

Case Title	<i>18 judgements interpreting the proviso underlying Section 8(1) of the Right to Information Act, 2005</i>
Case No.	<i>See case citation below</i>
Decided on	<i>See case citation below</i>
Source	<i>The High Courts of Bombay, Calcutta, Delhi, Kerala, Madras, Madhya Pradesh, Patna and Punjab and Haryana.</i>

A Critical Analysis¹

The Issue:

The Right to Information Act (RTI Act) has been fully operational since 12 October, 2005. Several thousand public authorities have dealt with at least a few million requests during the last eight years. 28 Information Commissions have adjudicated over access disputes arising out of rejections or refusals of public authorities to part with the requested information. Not all such decisions reach finality at the level of the Commissions. Public authorities, private agencies and aggrieved information requestors have moved the High Courts under Article 226 of the Constitution to challenge the Commissions' decisions. The High Courts (and in a small number of cases the Supreme Court) have handed down several hundred judgements which constitute the jurisprudence on access rights of citizens and obligations of public authorities. Adjudication of access disputes in the High Courts has not always conformed to the doctrine of precedent. We have chosen one such issue for analysis where despite the existence of more than 15 judgements, the jurisprudence does not provide clarity of interpretation of a crucial provision of the RTI Act.

Section 8 of the RTI Act deals with exemptions to the right to information. Sub-Section (1) lists out the specific exemptions to disclosure, namely, information that a requestor may not claim as a matter of right. Sub-Section (2) provides for the disclosure of even exempt information when public interest in disclosure outweighs the harm to the protected interests. Sub-Section (3) limits the operation of seven out of the ten exemptions up to 20 years for a given set of records. The exemptions relating to national security, foreign relations with foreign Governments, Parliamentary and Legislative privilege and Cabinet documents apply for an indefinite period of time. A *proviso* is inscribed at the bottom of Section 8(1). The complete text of Section 8(1) along with the *proviso* is reproduced below:

“8. (1) Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen,—

¹ Analysed and disseminated by Venkatesh Nayak, Programme Coordinator, Access to Information Programme, Commonwealth Human Rights Initiative (CHRI), New Delhi in public interest on 29 January, 2013. These judgements have been sourced from Manupatra.com and cross-checked against copies of the judgements uploaded on the website of the respective High Courts, where accessible.

(a) information, disclosure of which would prejudicially affect the sovereignty and integrity of India, the security, strategic, scientific or economic interests of the State, relation with foreign State or lead to incitement of an offence;

(b) information which has been expressly forbidden to be published by any court of law or tribunal or the disclosure of which may constitute contempt of court;

(c) information, the disclosure of which would cause a breach of privilege of Parliament or the State Legislature;

(d) information including commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party, unless the competent authority is satisfied that larger public interest warrants the disclosure of such information;

(e) information available to a person in his fiduciary relationship, unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information;

(f) information received in confidence from foreign Government;

(g) information, the disclosure of which would endanger the life or physical safety of any person or identify the source of information or assistance given in confidence for law enforcement or security purposes;

(h) information which would impede the process of investigation or apprehension or prosecution of offenders;

(i) cabinet papers including records of deliberations of the Council of Ministers, Secretaries and other officers:

Provided that the decisions of Council of Ministers, the reasons thereof, and the material on the basis of which the decisions were taken shall be made public after the decision has been taken, and the matter is complete, or over:

Provided further that those matters which come under the exemptions specified in this section shall not be disclosed;

(j) information which relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the Central Public Information Officer or the State Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information:

Provided that the information which cannot be denied to the Parliament or a State Legislature shall not be denied to any person."

Eight High Courts have interpreted the scope and application of the *proviso* under Section 8(1) varyingly. Starting with the Bombay High Court, in 2007, five High Courts (Bombay, Delhi, Madhya Pradesh, Madras and Patna) have interpreted this *proviso* in six cases as being applicable only to clause (j) of Section 8(1), namely, the exemption protecting personal information of an individual from disclosure. Three High Courts (Calcutta, Kerala and Punjab and Haryana) have in ten cases interpreted this *proviso* as applying to all exemption clauses listed in Section 8(1). In at least two High Courts (Bombay and Delhi)

single-judge and Division Benches have held contrary views indicating the lack of crystallisation of judicial precedent regarding the interpretation of the scope and application of this *proviso*. A case-wise summary of the main dispute, the Court's interpretation of the *proviso* and our analysis of the interpretation are given below in chronological order. This is followed by a brief note on other sources that can serve as aids for the correct interpretation of the *proviso*.

The jurisprudence around the *proviso* underlying Section 8(1):

1) *Mr. Surup Singh Hrya Naik vs State of Maharashtra Through Additional Secretary, General Administration Deptt. And Others, Bombay High Court [Writ Petition No. 1750 of 2007] decision date: 23/03/2007.*²

1.1) Case summary:

The Petitioner was a member of the Legislative Assembly whom the Supreme Court sentenced to a month's imprisonment for committing contempt of its orders during his tenure as Minister in the Government of Maharashtra. The Petitioner spent 21 days of his jail term in a hospital in Mumbai under the pretext of being treated for various illnesses. A private citizen sought medical reports of his treatment in order to ascertain why he had spent most of the duration of his sentence in an air-conditioned hospital. The Petitioner objected to the disclosure of his medical records claiming that such action would cause invasion of his right to privacy. The matter escalated to the State Information Commission which ordered disclosure in the larger public interest. The Petitioner challenged the order of disclosure on various grounds including the right to privacy and the requirement of confidentiality of patient-related information under the *Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations 2002*.³ A 2-judge Bench of the Bombay High Court upheld the order of disclosure of the Petitioner's medical records in the larger public interest.

1.2) The Court's interpretation of the *proviso* underlying Section 8(1):

The Court relied upon the judgement of a single-judge Bench in an earlier dispute relating to access to information under the *Goa Right to Information Act, 1997* (Goa RTI Act) to hold that the *proviso* underlying Section 8(1) applied only to clause (j).⁴ The Court reasoned as follows:

*"14. The next aspect of the matter is whether the proviso after Section 8(1)(j) applies in its entirety to Section 8(1)(a) to 8(1) or only to Section 8(1)(j). Does, therefore, the proviso apply to Section 8(1). Before answering the issue we may refer to the judgment of a learned single Judge of this Court in the Page 0855 case of *Panaji Municipal Council v. Devidas J.S. Kakodkar and Anr. 2001 (Supp.2) Bom. C.R.544*, to which our attention was invited by the learned Counsel for the*

² Equivalent citation: AIR 2007 Bom121.

³ These Rules are framed under the *Indian Medical Council Act, 1956*.

⁴ *The Panaji Municipal Council etc. vs Devidas J.S. Kakodkar and Anr.* W.P. No. 402 of 1998, decision date: 29/09/2000.

petitioner. In that case what was in issue was the proviso to Section 5 of the Goa Right of Information Act, 1997. The proviso there was placed after the various provisions. The learned Single Judge while construing the effect of the proviso, restricted it only to Sub-Sections 5(e) and not to Section 5(a),(b),(c) and (d) as otherwise according to the learned Judge the Section was liable to be struck down as being violative of Article 21 of the Constitution of India. We do not propose to go into the correctness of the said judgment. Suffice it to say that in the Central Act, the proviso has been placed after Section 8 and in that context it would have to be so interpreted. So reading the proviso applies only to Section 8(1)(i) and not to the other sub-sections of that Section." [emphasis supplied]

1.3) Brief analysis of the Court's interpretation:

It is respectfully submitted, had the Court gone into the reasoning of the single-judge Bench in the *Panaji Municipal Council* case⁵, it would have come to a different conclusion. In that case a single-judge Bench of the Court interpreted a similarly worded *proviso* under Section 5 of the Goa RTI Act titled "Restrictions on Right to Information" as being applicable only to clause (e) which restricted disclosure of information that would endanger the life or physical safety of a person or identify the source of information or source of assistance given in confidence for law enforcement or security purposes or in public interest. The reasoning applied was that if the *proviso* were to be read as applying to all sub-sections, the restrictions placed on the right to information would become nugatory. The single-judge Bench sought to save the restriction relating to privacy of an individual from the operation of the *proviso* in the following words:

"6. ...If the proviso is applied to Section 5 generally to all its sub-clauses, the purpose for which that restriction is imposed will become nugatory. So also clause (b) relates to information relating to an individual or other information. The restriction imposed is in supplying the information which will not subserve the public interest and also the information which may be likely to affect the personal privacy. If the proviso is applied then the entire clause (b) will become nugatory. The result will be that all private interest and personal privacy will have to be disclosed to the seeker of the information. The result will be very fatal. Section 5 clause (b) brings about an object to protect a citizen's right of privacy as envisaged under Article 21 of the Constitution of India. Therefore is such restriction is not there the entire Act comes under the mischief of violation of Article 21 of the Constitution of India. In order to avoid the calamity the Legislature thought it fit to incorporate such provision as contained in Clauses (a), (b), (c) and (d). It is also to be noted that the class of information which is stated in Clauses (a), (b), (c) and (d) and the class of information stated in Clause (e) is quite different. The information under Clause (e) relates to the disclosure which would endanger the life or physical safety of any person or identify the source of information or assistance given in confidence for law enforcement or security purposes or in public interest. Therefore, if on an harmonious reading of the provisions in order to save the Legislation from the vice of unconstitutionality, the

⁵ Ibid., para #5.

Court will always choose a path which can save the enactment by reading down the same in consistent [sic] with the provisions of the Constitution. The enactment if is so read, I have no doubt in my mind that the proviso will relate only to Clause (e) and I have to accept the contention that if such a reading is adopted the impugned order passed by the appellate authority is liable to be quashed. I do so.

7. Looking from another angle, this proviso makes the Legislature and an ordinary person on par in seeking information. What information a Legislature is entitled to, such information the citizens are also entitled to receive. That gives a general guidelines to both the author and the seeker. The proviso only seeks to further explain the Section. But a Legislature is also not entitled to get information if it relates to the subject, enumerated in sub-clause under Section 5 of the Act. Viewing in this prospective [sic] also the appellate authority is liable to be set aside." [emphasis supplied]

It is respectfully submitted, in the *Surup Singh* case, the Court ought to have addressed the question as to whether Parliament had intended to provide access to even personal information in public interest and if this was not violative of the Article 21 of the Constitution. Earlier in the *Panaji Municipal Council* case the Court had reasoned that the Goa Legislature could not have enacted a law to curtail the fundamental right to privacy in Article 21, so the *proviso* was required to be read down to save the RTI Act from being declared *ultra vires* of the Constitution. The main cause in the *Surup Singh* case was about an individual's right to privacy in relation to his medical records. In our opinion inquiring into Parliament's intent behind placing the *proviso* under Section 8(1) in the light of the Court's earlier pronouncement was necessary before determining its scope and application. Instead the ratio of the Court in the *Panaji Municipal Council* case was applied mechanically without regard to the reasoning that informed it. **In view of this glaring contradiction the Court's reading of the import and application of the proviso underlying Section 8(1)(j) of the RTI Act, deserves to be reviewed.**⁶

2) *Canara Bank vs The Central Information Commissioner and Another*, Kerala High Court [Writ Petition (Civil) 9988 of 2007, decision date: 11/07/2007]⁷

2.1) Case summary:

An Applicant sought information about the appointment, posting, transfer and promotion of clerical staff employed by the Canara Bank (the Bank) in Ernakulam district of Kerala during the period 2002-2006. The Bank denied access on various grounds. When the matter escalated to the Central Information Commission, it ordered that the information be disclosed. The Bank challenged this order before the Kerala High Court

⁶ It is clarified that the purpose of this analysis is to question the reasoning informing the Court's interpretation of the scope of the *proviso* underlying Section 8(1). The author respectfully agrees with the Court's finding in the main matter relating to the disclosure of the medical records of the Petitioner.

⁷ Equivalent citation: AIR 2007 Ker225.

claiming the protection of Section 8(1)(e)- when information is available to a person in his fiduciary relationship- and Section 8(1)(j)- when disclosure of personal information has no relationship to any public activity or interest or if disclosure would cause unwarranted invasion of the privacy of the individual. A single-judge Bench of the Court rejected both contentions and upheld the order of the Central Information Commission.

2.2) The Court's interpretation of the proviso underlying Section 8(1):

The Court independently held that the *proviso* applied to the whole of Section 8(1) and not merely to clause (j) of that Section. The Court held as follows:

"8. I am of opinion that the information mentioned in Section 8(1)(j) is personal information which are so intimately private in nature that the disclosure of the same would not benefit any other person, but would result in the invasion of the privacy of that person. In the present case, without the information requested for the 2nd respondent would not be in a position to effectively pursue his claim for transfer in preference to others. On the other hand, the disclosure of such information would not cause unwarranted invasion of privacy of the other employees in any manner insofar as that information is not one which those employees can keep to themselves. If the 2nd respondent is to contest that the transfers made are in violation of his rights for preferential transfer, he necessarily should have the information which cannot be withheld from him by resort to Section 8(1)(j). More importantly, the proviso to the section qualifies the section by stating that information which cannot be denied to the Parliament or a State Legislature shall not be denied to any person. By no stretch of imagination can it be held that the information requested for by the 2nd respondent are information which can be denied to the Parliament and a State Legislature. In fact that proviso effectively nullifies the impact of the main provision to a great extent. Therefore, I do not find any merit in the contention based on Section 8(1)(j) also." [emphasis supplied]

2.3) Brief analysis of the Court's interpretation:

The Court did not make any reference to the *Surup Singh* case. Perhaps none of the parties brought this case to the Court's notice. The absence of any reasoning to support this interpretation is clearly problematic given the views of the Bombay High Court in the *Surup Singh* case.

3) Pritam Rooj vs University of Calcutta, Calcutta High Court [Writ Petition No. 22176 of 2007], decision date: 28/03/2008.⁸

3.1) Case summary:

A student sought access to his answer scripts in a Bachelor's Degree examination conducted by the University of Calcutta. The Public Information Officer (PIO) rejected the request without invoking any of the exemptions provided in Section 8 of the RTI Act.

⁸ Equivalent citation: AIR 2008 Cal 118.

He merely stated, in an undated letter, that the University had taken a decision not to permit inspection of evaluated answer scripts under the RTI Act. The matter escalated to the High Court where the University cited a decision of the Central Information Commission which had ruled in an earlier case that where Boards and Universities conducting public examinations had evolved a robust system of evaluation and, if, by their own rules, prohibited disclosure of evaluated answer-sheets or where such disclosure would result in rendering the system unworkable in practice, a citizen could not seek disclosure of the answer-sheets. The University also contended that answer scripts did not fall within the definition of information under Section 2(f) of the RTI Act and that disclosure of the evaluated answer scripts would endanger the lives of the examiners. The University contended further that the Supreme Court had in earlier decisions refused to order disclosure of such documents, so Section 8(1)(b) of the RTI Act would apply.⁹ A single-judge Bench of the Court rejected these contentions in a well-reasoned judgement and ordered the evaluated answer sheets to be disclosed.

3.2) The Court's interpretation of the proviso underlying Section 8(1):

Both parties to this case relied on *Surup Singh* case to substantiate their arguments. So the Court examined the reasoning and ratio of that decision in some detail, highlighting the procedural safeguards that must be observed under Section 11 of the RTI Act before making a decision on disclosing information relating to third parties. The Court also took notice of the need for protecting the privacy of individuals. However the Court held that the *proviso* underlying Section 8(1) applied to the whole of that Section. The Court stated as follows:

"68. ... Clause (a) of Sub-section (1) of Section 8 deals with information that would compromise the sovereignty or integrity of the country and like matter; Clause (c) covers such matters which would cause a breach of privilege of the Parliament or the State Legislatures; Clause (d) protects Information of commercial nature and trade secrets and their ilk; Clause (f) prevents information being disseminated if it is received in confidence from any foreign government; Clause (h) bars access to such information which would impede the process of investigation or apprehension or prosecution of offenders; Clause (i) forbids records and papers relating to deliberations of ministers and officers of the executive being made available, subject to a proviso; and, Clause (j) prohibits disclosure of personal information unless there is an element of public interest involved. The proviso at the foot of Clause (j) appears to cover the entirety of Section 8(1), notwithstanding the view taken by the Division Bench of the Bombay High Court. The manner in which the exceptions to the rule have been carved out in Section 8 and the proviso which appears to govern all the cases covered by Section 8(1) of the said Act, makes the exemption section exhaustive." [emphasis supplied]

⁹ Section 8(1)(b) exempts information whose disclosure is forbidden by any court or if disclosure will constitute contempt of court.

3.3) Brief analysis of the Court's interpretation:

That the Court rejected the finding of a larger Bench of another High Court without supplying a reasoned justification is problematic, particularly when both parties had used the ratio to support their contention. The Court chose not to go into legislative intent behind the *proviso* as that matter was not a bone of contention. However the Court's brief reasoning which must be treated as *obiter dicta* echoed the latter part of the Bombay High Court's opinion in the *Panaji Municipal Council* case- that the *proviso* was more of a guiding principle for applying the exemptions, namely, information that would have to be given to Parliament or a State Legislature cannot be denied to a citizen requestor under the RTI Act.

4) R. Anbazhagan Deputy Manager (Mechanical) Tamilnadu Newsprint and Papers Ltd. (TNPL) Vs. The State Information Commission, The Managing Director Tamilnadu Newsprint and Papers Ltd. (TNPL), The Chief Manager Tamilnadu Newsprint and Papers Ltd. (TNPL) and Mrs. M. Vijaya W/o N. Rajendran, Madras High Court [Writ Petition No. 47897 of], decision date: 17/04/2008.¹⁰

4.1 Case summary:

Mrs. M Vijaya the fourth Respondent to this writ petition sought information about the annual gross income of the Petitioner when he served as a senior functionary of Tamil Nadu Newsprint and Papers Ltd. (TNPL). The PIO rejected the request in order to protect the individual's privacy under Section 8(1)(j) of the RTI Act. The matter escalated to the Tamil Nadu State Information Commission which ruled in favour of disclosure. The petitioner challenged this order before the Madras High Court on the grounds that TNPL was not a public authority and also that the Commission had not recorded satisfactory reasons for disclosure of personal information in the larger public interest. A single-judge Bench of the Court rejected both contentions and held that TNPL was a public authority covered by the RTI Act. It upheld the Commission's order on the ground that the petitioner was an employee of TNPL at the time the information request was made and that his remuneration details were required to be disclosed proactively under Section 4(1)(b)(x) of the RTI Act.

4.2 The Court's interpretation of the proviso underlying Section 8(1):

The Court took judicial notice of the ratio of *Surup Singh* in this case on the issue of protecting an individual's right to privacy but did not engage in an examination of the import of the *proviso*.

¹⁰ Equivalent citation: (2008) 5MLJ 200.

5) *Vijay Prakash vs Union of India and Others*, Delhi High Court [Writ Petition (Civil) 803 of 2009], decision date: 01/07/2009.¹¹

5.1 Case summary:

The Petitioner sought information relating to his estranged wife's service matters such as leave record, applications for leave, record of financial investments made and details of nominees in this regard. The PIO rejected the request by invoking Section 8(1)(j)-when disclosure of information has not relationship to any public activity or interest or when disclosure may cause unwarranted invasion of the privacy of the individual. The matter escalated to the Central Information Commission which upheld the order of rejection. The Petitioner challenged this decision before the Delhi High Court. A single-judge Bench of the Delhi High Court upheld the order of rejection. The Court rejected the Petitioner's contention that the information sought was required in a divorce case where he was the litigant and that was a sufficient public interest ground for ordering disclosure.

5.2 The Court's interpretation of the proviso underlying Section 8(1):

The Court took judicial notice of the *Surup Singh* case but did not go into the issue of whether the *proviso* applied to only clause (j) or the whole of Section 8(1). Instead the Court rejected the emphasis that the Bombay High Court placed on the *proviso* as a check on the intemperate use of Section 8(1)(j) in the following words:

"22. ...The court is also unpersuaded by the reasoning of the Bombay High Court, which appears to have given undue, even overwhelming deference to Parliamentary privilege (termed "plenary" by that court) in seeking information, by virtue of the proviso to Section 8(1)(j). Were that the true position, the enactment of Section 8(1)(j) itself is rendered meaningless, and the basic safeguard bereft of content. The proviso has to be only as confined to what it enacts, to the class of information that Parliament can ordinarily seek; if it were held that all information relating to all public servants, even private information, can be accessed by Parliament, Section 8(1)(j) would be devoid of any substance, because the provision makes no distinction between public and private information. Moreover there is no law which enables Parliament to demand all such information; it has to be necessarily in the context of some matter, or investigation. If the reasoning of the Bombay High Court were to be accepted, there would be nothing left of the right to privacy, elevated to the status of a fundamental right, by several judgments of the Supreme Court." [emphasis supplied]

5.3) Brief analysis of the Court's interpretation:

The Court's reasoning in the current case is reminiscent of the reasoning that the Bombay High Court applied to the *Panaji Municipal Council* case. However the reasoning applied is not convincing as the Court did not go into the legislative intent behind enacting the *proviso*. *Provisos* are exceptions to the general rule contained in the main

¹¹ Equivalent citation: 160(2009) DLT 631.

provision. The Court's dismissal of the Bombay High Court's reasoning that the *proviso* acts as a check on the liberal use of the main provision to deny access to information is also difficult to accept.

6) Union of India Thr. Director, Ministry of Personnel, PG and Pension vs Central Information Commission and Shri P D Khandelwal, Delhi High Court [Writ Petition (Civil) Nos. 8396/2009, 16907/2006, 4788/2008, 9914/2009, 6085/2008, 7304/2007, 7930/2009 and 3607 OF 2007], decision date: 30/11/2009.¹²

6.1) Case summary:

In this case a single-judge Bench of the Delhi High Court ruled over a batch of eight writ petitions filed by government servants challenging the orders of the Central Information Commission rejecting the disclosure of information requested by both serving and retired government servants. The requests related to annual confidential reports, first information and post mortem reports pertaining to an ongoing criminal investigation, the reasons behind disposal of a complaint relating to misconduct of an official, the proceedings of selections boards and inspection of the minutes of the meetings of the Cabinet Committee on Appointments. The Court ordered the disclosure of some information, remanded one matter back to the Central Information Commission and rejected access to information such as names of members of selection boards.

6.2) The Court's interpretation of the proviso underlying Section 8(1):

The Court agreed with the view of the Bombay High Court in the *Surup Singh* case that the *proviso* applied only to Section 8(1)(j). The Delhi High Court pointed out that the *proviso* served more as a guiding principle than as substantive law that would override the main clause. The Court also pointed out to use of punctuation marks in all clauses of Section 8(1) in support of its reasoning that the *proviso* applied only to clause (j). The Court's reasoning is reproduced below:

*"41. The proviso below Section 8(1)(j) of the RTI Act was subject of arguments. The said proviso was considered by the Bombay High Court in **Surup Singh Hryanaik versus State of Maharashtra** AIR 2007 Bom. 121 and it was held that it is proviso to the said sub-section and not to the entire Section 8(1). The punctuation marks support the said interpretation of Bombay High Court. On a careful reading of Section 8(1), it becomes clear that the exemptions contained in the clauses (a) to (i) end with a semi colon ";" after each such clause which indicate that they are independent clauses. Substantive sub section Clause (j) however, ends with a colon ":" followed by the proviso. Immediately following the colon mark is the proviso in question which ends with a full stop ".". In Principles of Statutory Interpretation, 11th Ed. 2008 (at page No. 169) G.P Singh, has noted that "If a statute in question is found to be carefully punctuated, punctuation, though a minor element, may be resorted to for purposes of construction." Punctuation*

¹² Equivalent citation: MANU/DE/3138/2009.

marks can in some cases serve as a useful guide and can be resorted to for interpreting a statute.

42. Referring to the purport of the proviso in **Surup Singh** (*supra*), the Bombay High Court has held that information normally which cannot be denied to Parliament or State Legislature should not be withheld or denied.

43. A proviso can be enacted by the legislature to serve several purposes. In **Sundaram Pillai versus Patte Birman** (1985) 1 SCC 591 the scope and purpose of a proviso and an explanation has been examined in detail. Normally, a proviso is meant to be an exception to something in the main enactment or to qualify something enacted therein which but for the proviso would be within the purview of the enactment. A proviso cannot be torn apart from the main enactment nor can it be used to qualify and set at naught, the object of the main enactment. Sarthi on "Interpretation of Statutes", referred to in the said judgment, states that a proviso is subordinate to the main section and one of the principles which can be applied in a given case is that a proviso would not enlarge an enactment except for compelling reasons. It is unusual to import legislation from a proviso into the body of the statute. But in exceptional cases a proviso in itself may amount to a substantive provision. The proviso in the present cases is a guiding factor and not a substantive provision which overrides Section 8(1)(j) of the RTI Act. It does not undo or rewrite Section 8(1)(j) of the RTI Act and does not itself create any new right. The purpose is only to clarify that while deciding the question of larger public interest i.e., the question of balance between – public interest in form of right to privacy' and – public interest in access to information' is to be balanced." [emphasis supplied]

6.3) Brief analysis of the Court's interpretation:

None of the parties appear to have presented views expressed by other High Courts which interpreted the *proviso's* scope and application differently. That the *proviso* serves as a guiding principle for the PIO while balancing public and private interests is true. However restricting its application only to clause (j) without examining its effect on other clauses is problematic. The Court ought to have gone into the legislative intent behind enacting the *proviso*.

7) **Shrikant Pandya vs State of Madhya Pradesh, Madhya Pradesh High Court [Writ Petition 13646 of 2009], decision date: 01/02/2010.**¹³

7.1) Case summary:

The Petitioner sought a certified copy of the complete service record of a school teacher from the office of the District Education Officer in Madhya Pradesh. The PIO rejected the request on the ground of violation of privacy. The First Appellate Authority and the Madhya Pradesh State Information Commission both upheld the order of rejection. The

¹³ Equivalent citation: AIR 2011 MP14.

Petitioner challenged the order of rejection before the Madhya Pradesh High Court citing a public interest ground that the teacher had received two advance increments because he had undergone a sterilization operation. A single judge Bench of the Court upheld the order of rejection.

7.2) The Court's interpretation of the proviso underlying Section 8(1):

The Court merely cited Section 8(1)(j) along with the *proviso* and decided that the public authority was right in refusing access to the school teacher's service record. The Court did not go into the scope and application of this *proviso*. No reference was made to the *Surup Singh* case either.

8) The Tamil Nadu Public Service Commission rep. by its Secretary, Omanthoorar Government Estate vs The Tamil Nadu Information Commission rep. by its Registrar and Others, Madras High Court [W.P. Nos. 34630 of 2007, 6518 and 10327 of 2008, 4113, 18049 and 21109 of 2009 and M.P. Nos. 1 of 2007, 1 of 2008 and 1 of 2009], decision date: 30/03/2010.¹⁴

8.1) Case summary:

Six individuals, through separate requests, sought information from the Tamil Nadu Public Service Commission (TNPSC). The requestors sought disclosure of answer sheets and answer keys relating to examinations conducted by TNPSC and also the action taken on a representation made by one of them. The PIO of TNPSC rejected all requests. The First Appellate Authority upheld all rejections. However the Tamil Nadu State Information Commission directed disclosure of all the information. TNPSC challenged these orders through separate writ petitions before the Tamil Nadu High Court claiming the protection of Section 8(1)(d)- when disclosure of information in the nature of commercial confidence, trade secrets or intellectual property may harm the competitive position of a third party; Section 8(1)(e)- when information was available to a person in his fiduciary relationship and Section 8(1)(j)- when disclosure of personal information has no relationship to any public activity or interest or when disclosure would cause unwarranted invasion of the privacy of the individual. A single-judge Bench of the Court threw out all petitions through a common order upholding the Commission's decision.

8.2) The Court's interpretation of the proviso underlying Section 8(1):

The Court examined TNPSC's response to the Information Commission's query during the second appeal proceedings as to whether the information sought could be disclosed to Parliament or the State Legislature. TNPSC replied in the affirmative. So the Court found no reason to interfere with the Information Commission's order. The Court recognised that the *proviso* applied to Section 8(1)(j) in the following words:

¹⁴ Equivalent citation: MANU/TN/0518/2010.

"24. The last contention that the information sought for in respect of one Tmt. Shanthi in W.P. No. 4113 of 2009 by the contesting respondent Kozandavelu cannot be denied only on the ground that there was any third party interest involved. When TNPSC took defence in terms of exemption under Section 8(1)(j) and the Information Commission had asked the TNPSC whether if such information will be provided to the State legislature if it sought for it, the TNPSC answered the same in the affirmative. Therefore, the Information Commission directed in public interest to provide such information. This was on the premise that what was made available to a legislature should also be available to a private respondent, as can be seen from the proviso to Section 8(1)(j). It is clearly stated that the information which cannot be denied to the Parliament or the State legislature, shall not be denied to any person.

25. In the light of the above, all the writ petitions will stand dismissed..." [emphasis supplied]

8.3) Brief analysis of the Court's interpretation:

In arriving at its decision the Court did not examine the scope and application of the *proviso*. It also did not make reference to any case law on the interpretation of this *proviso* as to why it may be linked it to Clause (j) only. As the Court already rejected TNPSC's claim to clauses (d) and (e) of Section 8(1), there was no need to go into the applicability of the *proviso* to these other exemptions.

9) Joint Registrar (Judicial)-cum-Public Information Officer vs State Information Commission and Others, Patna High Court [CWJC No. 15814 of 2009], decision date: 28/07/2010.¹⁵

9.1) Case summary:

An applicant sought from the PIO of the Patna High Court, the name of the private agency that conducted an examination for the posts of Additional District and Sessions Judge in Bihar. The PIO rejected the request claiming the protection of Section 8(1)(j) of the RTI Act. The First Appellate Authority upheld the rejection on the ground that disclosure of the name of the agency would lead to disclosure of the names of the evaluators of the answer sheets whose privacy deserved to be protected under Section 8(1)(j). However the State Information Commission ordered disclosure of the letter issued by the Registry of the Patna High Court appointing the private agency to conduct the examination. The PIO challenged this decision before the Patna High Court. A single-judge Bench of the Court set aside the Information Commission's order holding that disclosure of the name of the private agency would lead to disclosure of the names of the evaluators, invigilators, examiners, tabulators and the superintendent. As this information was protected under Section 8(1)(j) there was no liability to disclose the information.

¹⁵ Equivalent citation: AIR 2010 Pat176.

9.2) The Court's interpretation of the proviso underlying Section 8(1):

The Court held that the *proviso* was applicable to Section 8(1)(j) in the following words:

"26. Now it is to be seen whether the Petitioner can withhold the supply of name of agency which conducted the examination of Additional District & Sessions Judge in the year, 2002. It would appear from bare perusal of Section 8(1)(j) of the R. T. I. Act that information which is personal in nature and the disclosure of which will have no relationship with any public activity or interest, need not be disclosed. It is also not obligatory to disclose such personal information which would cause unwarranted invasion of the privacy of an individual, unless and until the public interest demands the disclosure. The exemptions, however, is subject to the proviso that the information which cannot be denied to the Parliament or a State Legislature shall not be denied to any person, seeking such instruction."
[emphasis supplied]

9.3) Brief analysis of the Court's interpretation:

The Court's reasoning in refusing to disclose the name of the private agency that conducted the examination is itself problematic. However as Section 8(1)(j) was the only exemption that the PIO claimed, there was perhaps no occasion to go into the scope and applicability of the *proviso*. Further, the Court did not make an assessment as to whether the said information could be denied to Parliament or the State Legislature.

10) Treesa Irish w/o Milton Lopez vs The Central Public Information Officer, The Appellate Authority, The Central Information Commission and Union of India, Kerala High Court (at Ernakulam) [W.P. (C) No. 6532 of 2006 (C)], decision date: 30/08/2010.¹⁶

10.1) Case summary:

The Petitioner appeared in an examination conducted by the Department of Posts for its Kerala circle. As she was not selected she applied for a copy of her answer scripts under the RTI Act. The PIO refused access on the ground that no public interest would be served by disclosure. The First Appellate Authority upheld the rejection on the additional ground that disclosure would compromise the fairness and impartiality of the selection process. The Central Information Commission upheld the rejection for reasons of Section 8(1)(e)- when information sought was held in a fiduciary relationship and also because no public interest would be served by disclosure. The petitioner challenged these decisions before the Kerala High Court. A single-judge Bench of the Court rejected the Dept. of Posts' claim to the exemptions and ordered disclosure of the answer scripts.

10.2) The Court's interpretation of the proviso underlying Section 8(1):

The Court interpreted the *proviso* as applying to the whole of Section 8(1) and consequently to all exemptions listed there. The Court referred to its earlier decision

¹⁶ Equivalent citation: 2010 (3) KJ284.

where a similar interpretation was made (*Canara Bank vs The Central Information Commission* – see case#2 above) and held as follows:

“22. Here, it is to be noted that Section 8 is qualified by a proviso which reads as follows:

....provided that the information, which cannot be denied to the Parliament or a State Legislature shall not be denied to any person.

I am of the opinion that this proviso adds to the rigour against the right to claim exemption and in fact takes the sheen out of the main Section, making it all the more difficult for the public authority to claim exemption from disclosure of information under any of the provisions of the main section. It does not require much racking of the brains to conclude that if a question is raised in the Parliament or the State Legislature regarding any irregularity or corruption in the valuation of the answer papers in this case, then certainly the answer papers cannot be denied to the Parliament and the State Legislature and therefore the respondents cannot deny the information to the petitioner as well, claiming exemption under Section 8(1)(j).” [emphasis supplied]

10.3) Brief analysis of the Court's interpretation:

None of the parties seem to have agitated for a different interpretation of the *proviso* by citing the *Surup Singh* case or any other High Court decision where its application was restricted to clause (j). Further the Court's own decision in the *Canara Bank* case became precedent which also does not appear to have been assailed by any party. However in the absence of a discussion of the legislative intent underpinning the *proviso*, the controversy about its scope and application persists.

11) D P Jangra vs State Information Commission and Others, Punjab and Haryana High Court, [Civil Writ Petition No. 15964 of 2010 (O and M)], decision date: 06/01/2011.¹⁷

11.1) Case summary:

The Petitioner is a government servant. A private citizen sought copies of the Petitioner's movable and immovable property returns as well as permissions granted to him to buy or sell property. The PIO rejected the request by invoking Section 8(1)(j) holding that disclosure would cause unwarranted invasion of the petitioner's privacy. The First Appellate Authority upheld the rejection. The State Information Commission ordered disclosure of all information after giving the Petitioner of an opportunity of being heard. The Commission directed that the assets details of the Petitioner's wife and family members also be furnished to the requestor. The Commission also directed that the Department make the details of assets of all of its employees (Sub-Inspector rank onwards) public through its website. The Petitioner challenged this order before the Punjab and Haryana High Court. A single-judge Bench dismissed the petition holding that the information was fit to be disclosed.

¹⁷ Equivalent citation: (2011)162PLR44.

11.2) The Court's interpretation of the proviso underlying Section 8(1):

The Court perceived the *proviso* as being applicable to all of Section 8 of the RTI Act. The Court held as follows:

"15. Likewise, Proviso to Section 8 of the Act envisaged that the information, which cannot be denied to the Parliament or the State Legislature, shall not be denied to any person." [emphasis supplied]

11.3) Brief analysis of the Court's interpretation:

The Court did not take judicial notice of the *Surup Singh* case or any other later decision, perhaps because none of the parties may have raised the issue. The Court formed its opinion *de novo* without going into the legislative intent informing the *proviso*.

12) Haryana Public Service Commission and Another vs The State Information Commission and Another, Punjab and Haryana High Court, [Civil Writ Petition Nos. 9721 and 10304 of 2010], decision date: 10/01/2011.¹⁸

12.1) Case summary:

One candidate who did not make the grade in a recruitment-related examination conducted by the Haryana Public Service Commission sought information such as copies of the question booklet with model key code for all subjects on which the candidates' knowledge was tested. The PIO rejected the request on grounds of confidentiality. The First Appellate Authority upheld the rejection. HPSC denied access to five other candidates who sought similar information. The State Information Commission ordered that HPSC to:

- i) permit candidates to retain the question booklet after completing the examinations;
- ii) make the model key (answers to the question booklet) public on its website; and
- iii) permit any candidate to inspect the answer scripts after the selection process is completed.

HPSC challenged this order before the Punjab and Haryana High Court. HPSC claimed the protection of Section 8(1)(j) and also cited a handful of decisions from the Supreme Court to justify its decision of refusal. A single-judge Bench of the Court rejected all these contentions and upheld the Commission's order of disclosure.

¹⁸ Equivalent citation: (2011) 161 PLR370.

12.2) The Court's interpretation of the proviso underlying Section 8(1):

The Court perceived the *proviso* as being applicable to all of Section 8 of the RTI Act. The Court held as follows:

"20. Likewise, Proviso to Section 8 of the Act envisaged that the information, which cannot be denied to the Parliament or the State Legislature, shall not be denied to any person." [emphasis supplied]

12.3) Brief analysis of the Court's interpretation:

The Court did not take judicial notice of the *Surup Singh* case or any other later decision, perhaps because none of the parties may have raised the issue. The Court formed its opinion without going into the legislative intent informing the *proviso*. The paragraph cited above is similar to the Court's opinion expressed in the *D P Jangra* case (see case #11 above).

13) Hindustan Petroleum Corporation Ltd. vs The Central Information Commission and Others, Punjab and Haryana High Court [Civil Writ Petition No. 1338 of 2011], decision date: 24/01/2011.¹⁹

13.1) Case summary:

A private citizen sought a range of information relating to an authorised distributor of liquid petroleum gas (LPG) such as, number of consumers registered for supply of LPG at their homes, number and list of customers who do not require home delivery, number of persons registered for commercial use, number of cylinders received from the HPCL Plant at Jind and the procedure for booking cylinders for domestic use. The PIO provided some information but rejected access to other information including the list of consumers of LPG under Section 8(1)(d)- when disclosure of information in the nature of commercial confidence may harm the competitive position of a third party. When the matter escalated to the Central Information Commission (CIC) it ordered disclosure of some of the requested information. Hindustan Petroleum Corporation Ltd. (HPCL) challenged the order before the Punjab Haryana High Court. The Court remanded the matter back to the CIC. The CIC reheard the matter and ordered disclosure of the list of consumers. HPCL challenged this order also before the Court claiming the protection of exemptions under clauses (d), (e) and (j) of Section 8(1). After hearing all parties, a single-judge Bench of the Court dismissed the petition as being without merit. It refused to accept the petitioner's contention that the list of consumers was in the nature of commercial confidence or trade secrets or intellectual property or was held in a fiduciary relationship.

13.2) The Court's interpretation of the proviso underlying Section 8(1):

The Court perceived the *proviso* as being applicable to all of Section 8 of the RTI Act. The Court held as follows:

¹⁹ Equivalent citation: AIR 2011 P&H152.

"18. In the same sequence, proviso to Section 8 of the Act envisaged that the information, which cannot be denied to the Parliament or the State Legislature, shall not be denied to any person.

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20. To my mind, the information sought by Respondent No. 2 with regard to M/s Rajesh Gas Service, an authorized distributor of LPG, such as number of consumers, who use domestic LPG cylinders with home-delivery, without home delivery facilities, for commercial purpose number of LPG cylinders received from HPCL, LPG Plant, Jind, during the period 1.10.2008 to 31.12.2008 and procedure of booking system for domestic cylinders etc. cannot possibly be termed either to be the information of commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party or available to a person in his fiduciary relationship and the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual. Moreover, the CIC was satisfied that larger public interest justifies the disclosure of such information. Since the information sought cannot be denied to the Parliament or the State Legislature, so, the same cannot also be denied to Respondent No. 2, as contemplated in the proviso to section 8 of the Act." [emphasis supplied]

13.3) Brief analysis of the Court's interpretation:

The Court did not take judicial notice of the *Surup Singh* case or any other later decision, perhaps because none of the parties may have brought them to its notice. The Court formed its opinion without going into the legislative intent informing the *proviso*. However the Court clearly applied the *proviso* to reject HPCL's claim to the protection of clause (d) which is up higher than clause (j) on the list of exemptions contained in Section 8(1). The Court's opinion was similar to its views expressed in the *D P Jangra* case and the *HPSC* case (see cases #11 and 12 above).

14) *Bhupinder Singh Jassal vs The State Information Commissioner, Punjab and Others*, Punjab and Haryana High Court [Civil Writ Petition No. 2233 of 2011], decision date: 04/04/2011.²⁰

14.1) Case summary:

The Petitioner sought the names of the owners and partners of a mill operating in Shahkot from the office of the Excise and Taxation Commissioner. The PIO rejected the request on grounds of commercial confidence. The First Appellate Authority and the Punjab State Information Commission both upheld the rejection. The Petitioner challenged these orders through a writ petition before the Punjab and Haryana High Court. A single-judge Bench of the Court rejected the Department's claim to Section 8(1)(d)- when disclosure of information in the nature of commercial confidence, trade

²⁰ Equivalent citation: (2011) 163 PLR336.

secret or intellectual property would harm the competitive position of a third party. The Court ordered that the information sought be disclosed within three weeks.

14.2) The Court's interpretation of the proviso underlying Section 8(1):

The Court perceived the *proviso* as being applicable to all of Section 8 of the RTI Act. The Court held as follows:

"16. In the same sequence, proviso to Section 8 of the Act envisaged that the information, which cannot be denied to the Parliament or the State Legislature, shall not be denied to any person.

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18. *What is not disputed here is that petitioner has only sought the information that who are owners/partners of M/s Punjab Ice and General Mills, Gurudwara Road, Shahkot having VAT No. 03601023849 and nothing else, To me, the information sought by the petitioner is factual in nature and cannot possibly be termed either to be the information of commercial confidence, trade secrets or intellectual property, the disclosure of which would harm' the competitive position of a third party or available to a person in his fiduciary relationship and the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual as held by the SIC. Moreover, since the information sought cannot be denied to the Parliament or the State Legislature, so, the same cannot also be denied to the petitioner as well. Thus, as the information sought by the petitioner is factual in nature, therefore, the respondents cannot claim the exemption, as provided under Section 8(1) (d) of the Act, as urged on their behalf."* [emphasis supplied]

14.3) Brief analysis of the Court's interpretation:

The Court did not take judicial notice of the *Surup Singh* case or any other later decision, perhaps because none of the parties may have brought them to its notice. The Court formed its opinion without going into the legislative intent informing the *proviso*. However the Court clearly applied the *proviso* to reject the Excise Department's claim to the protection of clause (d) which is up higher than clause (j) on the list of exemptions contained in Section 8(1). The Court's opinion was similar to its views expressed in the *D P Jangra* case, the *HPSC* case and the *HPCL* case (see cases #11 and 12 above).

15) *The Hindu Urban Cooperative Bank Ltd. vs The State Information Commission and Others*, Punjab and Haryana High Court [CWP No. 19224 of 2006 and other connected writ petitions], decision date: 09/05/2011.²¹

15.1) Case summary:

Multiple requestors sought information from 'private' cooperative societies, cooperative banks, sugar mills, schools, clubs and other institutions receiving

²¹ Equivalent citation: (2011) ILR 2 Punjab and Haryana64.

government aid. The functionaries of these institutions refused to supply the information claiming that they were not public authorities under the RTI Act. The State Information Commissions of Punjab and Haryana held them to be public authorities and ordered disclosure of the information sought. The institutions challenged these orders through multiple writ petitions. A single-judge Bench of the Punjab and Haryana High Court held them all to be public authorities in the totality of facts and circumstances related to each institution. The Court held that these institutions were under the control of the respective governments, received substantial funding and had public dealings and were therefore obliged to comply with the requirements of the RTI Act in the manner of other public authorities.

15.2) The Court's interpretation of the proviso underlying Section 8(1):

While explaining the objectives of the Act and examining its clauses the Court perceived the *proviso* as being applicable to all of Section 8 of the RTI Act. The Court held as follows:

“31. Likewise section 8(1) of the Act deals with exemption from disclosure of the information. Proviso to this section has the overriding effect that the information, which cannot be denied to the Parliament or a State Legislature shall not be denied to any person.” [emphasis supplied]

15.3) Brief analysis of the Court's interpretation:

The Court was not interpreting any exemption in this case but merely examining the status of the petitioners as to whether or not they are public authorities under the RTI Act. Nevertheless, it expressed the view that the *proviso* applied to all of Section 8(1) in tandem with its treatment of this issue in *D P Jangra, HPSC, HPCL* and the *Bhupinder Singh* cases.

16) *Shonkh Technology International Ltd. Through its Authorised Signatory Shri Nilesh Khobragade vs State Information Commission Maharashtra Konkan Region, Appellate Authority, Joint Transport Commissioner (Computer), Public Information Officer, Deputy Transport Commissioner and Shri Sanjay s/o Anant Bhole, and United Telecom Ltd. vs State Information Commission Maharashtra Konkan Region, Bombay High Court [Writ petition Nos. 2912 and 3137 of 2011] decision date: 01/07/2011.*²²

16.1) Case summary:

A private citizen sought copies of agreements entered into by the office of the Joint Transport Commissioner with the Petitioners- both private companies- for supplying various kinds of Smart Cards for the purpose of issuing electronic vehicle registration certificates and driving licenses. The PIO rejected the request by invoking Section 8(1)(d)-when disclosure of information in the nature of commercial confidence, trade secrets or intellectual property would harm the competitive position of a third party. The First Appellate Authority upheld the PIO's order and cited the confidentiality clause in the agreement as an additional ground for refusing access. The Petitioners approached the Maharashtra State Information Commission for redress. The

²² Equivalent citation: 2011(113) Bom.L.R. 2433.

Commission remanded the matter back to the First Appellate Authority by an interim order. The First Appellate Authority denied access once again. In its final order the Commission directed the Department to furnish a copy of the agreement to the requestor within a month. The Petitioners challenged this order before the Bombay High Court claiming the protection of Section 8(1)(d) and also Section 8(1)(a)- when disclosure of information would prejudicially affect the security, economic and strategic interests of the State or would lead to incitement of an offence. The requestor appearing as one of the Respondents argued that a similar agreement between the petitioner and the Delhi Government had already been disclosed. A single-judge Bench of the Court rejected the petitioners' arguments and upheld the Commission's order holding that disclosure of the agreements would in no way jeopardize the security of the Smart Cards or the vehicle owners. The Court reasoned that other Transport Commissionerates were disclosing similar agreements in public interest.

16.2) The Court's interpretation of the proviso underlying Section 8(1):

The Court cited clauses (a) and (d) of Section 8(1)(a) along with the *proviso* while examining the petitioners' claim to their protection. The Court stated as follows:

"By Section 3, all citizens have the right to information subject to the provisions of the RTI Act. The obligations of the public authorities are set out by Section 4 and Section 5 provides for designation of the Public Information Officers. The request for obtaining the information is to be made in terms of Section 6 and the disposal of the request is to be made in terms of Section 7. Then comes Section 8, relevant portion, namely, 8(1)(a) and 8(1)(d) of which reads thus:"

8. Exemption from disclosure of information:- 1) *Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen-*

a) information, disclosure of which would prejudicially affect the sovereignty and integrity of India, the security, strategic, scientific or economic interests of the State, relation with foreign State or lead to incitement of an offence;

(b)

(c)

(d) information including commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party, unless the competent authority is satisfied that larger public interest warrants the disclosure of such information;

(e)

(f)

(g)

(h)

(i)

(j)

Provided that the information which cannot be denied to the Parliament or a State Legislature shall not be denied to any person. [emphasis supplied]

There is no further discussion on the scope and application of the *proviso* in the judgement.

16.3) Brief analysis of the Court's interpretation:

Although there is no discussion on the scope of the *proviso* underlying Section 8(1), the fact that the Court cited it in conjunction with clauses (a) and (d) is significant. It may be recalled here that a Division Bench of the same Court had viewed the scope and application of the *proviso* differently in the *Surup Singh* case (see case #1 above). The Court does not seem to have examined the ratio of *Surup Singh* while determining the application of the *proviso* to the clauses in question in the current case. This may have been so because the petitioners could not have justifiably laid a claim to the protection of clause (j) which was under dispute in the *Surup Singh* case.

17) *Bharat Sanchar Nigam Ltd. vs Shri Chander Sekhar, Delhi High Court [LPA No. 900/2010], decision date: 23/03/2012.*²³

17.1) Case summary:

The Respondent claiming to be a shareholder of a private company sought copies of reports of the evaluation of financial bids relating to tender processes floated by the petitioner in four zones of Delhi. Bharat Sanchar Nigam Ltd. (BSNL) had floated tenders for the installation of 93 million GSM lines in four parts and the private company was one of the bidders. The PIO rejected the request by invoking Section 8(1)(d)- when the disclosure of information in the nature of commercial confidence, trade secrets or intellectual property would harm the competitive position of a third party. The First Appellate Authority upheld the rejection on the additional ground that BSNL had signed non-disclosure agreements with the bidders. The Central Information Commission ordered disclosure of all information because it held that the evaluation process had been completed and that public interest in disclosure outweighed the harm to the protected interests. The petitioner challenged this decision in the Delhi High Court. A Division Bench of the Court allowed the appeal in part and remanded the matter back to the Commission. It directed the Commission to issue notice to all bidders under Section 11 of the RTI Act to ascertain their objections to disclosure of the requested information.

17.2) The Court's interpretation of the proviso underlying Section 8(1):

The Court examined the Respondent's contention that the information sought could not be denied to Parliament or a State Legislature but refused to adjudicate on that point. Instead it simply referred to the ratio in *Surup Singh* case as follows:

"17. We however do not deem it necessary to adjudicate on the proviso after Section 8(1)(j) of the Act and leave the same to be adjudicated in an appropriate proceedings. We may however notice that a Division Bench of the Bombay High Court in Surupsingh Hrya Naik Vs. State of Maharashtra: AIR 2007 Bom 121 has

²³ Equivalent citation: 2012 VII AD(Delhi) 342.

held that the proviso has been placed after Section 8(1)(j) and would have to be so interpreted in that context and the proviso applies only to Section 8(1)(j) and not to other sub-sections." [emphasis supplied]

17.3) Brief analysis of the Court's interpretation:

While the Court did make a reference to the ratio in *Surup Singh* case it did not refer to a similar interpretation given by a single-judge Bench earlier in the *Union of India* case (see case #6 above). As the Court refused to adjudicate on the scope and application of the *proviso* in the instance case the issue is still at large.

18) *Union of India and Others vs Col. V K Shad and Union of India and Another vs Col. P P Singh*, Delhi High Court [Writ Petition (Civil) 499/2012 & CM 1059/2012 and Writ Petition (Civil) 1138/2012 & CM 2462/2012 along with Writ Petition (Civil) 1144/2012 & CM 2486/2012], decision date: 09/11/2012.²⁴

18.1) Case summary:

Col. V K Shad sought copies of the records of a Court of Inquiry which he had been subjected to earlier, along with copies of recommendations made by officers in the chain of command in that case and also copies of the letters containing allegations leveled against him by his junior colleague. The PIO of the Indian Army rejected his request but advised him to apply for the same records under the applicable Army Rules. The First Appellate Authority ordered disclosure of the letters of complaint but upheld the PIO's order rejecting access to other records. Col. Shad sought redress from the Central Information Commission. The Commission ordered disclosure of all information sought. As the PIO did not comply with this order, Col. Shad filed a complaint before the Commission. The Commission issued a penalty show cause notice to the PIO and a compensation show cause notice to the Secretary, Government of India, Ministry of Defence. The Ministry challenged these orders and notices before the Delhi High Court.

In the second case Col. P P Singh sought copies of the findings of a Court of Inquiry which inquired into a case of an army rifle and ammunition that went missing (but which was recovered later). Subsequent to the completion of proceedings, the GOC-in-Chief (Central Command) directed that his severe displeasure (Recordable) be conveyed to Col. Singh. Col Singh sought copies of the findings of the Court of Inquiry and the file notings recorded by all officers involved in the chain of command in relation to this case. The PIO of the Army rejected the request by invoking Section 8(1)(e)- when information is available to a person in his fiduciary relationship. The First Appellate Authority upheld the rejection but on grounds contained in Section 8(1)(g)- when disclosure of information would endanger the life or safety of a person and Section 8(1)(h)- when disclosure of information would impede the process of investigation or apprehension or prosecution of offenders. When the matter escalated to the Central Information Commission, it cited its own order in the case of Col. Shad as precedent and ordered

²⁴ Equivalent citation: MANU/DE/5484/2012.

disclosure of all records after redacting the names of officers involved in the decision-making process. The Ministry challenged these orders before the Delhi High Court.

In the third case Brigadier S Sabherwal was found guilty, by a Court of Inquiry, of irregularities along with four other officers in relation to procurement of shoes for Indian troops prior proceeding on a United Nations assignment. The GOC-in-Chief (Western Command) directed that his severe displeasure (Recordable) be conveyed to the Brigadier. Brigadier Sabherwal sought copies of all file notings and correspondence available with the Western Command in relation to his case. The PIO denied access invoking the exemptions under Sections 8(1)(e) and (h) of the RTI Act. The First Appellate Authority upheld the order of rejection. However the Central Information Commission ordered disclosure of the information after severing the names of officers involved in the chain of command. The Ministry challenged these orders before the Delhi High Court. A single-judge Bench of the Court dismissed all petitions and directed disclosure of the information sought by all Respondents.

18.2) The Court's interpretation of the proviso underlying Section 8(1):

The Court treated the *proviso* as being applicable to all of Section 8(1) of the RTI Act. The Court reasoned as follows:

"16.4 Therefore, one would have to examine the provisions of Section 8(1)(e) of the RTI Act. The relevant parts of the said Section read as under:

8. Exemption from disclosure of information-(1) Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen-

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(e) information available to a person in his fiduciary relationship, unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information.

XXX

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Provided that the information, which cannot be denied to the Parliament or State Legislature shall not be denied to any person.

(2) Notwithstanding anything in the Official Secrets Act, 1923 (19 of 1923) nor any of the exemptions permissible in accordance with sub-section (1), a public authority may allow access to information, if public interest in disclosure outweighs the harm to the protected interests.

(3) XXX

Provided that where any question arises as to the date from which the said period of twenty years has to be computed, the decision of the Central Government shall be final, subject to the usual appeals provided for in this Act. ...

19. Before I proceed further, I may also note that the first proviso in Section 8 says that, information which cannot be denied to the Parliament or the State Legislature, shall not be denied to any person. Subsection (2) of Section 8, states that notwithstanding anything contained in the Official Secret Acts, 1923, or any of the exemptions provided in Subsection (1), would not come in the way of a public authority in allowing access to information if, public interest in its disclosure outweighs the harm to the protected interest. ...

X X X

21. This brings me to the first proviso of Section 8(1), which categorically states that no information will be denied to any person, which cannot be denied to the Parliament or the State Legislature. Similarly, sub-section (2) of Section 8, empowers the public authority to over-ride the Official Secrets Act, 1923 and, the exemptions contained in sub-section (1) of Section 8, of the RTI Act, if public interest in the disclosure of information outweighs the harm to the protected interest. As indicated hereinabove, the Supreme Court in CBSE vs. Aditya Bandopadhyay case has clearly observed that exemption under Section 8(1)(e) is conditional and not an absolute exemption. ...

22.1 Having regard to the above, I am of the view that the contentions of the petitioners that the information sought by the respondents (Messers V.K. Shad & Co.) under Section 8(1)(e) of the Act is exempt from disclosure, is a contention, which is misconceived and untenable. For instance, can the information in issue in the present case, denied to the Parliament and State Legislature. In my view it cannot be denied, therefore, the necessary consequences of providing information to Messers V.K. Shad should follow.” [emphasis supplied]

18.3) Brief analysis of the Court's interpretation:

It is interesting to note that within six months of the Division Bench's decision in the BSNL case, a single-judge Bench of the same court interpreted the *proviso* differently. The Court held that the *proviso* applied to clause (e) of Section 8(1) and not merely to clause (j). It is not known whether the Counsels for the Government of India brought to the notice of the Bench the interpretation of the *proviso* attempted in the *Union of India* case and the BSNL case (see cases #6 and 17 and above). The Court did not go into the issue of legislative intent underpinning the *proviso* before arriving at its conclusion about its scope and applicability.

Other aids to interpret the scope and application of the proviso:

There are at least two sources of information that may aid in the correct interpretation of the *proviso* underlying Section 8(1). The first is a set of guidelines that the Department of Personnel and Training, Government of India circulated to public authorities, PIOs and First Appellate Authorities at the Central and State level for implementing the RTI Act. The relevant para in all three sets of guidelines reads as follows:

*"The Act gives the citizens a right to information at par with the Members of Parliament and the Members of the State Legislatures. According to the Act, information which cannot be denied to Parliament or a State Legislature, shall not be denied to any person."*²⁵

The Central Government appears to have been of the opinion that the *proviso* contained a guiding principle for public authorities intent on invoking one or more exemptions listed in Section 8(1) to reject information requests. It is interesting to note that these guidelines were circulated after the Bombay High Court decided the *Surup Singh* case.

Another aid for interpreting the *proviso* is found in the RTI Bill tabled in Parliament in December 2004. The *proviso* featured as a separately numbered clause under the exemptions listed under clause 8(1):

"8. Exemption from Disclosure of Information:- (1) Notwithstanding anything contained in this Act, except as otherwise provided herein, the following information shall be exempted from disclosure, namely:

(a) information, the disclosure of which would,

(i) prejudicially affect the sovereignty and integrity of India, security, strategic, scientific or economic interest of the State, relation with foreign State; or

(ii) lead to an incitement to commit an offence;

(b) information, which has been expressly forbidden to be disclosed by any court of law or tribunal or the disclosure of which may constitute contempt of court;

(c) information, the disclosure of which may result in a breach of privileges of Parliament or the Legislature of a State;

(d) information, including commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party:

Provided that such information may be disclosed, if the Public Information Officer is satisfied that a larger public interest warrants the disclosure of such information;

(e) information available to a person in his fiduciary relationship:

²⁵ Para #5 of "Guidelines for the officers designated as Central Public Information Officer under the Right to Information Act, 2005", Office Memorandum No. 1/69/2007-IR, dated 27th February, 2008; Para #5 of "Guidelines for the public authorities under the Right to Information Act, 2005", Office memorandum No. 1/4/2008-IR, dated 25th April, 2008 and Para #5 of "Guidelines for the Officers designated as first appellate authority under the RTI Act, 2005", Office Memorandum No. 1/3/2008-IR, dated 25th April, 2008.

Provided that such information may be disclosed, if the Public Information Officer is satisfied that a larger public interest warrants the disclosure of such information;

(f) information received in confidence from a foreign government;

(g) information, the disclosure of which would endanger the life or physical safety of any person or cause to identify the source of information or assistance given in confidence of law enforcement or security purposes;

(h) information, the disclosure of which would impede the process of investigation or apprehension or prosecution of offenders;

(l) the Cabinet papers, including records of deliberations of the Council of Ministers, Secretaries and other officers:

Provided that the decisions of the Council of Ministers, the reasons thereof, and the material on the basis of which the decisions were taken, shall be made public after the decision has been taken, and the matter is complete, or over:

Provided further that those matters which come under the exemptions listed in this section shall not be disclosed;

(j) information which relates to personal information, the disclosure of which has no relationship to any public activity or interest or which would cause unwarranted invasion of the privacy of the individual:

Provided that such information may be disclosed, if the Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information.

(2) Information which cannot be denied to Parliament or Legislature of a State, as the case may be, shall not be denied to any person:

(3) A public authority may, notwithstanding the exemptions specified in sub-section (1), allow access to information if public interest in disclosure of the information outweighs the harm to the public authority.

(4) Subject to the provisions of clauses (a) and (l) of sub-section (1), any information relating to any occurrence, event or matter which has taken place or occurred ten years before the date on which any request is made under section 6, shall be provided to the person making the request under that section:

Provided that where any question arises to the date from which the said period of ten years has to be computed, the decision of the Central Government shall be final." [emphasis supplied]

The Department-related Parliamentary Standing Committee for Personnel, Public Grievances, Law and Justice, which examined the RTI Bill and recommended several amendments to strengthen it, left Section 8(2) intact. However, the standalone clause had, in May 2005, become a *proviso* underneath Section 8(1) when the Central Government tabled more than 140 amendments to the RTI Bill based on the Committee's recommendations. This significant change is what has caused confusion about the scope and applicability of what is essentially a guiding principle to be applied by public authorities while invoking the exemptions. We hope that in an appropriate case the true meaning of the *proviso* underlying Section 8(1) is interpreted by the courts with due regard to legislative intent and the drafting history of the RTI Act. The current jurisprudence regarding the import of the *proviso* underlying Section 8(1) is far from convincing.
