exercise was "quote from official documents." FAQs displayed on the website of the Department of Personnel and Training (DoPT) stating that 'file notings' were excluded from the definition of the term 'information' was taken as the bible. Much water has flown since then. The Central Information Commission (CIC) has repeatedly held that there is no rationale in the RTI Act for denying access to file notings unless one or more exemptions are applicable. CIC has also instructed DoPT to remove the misinformation regards file notings from its website. DoPT has stubbornly resisted to implement the orders of the CIC. CIC has recently issued a show cause notice for offences under the Indian Penal Code.

The Honb'le President of India in her speech to the joint session of Parliament has signalled that the government intends to 'strengthen' the RTI Act in 'non-strategic areas'. There has been no consultation on how the RTI Act is to be strengthened and the basis on which any amendment is being contemplated. However it is well known that the government is keen to restrict access to several areas of information which are presently available on request. Give at the bottom of this message is the list of the amendments proposed by GOI in 2006 and CHRI's detailed objections to them. This document was prepared in 2006- we have not changed its tone in order to retain the flavour of the times.

What can you do to demand transparency and resist amendments?

Please send emails demanding your right to know and insisting on the public authorities to proactively disclose detailed reasons for rejection. Please also strongly voice your opposition to making any amendments to the RTI Act. A sample email is given below which you are free to adapt:

"Dear-----,

I would like to exercise my right to know the detailed reasons behind the acceptance of some and the rejection of various other recommendations made by the Second Administrative Reforms Commission in its first report- *Right to Information: Master Key to Good Governance*. I urge you to place the entire contents of the file relating to the said report including all file notings on your website. I would like to remind you that you have an obligation to proactively disclose all facts relating to the decisions taken on the recommendations contained in the said report under clauses (c) and (d) of sub-section (1) of section 4 of the Right to Information Act (RTI Act).

As a citizen of India I would like to assert that there is no need to amend anything in the RTI Act which guarantees my fundamental right to seek and obtain information from public authorities.

Yours sincerely,

Name of the sender."

NO AMENDMENTS - LEAVE OUR RTI ACT ALONE."

Please send this email along with the slogan to the Minister and Secretaries mentioned below:

- 1) Mr. Prithviraj Chavan, Minister of State, Personnel, Public Grievances and Pensions, Government of India.
Email: mmos-pp@nic.in or mchavanprithviraj@sansad.nic.in
- 2) Ms. Rajni Razdan, Secretary, Department of Administrative Reforms, Ministry of Personnel, Public Grievances and Pensions, Government of India.
Email: mraini.razdan@nic.in

- 3) Mr. Rahul Sarin, Secretary, Department of Personnel and Training, Ministry of Personnel, Public Grievances and Pensions, Government of India.
Email: msecy_mop@nic.in

Please circulate this email within your networks. Please build up pressure against any attempt to amend the RTI Act. If each email group decided to send a 1000 mails from its members we could create some impact.

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Our Slogan: NO AMENDMENTS - LEAVE OUR RTI ACT ALONE.

BACKGROUND TO THE AMENDMENTS PROPOSED IN 2006

On 15 June 2005, [President APJ Abdul Kalam gave his assent](#) to the [Right to Information Bill 2005](#), which had been passed by the Lok Sabha (11th May) and the Rajya Sabha (12th May). The Central and State Governments were given 120 days to put in place systems and mechanisms to enable people to access information from public authorities. The RTI Act became fully operational on the 12th of October from which date citizens started submitting information requests.

The controversy over file notings began soon after the RTI Act was notified in the Official Gazette. The Department of Personnel and Training (DoPT- the nodal agency for overseeing the implementation of the Act) declared on its website (<http://persmin.nic.in>) under Frequently Asked Questions (FAQs) about the new law, that 'file notings' as a category were not covered within the definition of the term 'information' given in Section 2(f). This clarification is bad in law because the DoPT cannot arbitrarily take away what is not explicitly exempted from disclosure under Sections 8 and 9 of the Act. CHRI wrote to the DoPT recommending that the misleading FAQ about file notings be removed from its website. Despite vociferous protests against such misinformation from civil society groups and RTI activists the DoPT continued to maintain its position on the subject. Subsequently the Union Ministry of Home Affairs also issued a circular to all of its Public Information Officers and Appellate Authorities quoting the DoPT's clarification as the position to adopt on the issue of file notings.

Later in December that year, in a bid to defuse the controversy, the Prime Minister issued a directive to the DoPT to allow access to file notings that related to social and development issues. It appears that the establishment wanted to posture itself as being pro-transparency by allowing access to some file notings that it thought ultimately mattered to people. CHRI once again wrote to the Prime Minister and to the DoPT clarifying that neither office could effect such changes without Parliamentary approval. Withholding some or all file notings from disclosure requires specific mention of the same in the exemptions clause of the RTI Act. This change cannot be made through executive fiat but only through an amendment to the Act approved by Parliament.

Thereafter file notings continued to be a focus area for discussion and debate with government officers and activists taking opposing positions regarding disclosure. In January 2006 the Central Information Commission (CIC) brought some clarity to the issue when it ruled that file notings, being an integral part of a file opened on any subject, were covered by the definition of the terms "information," "record" contained in the RTI Act. The CIC, in support of its decision, argued, "If the

legislature had intended that 'file notings' are to be exempted from disclosure, while defining a 'record' or 'file' it could have specifically provided so". By the middle of June 2006 when the Government drafted an amendment to restrict access to file notings the CIC had reiterated its position in eight cases and allowed access to file notings in at least six.

Meanwhile the DoPT and other Ministries in the Union Government continued to work on the PM's directive about disclosure of file notings in social and development related matters. The secrecy that surrounded this process contrasted with the openness and civil society participation that characterized the exercise of drafting the RTI Bill in 2005. In a press release dated 26 July 2006, the Prime Minister's Office reaffirmed the DoPT's position that the existing legislation did not provide access to file notings and that an amendment was being proposed to make certain kinds of file notings relating to plans, schemes and programmes of the Government concerning development and social issues accessible to the people.

The press release also mentioned that the proposed amendments would add to the existing role and responsibilities of the Central and the State Information Commissions and give them additional powers to facilitate better implementation of the Act. The Government announced its intention of tabling these amendments during the monsoon session of Parliament beginning in July. However the Government failed to release in the public domain an authentic version of the text of the proposed amendments. This decision evoked sharp criticism from various sections of the press and civil society. CHRI also protested against this move. Later on members of the National Campaign for People's Right to Information and activists of the Mazdoor Kisan Shakti Sangathan and Parivartan managed to procure a copy of the tentative draft of the proposed amendments and circulated it amongst the media at a [press conference](#) held in Delhi on 3 August 2006.

Activists and civil society groups formed the 'Save RTI Campaign' in response to the Government's move to curtail the scope of 'information' accessible under the Act. Citizens and civil society groups from around the country sent postcards and signed petitions urging that the proposed amendments be dropped as they were contrary to the UPA Government's promise, of making the RTI Act more progressive, meaningful and participatory, contained in its Common Minimum Programme, announced in 2004. Demonstrations and street ballots were held in Delhi, Mumbai and other cities in order to mobilise public opinion against the proposed amendments. By the middle of August, sensing the public mood, both Communist parties which support the Government and the Opposition, publicly announced that they would oppose the amendments in Parliament. The Government subsequently backtracked and did not table the amendments during the monsoon session. However the threat of amendments to restrict the scope of the Act has not gone away as the Government might bring them back during the winter session of Parliament or later next year.

Secrecy in Bureaucracy – the Legal Basis

The colonial administration in India thrived on the culture of secrecy and post independence, the same culture remained in place because of the *Official Secrets Act* (OSA) of 1923. Any officer who passes on information contained in government records and files to any other person or any other officer, without proper authorisation, is liable for punishment under the OSA. Similarly any person who is found to be in possession of government records or copies of such documents, without proper authorisation, is also liable for prosecution under this law. In essence, through the OSA the colonial administration established a regime of secrecy that covered all government work. Secrecy was the norm to be followed and transparency and access to government held information only an exception. The Government had the privilege to decide what information would be given to the people what it could hold back. The rules and instructions drawn up under OSA also required public authorities to classify documents and records into 'confidential', 'secret' and 'top secret' categories restricting access even within bureaucracy. In fact these norms of classification themselves have long been hidden from public view as they are marked 'top secret'.

As a result, the natural inclination of government officials to limit sharing of official information beyond a small circle and to resist attempts to penetrate its internal activities by those considered as "unqualified outsiders" has generally been tolerated by society at large since the pre-independence era.

WHAT ARE FILE NOTINGS?

Whenever a government office decides to take action on its own or on the basis of an application made by or representation received from a citizen or group a file is opened on the subject. The government officers involved in any normal decision making process may range from lower division clerks to the secretary of a ministry or even the concerned Minister. Under the normal bureaucratic

practice, the files relating any government activity move from one officer to another - both vertically and horizontally within the bureaucratic hierarchy - before a decision is reached or a policy is made. Files may move from the originating department to other regulatory departments such as the finance and law departments where officers may give their opinion on legal and budgetary implications of the action that is being proposed to be taken. Normally, each time a file or document changes hands within the bureaucratic system and hierarchy, the officer handling that file makes his written remarks/ observations/recommendations and gives his opinion. While recording one's notings on a file an officer may - advise a course of action or suggest an alternative; record one's objections to a course of action being contemplated; make remarks about increasing or curtailing expenditure; seek explanations about any aspect of the topic under consideration from one's subordinates or record any other point that will add value to the decision making process. The final decision taken on a case is also a part of the file notings contained in that file.

(a) File notings according to The Manual of Office Procedure

The Manual of Office Procedure (MOP), issued by the Central Secretariat contains a clear definition and understanding of the phrase file notings. The MOP is a basic operations manual that guides public servants working under various Departments of the Government of India to carry out their lawful duties. The term 'file' – is defined in the MOP as a collection of papers on a specific subject matter and assigned a file number consisting of one or more of the following parts^{1[1]}–

- (a) correspondence;
- (b) notes;
- (c) appendix to correspondence; and
- (d) appendix to notes.

The term 'note' is defined in the MOP as the remarks recorded on a case to facilitate its disposal. It includes a summary of previous papers, a statement or an analysis of the questions requiring decision, suggestions regarding the course of action and final orders passed thereon.^{2[2]} The term 'notes portion' is defined in the MOP as that portion of a file containing notes or minutes recorded on a case.^{3[3]} In effect the Central Government has clearly recognised in the MOP that notings made by officers are an inseparable and integral part of any file opened on any matter.

The procedure for disclosure of file notings is also given in the MOP which belies the argument that it is a class of information that ought to be kept secret for all times. The MOP states that the notes portion of a file will be ordinarily treated as confidential. Disclosure to any authority outside the department will require a general or specific consent of the department to which the file belongs.^{4[4]} As the RTI Act overrides not only the OSA but all other laws in existence at the time of its enactment this provision is also superseded. Furthermore as the RTI Act does not include 'file notings' in the category of ordinarily exempt information under Sections 8 and 9 every citizen has a right of access.

(b) File Notings according to *The Public Record Rules, 1997*

Parliament passed *The Public Records Act* in 1993 in order to facilitate time bound declassification and archiving of important government records. The Rules for implementing this Act were made in 1997. *The Public Record Rules* issued by the Government of India to facilitate implementation of this Act define a 'file' in a manner similar to that contained in the MOP. File is defined as "a collection of papers relating to the public records on a specific subject matter consisting of correspondence, notes and appendices thereto and assigned with a file number." ^{5[5]} No distinction was made between file notings and other contents of a file when it was ripe for declassification or archiving. They are to be treated as part of an integral whole.

(c) Interpretation of key provisions of the RTI Act relating to 'file notings.'

^{1[1]} Entry # 27, para no. 1, Chapter II.

^{2[2]} Entry # 38, Ibid.

^{3[3]} Entry # 39, Ibid.

^{4[4]} Para no. 118(1), Ibid.

^{5[5]} Section 2(g).

The RTI Act itself does not contain the phrase 'file notings'. The term 'file' is mentioned in Section 2(i)(a) of the Act as being illustrative of a 'record'. By implication, all correspondence, statistics, notes and opinion recorded by officers as part of the decision making process, annexes and other papers that are part of a file are covered under this term without exception. Furthermore Section 2(f) of the Act defines 'information' in an inclusive manner, and illustrates the kinds of materials that are understood to be 'information' within the meaning of that section. This definition includes opinions and advices recorded by officers on paper or sent by email. File notings are nothing but the opinion and advice recorded by various officers who are part of the chain of decision-making on any issue. As notings of officers are an integral part of a file and are included within the meaning of the terms – 'record' and 'information' every citizen's right to information extends to 'file notings' as well.

(d) The Central Information Commission's Ruling on File Notings

The Central Information Commission (CIC) gave its ruling on the status of file notings vis-à-vis the disclosure under the RTI Act in January this year.^{6[6]} It held that notings were covered by the definition of the terms 'information' and 'record' contained in the Act. Only those file notings which attracted the exemptions to disclosure mentioned in Sections 8 and 9 of the Act need not be disclosed unless there was a larger public interest involved. The CIC argued – "In the system of functioning of public authorities, a file is opened for every subject/matter dealt with by the public authority. While the main file would contain all the materials connected with the subject/matter, generally, each file also has what is known as note sheets, separate from but attached with the main file. Most of the discussions on the subject/matter are recorded in the note sheets and decisions are mostly based on the recording in the note sheets and even the decisions are recorded on the note sheets. These recordings are generally known as 'file notings'. Therefore, no file would be complete without note sheets having 'file notings'. In other words, note sheets containing "file notings" are an integral part of a file. Sometimes, notings are made on the main file also, which obviously would be a part of the file itself." The CIC is of the firm view that, in terms of the existing provisions of the RTI Act, a citizen has the right to seek information contained in "file notings" unless the same relates to matters covered under Section 8 of the Act.

THE PROPOSED AMENDMENTS REGARDING FILE NOTINGS

Three of the proposed amendments (Parts 2 and 3 of the tentative Draft Amendment Bill) will in effect deny citizens access to all file notings opinions, advice, suggestions and recommendations recorded by officials in the course of their routine work.

The **first amendment** is about changing the definition of the term 'record'^{7[7]} in order to exclude from its purview file noting "except substantial file notings on plans, schemes, programmes of the Central Government or a State Government, as the case may be, that relate to development and social issues;" In effect all file notings that do not relate to social and development issues will be exempt from disclosure if this amendment is carried through.

The **second amendment** is aimed at granting anonymity to officers in those cases where file notings can be accessed if they relate to social and development issues. The newly proposed subsection 8(1)(k) reads – (*Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen,*) "information relating to identity of any individual, or group of individuals, who made inspection, observations, recommendation, or gave legal advice or opinion or referred to in any minute relating to plans, schemes, programme of the public authority which relate to development and social issues;" A proviso is to be added to this subsection which reiterates the position mentioned in the first amendment mentioned above – "Provided that a citizen shall have a right to information in respect of plans, schemes, programmes of the public authority relating to development and social issues other than those exempted under clauses (a) to (m) of this sub-section;". In other words even where access to a file noting is granted Citizens will no longer have the right to know the name and designation of officers who gave their opinion/advice on any matter when it was pending before the government even after a decision has been taken.

The **third amendment** is aimed at effectively barring access to all file notings, advice and opinion tendered by officers before a policy is formulated or a decision on a pending matter is actually made. The newly proposed subsection 8(1)(m) reads - (*Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen,*) "copies of noting, or extracts from, the document,

^{6[6]} *Satyapal v CPIO, TCIL*. Appeal No. ICPB/A-1/CIC/2006, decision dated 31st January, 2006 accessible at <http://cic.gov.in>

^{7[7]} Section 2(i)(d) of the RTI Act, 2005.

manuscript and file so far as it relates to legal advice, opinion, observation or recommendation made by any officer of a public authority during the decision making process prior to the executive decision or policy formulation." This amendment will deprive citizens access to information regarding any decision-making process before the decision is actually taken.

What is wrong with these amendments?

- a) The RTI Act enables citizens to exercise their fundamental right to access information held by public authorities. RTI is subject to exemptions mentioned in Section 8 of the original Act which are by and large in conformity with the list of reasonable restrictions mentioned in the Constitution. By severely limiting access to file notings the Government will impose an unreasonable restriction on the citizens' fundamental right to information. In effect the Government is asking Parliament to violate the caveat provided in Article 13(2) of the Constitution that no law will be passed by Parliament or State legislatures that will take away or abridge fundamental rights in any manner.
- b) These amendments will deliver a body blow to the very objective of the RTI Act namely, "to hold Governments and their instrumentalities accountable to the governed." Accountability is a key attribute of good governance recognised the world over. It is not adequate for the purpose of entrenching accountability if access is provided only to the final decisions of a public authority. People have a right to know the details of the decision-making process including the concurring and dissenting opinions expressed by all officers involved. Transparency in the decision-making process will ensure that officials will record on files only such opinion and recommendations that have a basis in law and established norms and legitimate procedures.
- c) It is well known that considerable amount of discretionary powers are vested in the hands of the executive to carry on the day to day administration. Restriction on access to file notings and the granting of anonymity to officers making such notings will only encourage unscrupulous and corrupt elements in the administration to act with impunity. Transparency on the other hand will ensure that all officers will give their opinions and act in a responsible manner as they will be subject to public scrutiny.
- d) The Government claims that the proposed amendments will allow access to file notings on development and social issues. However in the absence of clear definitions of such terms, these amendments will only increase the discretionary power of officers to deny access to file notings on a majority of issues. The newly proposed sub-section 8(m) is likely to be misused to deny access to recorded opinions and observations of officials on all matters before the final decision is taken.

Since July 2005 CHRI has conducted training and sensitisation workshops on the RTI Act for more than 3,150 officers at the Central level and in 15 States. We have found that a large section of officers are in favour of making file notings accessible to people as they believe such a move would encourage more responsible opinion giving and decision making in government.

OTHER AMENDMENTS PROPOSED TO THE RTI ACT

(a) Restricting access to cabinet documents

Currently citizens have a right to access not only the decision of the Council of Ministers after it has been taken and the matter is complete or over but also the reasons behind the decision and the materials that formed the basis for that decision. Access to Cabinet papers is denied under Section 8(1)(i) of the Act only so long as the decision is pending. The newly proposed proviso to this clause takes away the citizens' right to access the material on the basis of which decisions of the Council of Ministers are taken. In effect people will be deprived of the right to know what kinds of materials were put up by the officers suggesting a course of action on any matter that requires cabinet approval.

What is wrong with this amendment?

The newly proposed proviso to sub-section 8(1)(i) also amounts to imposing unreasonable restrictions on the citizens' right to access papers relating to the decisions taken by the Council of Ministers. The people have a right to know not only the final decisions of the Council of Ministers but also what is contained in the materials that officials put up for its consideration. High standards of transparency should apply equally at all levels of decision-making from the lowest to the highest.

(b) Restricting access to exams related information

The newly proposed sub-section 8(1)(l) seeks to bar access to information that may adversely affect the objectivity or fairness of recruitment, examination and evaluation processes.

What is wrong with this amendment?

The RTI Act in its current form does not specifically exempt access to information whose disclosure may adversely affect the objectivity and fairness of examinations, recruitment and promotion processes conducted by a public authority. The Central Information Commission has also denied candidates access to their answer scripts after evaluation because they argue –

- a) answer scripts are personal information of the candidate with no relation to any public activity or public interest and
- b) they are protected by the fiduciary (trust-based) nature of the relationship between the public authority conducting the examination and the examiner who evaluates the answer script.^{8[8]}

This precedent has been followed by other State Information Commissions in the country to deny access to evaluated answer scripts to candidates.

This amendment is vaguely worded and provides public authorities with an excuse to deny access to information relating to recruitment and an examination even after the process is complete. Secrecy in examination and selection processes allows bad decisions, favouritism and even nepotism to go unchecked, because examiners and assessors are never required to publicly justify their decisions.

(c) Widening the powers of the Information Commissions

The newly proposed sub-sections 18(5) and 18(6) are intended to widen the scope of the powers granted to the Central and the State Information Commissions. These Commissions will be empowered to undertake research, develop guidelines, conduct workshop and conferences and provide advice to the Governments as regards the implementation of the RTI Act.

What is wrong with this amendment?

This amendment no doubt increases the range of activities that Information Commission can proactively undertake in order to promote the implementation of the RTI Act. However the newly proposed sub-section 18(6) states that the decision of the Government in relation to the recommendations made by the Commissions under this section will be final. Section 18 is an all important provision that empowers Information Commissions to directly receive and inquire into complaints received from citizens regarding non-compliance with the provisions of the RTI Act. Ensuring compliance with the decision of the Information Commissions would be next to the impossible if the respective Governments are given the choice of accepting or rejecting it. This proposed amendment severely curtails the power of the Information Commissions and reduces them to being mere recommendatory bodies.

^{8[8]} *Treesha Irish v CPIO, Kerala Postal Circle, Trivandrum*, Appeal No.ICPB/A-2/CIC/2006, decision dated February 06, 2006 accessible at <http://cic.gov.in> This position has been reiterated in later decisions of the CIC and is being followed by other State Information Commissions as a precedent.

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