Right to Information Act- Analysis of amendments being discussed - Submission I
26 October 2009

Dear friends,

The RTI fraternity has in right earnest begun the work of mobilising popular support against negative amendments of the Right to Information Act. Several amendment proposals are said to have been discussed at a closed door conference of Information Commissioners on 14th October, 2009. To their credit, a large majority of the Information Commissioners are said to have opposed the negative amendments.

I have copied below our analysis and submissions on two of these issues:

1) amending the law to exclude 'file notings' now renamed as 'information about discussions and consultations of officers'; and

2) removing a handful of security organisations from the excluded list in Schedule 2 of the RTI Act.

Many of you have already written extensively on these issues. Many others many be planning to write to policymakers or submit articles and opinion pieces to the media. I hope you will find our analysis useful in preparing your own write-ups. We will continue to send our submissions and analysis of other proposed amendments from time to time. If you have any additional arguments on these issues, please free to write to us.

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Thanks

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The Right to Information Act, 2005

Amendments being Discussed

Analysis and Submission

Introduction:

In May 2005 *The Right to Information Act* (RTI Act) was unanimously passed by both Houses of Parliament. Since 13th October, when it became fully operational, several lakhs of citizens have used the RTI Act for achieving its primary objectives, namely:-

a) to bring greater levels of transparency in the public administration;

b) to unearth instances of petty and large scale corruption;

c) to demand greater accountability of public authorities in cases of delayed or poor decision-making and

d) to increase people's awareness about the decisions and actions of government, in general.

Across the world India's legislation is being held up as a beacon of democracy and it is being used as an example for others to follow. In August 2006, the then Union Cabinet approved a set of proposals to amend the RTI Act. These proposals were primarily aimed at removing 'file notings' from its coverage. Thanks to widespread protests all over the country, several political parties spoke against the move to amend the RTI Act. The Government was compelled to put the matter on the backburner. The Department of Personnel and Training (DoPT)- the administrative department for the RTI Act- had always maintained that 'file notings' were not covered by the RTI Act. The DoPT reconsidered its view, earlier this year, due to pressure from several quarters including the Central Information Commission.

In June 2009, the Hon'ble President of India, in her address to the joint session of Parliament, declared that the RTI Act would be strengthened "by suitably amending the law to provide for disclosure by government in all non-strategic areas." The Minister for Personnel and Public Grievances reiterated in the Lok Sabha, the Government's intention to incorporate positive amendments to the RTI Act. Senior representatives of the DoPT have repeatedly stated in public fora that only positive changes would be made in the RTI Act.

However we have reason to believe that the Government is planning to amend the RTI Act to curtail its impact and is reviving the issue of 'file notings' in a roundabout manner. CHRI is concerned that proposed amendments may create ambivalences where there are none today and create impediments to the free flow of information and have the overall effect of curbing disclosure from public authorities. As the effect of the Act is only just beginning to be felt we are of the view that no amendments should be attempted at the present time.

Issue 1 : Revival of the issue of file notings

On 14 October, 2009, at a national level conference of Information Commissioners convened by the DoPT behind closed doors, the Department sought their approval for amending the RTI Act to exclude "information regarding discussions/consultations that take place before arriving at a decision in a public authority". The DoPT thinks information regards who gave what opinion or advice in a decision-making process has no relevance to the general public. Disclosure of such information would hamper the free

flow of thought amongst officers. Information Commissioners opposed these proposals as they are aimed at curbing the effectiveness of the RTI Act.

What are 'file notings' now renamed as 'discussions and consultations'?

Office procedure manuals require all government officers involved in the chain of decision-making, on any matter, to record their opinion, advice and words of caution on the concerned file. These are called 'file notings' - essentially they are a record of the consultation and the discussions that must necessarily be held before any decision is made or action is planned by a public authority. For example, the opinions expressed by officers regards award of contracts for public works, or about the procurement of materials and services used by a public authority for the people's benefit, or for transferring officers prematurely, are all recorded on the relevant file. In several instances despite the best of advice being recorded on file, wrong decisions are made leading to undesirable consequences. This leads to prolonged litigation in courts causing hardship to citizens and officers alike and a consequent drain on the public exchequer.

What is wrong with this proposal?

In a country like India where democratic governance is the prescribed norm, it is important for citizens to be able to ascertain for themselves whether the decisions in any matter were taken on the basis of the best and legally defensible advice available to the public authority. The proposal to exclude information about discussions and consultations is defective for the following reasons:

a) It is important for people to know whose advice prevails ultimately when a decision is made within a public authority. It is not adequate for the purpose of entrenching accountability if access is provided only to the final decisions of a public authority. For ensuring that the rule of law remains firmly established as the guiding norm of governance, citizens must have the right to hold public functionaries accountable for tendering ill-considered or unlawful advice or that which is intended to benefit vested interests. This would be possible only if people have access to all information about the decision-making process. If the category of 'discussions and consultations' is excluded, the primary objective of the RTI Act, namely, enabling citizens to hold the government and its instrumentalities accountable would become impossible to attain. Rather than hamper the free flow of thought, transparency in the details of the decision making process will ensure that officials tender only such opinion and recommendations that have a basis in law, are in tune with established norms and are defensible when questioned.

b) The Statement of Objects and Reasons attached to the RTI Bill, when it was tabled in the Rajya Sabha, made it clear that the statute was being brought in to enable citizens to exercise their fundamental right to information, guaranteed under Article 19(1)(a) of the Constitution. The Honb'le Supreme Court of India has, on several occasions, declared that the right to freedom of speech and expression guaranteed by the Constitution includes the right of every citizen to know everything about every act and every decision of public authorities. Since 2005, several High Courts have described the RTI Act as a unique law that gives effect to the fundamental right to information. The Constitution permits the imposition of reasonable restrictions on this fundamental right in order to protect information relating to defence, security, economic and strategic interests or for maintaining public order or for protecting the rights of individuals to their privacy and against defamation. Any other limitation imposed on the citizen's right to information is an unreasonable restriction and is *ultra vires* of the Constitution. The move to exclude

information about 'consultation and discussions' amounts to imposing an unreasonable restriction on citizens' right to access information.

c) The complete record of the plenary discussions of both Houses of Parliament and the State Legislatures is accessible to every citizen under the Constitution and the rules of business procedure of the respective Houses. The only exception to disclosure is when a House decides to hold closed door sittings. Similarly the complete record of the pleadings and arguments made by parties to a civil or criminal suit, in a court of law, are accessible to people. Except in a few sensitive cases such as matrimonial disputes or trial for sexual offences, all such proceedings are conducted in full public view. The complete text of the intellectual discussion that a judge indulges in while arriving at a decision in a case, weighing the pros and cons, is recorded in the judgement itself and is accessible to any person on payment of a fee. Given the fact that the record of discussions and deliberations in two out of three spheres of government are publicly accessible, there is no reason why the discussions and consultation of members of the executive must be insulated from public scrutiny. Where such discussions relate to sensitive subjects such as defence or security the exemption clauses under section 8(1) of the RTI Act provide adequate protection against disclosure. There is no justifiable reason why all 'discussion and consultations' as a category must be excluded from the RTI Act.

Our Submission:

Any proposal that may be tabled in Parliament to exclude 'file notings' or 'discussion and consultations' from the RTI Act must be rejected.

Issue 2: Review of the Second Schedule

When the RTI Act was passed in 2005 it excluded 18 'intelligence and security organisations' under section 24 (read with the second schedule). Later on new entities were added and a couple of existing organisations were removed. Today there are 22 such organisations excluded from ordinary obligations of transparency under the RTI Act. However even these organisations are required to furnish information in cases relating to allegations of human rights violations and corruption. Several State Governments have similarly notified security and intelligence organisations that are partially excluded from the RTI Act.

The DoPT has announced its intention to review this list and pull out the following organisations:

a) Directorate of Revenue Intelligence f) Central Reserve Police Force

b) Directorate of Enforcement g) Indo-Tibetan Border Police

c) Narcotics Control Bureau h) Central Industrial Security Force

d) Special Frontier Force i) Assam Rifles

e) Border Security Force

What is wrong with this proposal?

We welcome the proposal to remove these entities from the Second Schedule as we believe that blanket exclusion of organisations or categories of information is against the principle of maximum disclosure that underpins the RTI Act. The withdrawal of names of organisations from the Second Schedule does not require an amendment of the RTI Act.

It can be accomplished by a simple gazette notification which the Government can place before Parliament later for approval.

However there is a strong case for removing all such organisations from this list. The sensitive information held by such organisations is adequately protected by the exemptions provided under section 8(1) of the RTI Act as is the case with any other public authority. There is no reason why non-sensitive information about their appointed functions must also be excluded from public scrutiny.

Our Submission:

Any proposal aimed at a partial amendment of the Second Schedule must be rejected. Instead the entire list must be deleted.

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