Important Issues over RTI

Issue No. 1

Field Occupied by Right to Information Act and Sections 123, 124 and 162 of the Evidence Act

The field occupied by the Right to Information Act and other enactments dealing with analogous subjects are different. They do not encroach one over another.

Sections 123, 124 and 162 of Evidence Act deal with the subject of privilege claimed by the Government against

1. Disclosure of the documents containing information relating to the affairs of the State; and
2. Any other document.

In the first category of cases, the Head of the Department can decide the privilege and in the later it is the officer who is called upon to produce the document who raises the issue. Notwithstanding the decision made by the Head of the Department not to produce document, the court has power to compel its production after making due enquiry based on the affidavits and decide the issue. In doing so, the court can after securing the document may or may not examine the contents but allow it to be kept in sealed cover in case of its need to be opened in any appeal which may be filed.

In the second situation when the officer claims the privilege as regard the confidentiality and secrecy of information, the court may direct the officer to produce the document, examine the same in-camera and decide the issue of privilege. In either case, if the court rejects the claim for privilege it can admit the document and read the same as part of the evidence.

The field occupied by the Right to Information Act is not the same as covered by proceedings arising in the court. Here, it is a request made by a citizen for information. The right to accede to the request or reject it rests on the officials conferred with jurisdiction under the Act viz. the Central/State Public Information Officer, his superior and the Central/State Information Commission whose decision is final.

Similar situation may arise during the trial of criminal cases. Here to, the Court follows the same procedure as is followed in the Civil Courts.

Issue No. 2
Field Occupied by Right to Information Act and Articles 74 and 163 of the Constitution of India

Article 74 and Article 163 deal with the question of privilege claimed by the Government. The privilege claimed here is confined to the advice given by the Cabinet or Minister to the President or to the Governor as the case may be. The claim of privilege not to divulge any information as to what transpires between the Cabinet and the Head of the State is not confined to merely to the formal decision but also to the reasons and background for the advise tendered.
Under the Right to Information Act, the former part of it shall not be disclosed but the latter shall be disclosed after the matter in relation to which the advice is tendered is complete or over.
However, if the matter involved relates to the secrets, strategic, scientific or economic interests of the State, the privilege is absolute. The Central/State Public Information Officer is not obliged to make such information available if he decides that the relevant information asked for comes within the exception.

Issue No. 3
Field occupied by Right to Information Act and that of the Official Secrets Act, 1923

Official Secrets Act is a penal enactment. It describes the offences and prescribes punishments for offenders. The principal offence is spying. Though the Act does not give any definition for the word spying, the offences created under this enactment are illustrative of the offence of spying.
The offences created under Official Secrets Act are six in number. They are:

1. approaching for inspection of any prohibited area with a view to take sketches, etc., for communicating them to any foreign agency;
2. use of information gathered by any person or any person coming to be possessed of any information for the benefit of foreign agent;
3. unauthorised use of uniforms for securing entry into prohibited places;
4. falsification of reports and forgeries to commit above offences;
5. interfering with the duties of the police and armed forces; and
6. harbouring spies.

The Court trying these offences may direct that all the proceedings and evidence may be ordered to be kept secret and shall not be communicated.

The Official Secrets Act applies to every person including the Government servants and to the Indian citizens living abroad.

The obligation cast on Government servants not to disclose any information or communicate with foreign agents still continues notwithstanding the coming into force of the Right to Information Act.

Issue No. 4
Appeal to the Courts

If you are faced with a situation where you are not satisfied with the decision of the Information Commission, an appeal or a complaint, you can file an appeal in the State High Court or the Supreme Court. The RTI Act specifically bars the courts from considering any suit, application or any proceeding made under the RTI Act. However, it must be remembered that the RTI Act gives effect to a fundamental right, and according to the Constitution, the High Courts (under Article 224) and the Supreme Court (under Article 32) have the power to look into any matter relating to the fundamental rights of citizens.

Technically, therefore, you DO have the right to approach the High Court or the Supreme Court if you are not satisfied with the decision of the State or Central Information Commission as the case may be.

Issue No. 5
Whether the Information made available could be used as Evidence in Court
Is the document made available by the Central/State Public Information Officer admissible as evidence in a court of law? This question is sure to arise when the recipient of the document attempts to put in as evidence in a case pending in the Civil Court or Criminal Court?

The answer to this question at a glance seems to be "YES".

There are two opinions in this respect. According to discussions held with several sitting High Court Judges, it can be used as an evidence in a court of law.

But on the other hand some legal luminaries opine that it cannot be and give the following argument:

The document made available by the Public Information Officer is the one which is already recorded in the official records and published or it may be one which is not recorded and published or, the one which is yet to be recorded and published.

What the Public Information Officer does is he just furnishes a copy of the record. Such record may be a true copy but it is not either authenticated or can be vouch safe as true. The information available will be something like news. The Public Information Officer is not a party to such information. He is not capable of speaking anything about the contents of the document or about its veracity.

The document furnished by the Public Information Officer is no doubt a document issued from the proper custody and by the authority which by law

is found to keep the information and disseminate it. That by itself does not make the document either authentic or its contents true.

Further, the document issued has no purpose other than allowing the recipient to know of its contents and nothing more. It is not the intention or the purpose of Public Information Officer to support the recipient when he uses it for any purpose either to prove or disprove any fact in which the recipient of the document is only concerned. The document and the information contained therein are neutral as if it is just news.

The Public Information Officer is totally ignorant of the purpose for which the applicant has made his request for information nor the Public Information Officer is in any manner concerned with it. In the application for information the applicant is not required to state any reasons why he requires information. Therefore, it is not an application for a certified copy of any information recorded by any adjudicating authority in a dispute.

As per the practices of the Courts and tribunals the party applying for a certified copy should state whether it is required for purposes of appeal or for reference. No such condition is prescribed for the applicant for information to state the reason why he requires information. The copy furnished by the Court can be used only for the purposes for which the copy of application is made. As per the practices prevalent with the Government when an application for certified copy is made, the authority or the officer receiving the application will specifically endorse on the copy he grants, that it shall not be used in Court as evidence even though the information contained therein is not only true and is also authentic.

In such cases, the Court receiving the certified copy, before admitting the document requires that the document should be proved to be the original. It is particularly so in the case of survey maps, where the Court normally as a practice appoints the official surveyor as a Court Commissioner and obtain the true sketch. Here, in the case of Public Information Officer whether he makes an endorsement as is referred to above to the said effect that the documents supplied by him shall not be used in Court, it is implied in the circumstances of this Act that the document made available to the applicant shall not be used as a proof in Court proceedings.

Further, the principal purpose of the Act itself is to make available to the citizens all information the Government is possessed of for his self-illumination to function as an enlightened and well-informed citizen and not to help him to score any point with his opponent in any dispute.

Thus, when the citizen wants to use the document obtained by him from the Public Information Officer as a document in any civil or criminal proceedings, he should adopt the procedure prescribed for purposes of obtaining certified

copies through court process and not by making an application for information under this Act.

However, till date no such ruling by either the Supreme Court or any State High Courts is available on this point.

In the opinion of author there may be controversy regarding the usage of information obtained as evidence but if the copies of the documents supplied by the PIO along with the information, are attested by the authorised/competent authority, they can be used as evidence. It is so since the duly attested copies of any document are as good as original document and the person who has attested those documents can be summoned in the court to prove them. If the attesting official denies the veracity of his attestation then criminal proceedings can be initiated against that person for attesting any document without tallying it with the original document.

Issue No. 6 Public Interest and Larger Public Interest

The Right to Information Act uses the expression "public interest" and "larger public interest" in different contexts. In the case where information asked for is a matter which is kept with the Government by a third party on assurance that it will not be divulged; or in the case where it relates to commercial confidence and trade secrets or intellectual property; or in the case where information asked for relates to any communications between parties standing in fiduciary relationship, in the above said three circumstances, the Central/State Public Information Officer shall not make available such information unless he considers that the public interest served by the disclosure is larger than the public interest served by their non-disclosure. The concept of public interest and larger public interest may better be explained by following illustrations:

1. When an officer of Income Tax Department conducts an enquiry for purposes of bringing out a change in tax procedures and his report contains instances of large scale evasion of tax by several named assesses and of the collusion of several officials in this regard, it does not surely serve any larger public interest if the information is divulged at the instance of individual citizen for the contents of the report are purely academic and are intended to prove the necessity of bringing about a reform in the system and not for taking any action against the alleged offenders.
2. It is no case of any service of larger public interest if the Information Officer refuses to divulge the trade secret of a particular trader to another where it is found that the substratum of the business of the former trader depends upon his trade secret. The third party's right to information does not overweigh nor it can be treated as one, which serves any larger public interest. The disclosure of trade secret may damage the pattern of trade to the detriment of business community.

3. In the case where the information available is of a confidential or fiduciary nature say, such as one between the Government and its counsel between the trustee and his ward there is not much larger public interest served if the communication between them and which are in possession of the Government is not disclosed. Since it is a well accepted principle in law that what is confidential and is kept confidential shall not be disclosed unless such disclosure is necessary for the purposes of taking any follow up action.

4. Where the information asked for is about personal matters of any individuals or officer, there is no public interest involved either in the disclosure or non-disclosure for what is required as a first condition for supply of information is that the information asked for shall relate to the administration of the State. Therefore, the Public Information Officer is not bound to supply such information which is personal. However, for any special reason such personal information is found to have some relation with the public activities of the concerned individual, the public interest sought to be served by the disclosure is certainly larger than keeping the information secret.

Issue No. 7 Appeals versus Complaints - What is the Difference?

Requesters who are aggrieved by a decision of a PIO can make an APPEAL to a departmental Appellate Authority, who will be an officer senior in rank to the PIO but in the same public authority. The Appellate Authority, after hearing from you and the PIO, has to make a decision on whether the PIO made the correct decision. If the order of the Appellate Authority also does not satisfy you, you can make a second appeal to the Information Commission.

Alternatively, a COMPLAINT can be made directly to the relevant Information Commission where it concerns ANY matter relating to accessing information under the RTI Act, for example, not giving information within a time limit, charging unreasonable fees, denying you a fee waiver despite being a BPL person, destroying a record which you had requested, or making a bad decision about disclosure. You can bypass the departmental Appellate Authority with a complaint, but it is important to call it a 'complaint' because otherwise the Information Commission may treat your communication as an appeal and tell you to go through the departmental Appellate Authority first.

You can file a complaint if you have any trouble in accessing information under the RTI Act, for example if:

- you have not been able to submit an application either because a PIO has not been appointed in a particular department to accept your application or an APIO has refused to accept your application;
- you have been refused access to any information requested;
- you do not get a response to your request or access to the information you requested within the specified time limit;
- you have been asked to pay fees which you think are unreasonable;

- you believe the information you have been given is incomplete, misleading or false;
- you face any other problem related to accessing information under the RTI Act.

Issue No. 8 Why Make a Complaint?

Instead of making an appeal to the Appellate Authority and then the Information Commission, you also have the option of approaching the Information Commission directly and submitting a complaint under section 18(1) of the Act if you are not satisfied with the decision of a PIO or if you think a public authority is failing to comply with its information duties under the Act. This is a particularly useful route if you immediately wish to seek a penalty for the PIO or compensation for yourself. The Appellate Authority does not have the power to order either of these, but Information Commissions do. By approaching the Information Commission directly, you will be able to bypass the Appellate Authority, although the lack of a specified time limit for the Information Commission to give its decision is a drawback to this procedure. The Appellate Authority has to give its decision within a maximum of 45 days. It is for you to carefully decide which procedure is best in your case.

You can file a complaint under section 18(1) if you have any trouble in accessing information under the RTI Act, for example if:

- you have not been able to submit an application either because a PIO has not been appointed in a particular department to accept your application or an APIO has refused to accept your application;
- you have been refused access to any information requested;
- you do not get a response to your request or access to the information you requested within the specified time limit;
- you have been asked to pay fees which you think are unreasonable;
- you believe the information you have been given is incomplete, misleading or false;
- you face any other problem related to accessing information under the RTI Act.

This last provision is purposely brought to allow you to complain to the Information Commission in relation to ANY problems that prevent you from effectively accessing information, even those not mentioned specifically under the RTI Act. These include, for example, failure by a public authority to - implement proactive disclosure requirements properly, appoint PIOs, and provide proper training to officials or failure by the government to produce the User's Guide required under the Act.

Issue No. 9 How Are Appeals Usually Handled By Appellate Authorities?

The RTI Act does not prescribe a procedure that Appellate Authorities should follow when deciding appeals. In general, however, appeals proceedings should not be adversarial but should be a search for the truth, to simply find out whether the Act was applied properly. In any appeal, it is the PIO who has to prove that the rejection of an application was justified. This means that in any hearing, the PIO should first be asked to explain themselves. Only if they make a defensible case should you be called on to explain why you think they are wrong. In any case, the Appellate Authority needs to apply his/her mind to consider all the facts again and decide whether the action of the PIO was correct. All parties involved - you, the PIO and any third party who was consulted about the disclosure - have the right to be heard before any decision is made.

Issue No. 10 How Appeal Proceedings are Held

The Central and State Information Commissions manage appeals in accordance with procedures prescribed under the relevant Appeal Rules. Commissions have the power to take oral or written evidence on oath/affidavit; inspect documents or copies; hear and receive affidavits from the PIO against whom the appeal has been made and/or the Appellate Authority who has decided the first appeal; and to hear from you. If the decision of a PIO or Appellate Authority relates to a third party, then that third party also has the right to be heard by the Information Commission before it makes a decision.

Appeals proceedings at the Information Commissions are not meant to be formal, like a court. It should not be necessary to hire a lawyer to plead your case before the Information Commission. Proceedings are meant to be informal and non-confrontational. Although the Commission does have the powers of a civil court under the RTI Act, the Commission is not supposed to operate like a court. If you feel uncomfortable during appeals or complaints proceeding you should inform the Information Commission and should be able to seek assistance from someone during your hearing. In any case, the Information Commission is an openness champion, and the Commissioners and their staff should be alert to ensure that arguments in favour of disclosure are not overlooked simply because you did not hire a lawyer.

The RTI Act does not prescribe a time limit for the Information Commission to decide on an appeal and no time limit has yet been included in any of the Appeal Rules that have been prescribed. However, best practice supports a deadline of 30-45 days to dispose of any appeal just like the Appellate Authorities.

If an Information Commission decides that your appeal is justified, the Commission will need to give you a written decision. The Information Commission has broad and binding powers to:

- order the public authority to take concrete steps towards meeting its duties under the RTI Act, for example, by providing access to the information you requested or by reducing the amount of fees you need to pay;
- order the public authority to compensate you for any loss you may have suffered in the process;
- impose penalties on the PIO or any other official who failed in their duties under the Act.

If the Information Commission decides that your case is groundless, it will reject your appeal. In either case, the Commission must give notice of its decision to you and the public authority, which should include any right of appeal. Even though the RTI Act states that appeals to the Courts are barred, you have a right under the Constitution to approach the High Court or Supreme Court, because the right to information is considered a fundamental constitutional right.

Whether the Information Commissions are hearing an appeal or a complaint, they have the same investigative and decision-making powers. In nutshell, the Information Commissions have broad investigative powers because they have the same powers as a civil court.

The RTI Act currently contains no time limit for disposal of appeals by the Information Commission.
If, after investigating the complaint, the Information Commission decides that your complaint is justified, the Information Commission has very broad and binding powers to require the public authority or official concerned to take any and all steps to comply with the RTI Act.

For example, by ordering release of the information you requested, appointing PIOs to receive and process applications or providing better proactive disclosure. The Information Commission can also require the public authority to compensate you for any loss or detriment you may have suffered and they can impose a penalty on non-compliant officials. Alternatively, if the Information Commission finds that your complaint was not justified, it can reject your application. In such a case, you can appeal to the State High Court or the Supreme Court of India.

Issue No. 11 Can I Prefer an Appeal to the courts?

If you are faced with a situation where you are not satisfied with the decision of the Information Commission, an appeal or a complaint, you can file an appeal in the State High Court or the Supreme Court. The RTI Act specifically

bars the courts from considering any suit, application or any proceeding made under the RTI Act. Under section 23.

However, it must be remembered that the RTI Act gives effect to a fundamental right, and according to the Constitution, the High Courts (under Article 224) and the Supreme Court (under Article 32) have the power to look into any matter relating to the fundamental rights of citizens.

Technically, therefore, you DO have the right to approach the High Court or the Supreme Court if you are not satisfied with the decision of the State or Central Information Commission as the case may be.

Issue No. 12 Burden of Proof

In any appeals proceeding, the burden of proof that the denial of a request was justified lies on the person who wants to keep the information secret - the PIO or a third party.

In practice, this means that you should only need to interact with the Commission after the person who wants to withhold the information has first been questioned, because they are the ones who have to show the Commission that they are right. If a hearing is then organized, the PIO or third party arguing for secrecy needs to be called on to make their case first. You will only need to make a case if the Commission thinks the PIO or third party has a point worth considering. At that stage, you then need to argue in favour of disclosure.

Section 19(5) of the Act specifically places the burden of proving that withholding information was justified onto the official who denied the request.

A requester will only need to make their case if the Commission thinks the official has a point worth considering. At that stage, the requester will then need to argue in favour of disclosure.

Issue No. 13 You Can Have Information "Partially Disclosed" to You

Sometimes one document will contain both some sensitive information which falls under an exemption, and some information which could be disclosed without causing any harm. In such cases, access to the information, which is not sensitive, can still be provided.

This is known as "partial disclosure". In practice, this means the PIO will often black out portions of a document - certain lines or paragraphs - or will disclose some documents requested but not others. If a PIO decides to partially disclose information, he/she has to notify you that you will only be getting partial disclosure of the information you asked for, the reasons for the

decision, the details of who made the decision, the fees to be paid, and your right to get the decision reviewed.

Issue No. 14 "Public Interest" Override Exemptions

Section 8(2) of the Act requires that even where an exemption applies to an application for information, a public body may release the information if the public interest in disclosure outweighs the interest protected by the exemption. The term "public interest" is not defined anywhere in the Act. This makes sense because what is in the public interest will change over time and will also depend on the particular circumstances of each case. Because of this, public authorities - more specifically, PIOs and departmental Appellate Authorities - as well as Information Commissions will need to consider each case on its individual merits. They need to decide whether any exemption applies and if so, whether it is overridden by more important public interest considerations, such as the need to promote public accountability, the imperative to protect human rights, or the fact that disclosure will expose an environmental or health and safety risk.

Section 8(2) of the Act makes all of the exemptions contained in section 8(1) of the Act subject to a "Public Interest Override". The notion of the 'public interest' is the unifying principle in the RTI Act. Government information is not the property of the organization that holds it. It is not 'owned' by any department or by the government of the day.

Information is generated for public purposes and is held for the community. Information can only be retained if it can be shown to be in the greater interest of the community to withhold the information.
In practice, this means that even where requested information is clearly covered by an exemption, an official - and the Information Commission when considering an appeal - should still order disclosure if the public interest in the specific case supports release of the information.

The term "public interest" is not defined anywhere in the Act. This makes sense because what is in the public interest will change over time and will also depend on the particular circumstances of each case. Because of this, public authorities - more specifically, PIOs and Departmental Appellate Authorities - as well as Information Commissioners will need to consider each case on its individual merits, taking into account the specific facts. They need to decide whether any exemption applies and if so, whether it is overridden by more important public interest considerations, such as the need to promote public accountability, the imperative to protect human rights or the fact that disclosure will expose an environmental or health and safety risk.

Issue No. 15 What If The Information Involves a "Third Party"?

Usually, people make applications for information created by the government which relates to the public authority receiving the application. In such cases, there are only two parties involved in the request process - the requester and the public authority. However, sometimes requesters will ask for information which also affects a third party.

For example, if you want to have a look at the tender submitted by a rival company or a letter to your MP from your work colleague, the company and your colleague are a "third party".

Sometimes - but not always - the RTI Act requires that third parties are consulted about applications. A third party only needs to be consulted if:

* the PIO is considering releasing the information; and
* the information relates to the third party or was given to the public authority by the third party "in confidence"; and
* the third party treated the information as confidential.

This last requirement is key. While a lot of information might relate to third parties, there are only a small number of cases where the third party would have treated the information as confidential. Information like lists of recipients of subsidies or permits, submissions to committees or government contracts, although involving third parties, do not involve confidential third party information and do not therefore require consultation with the third party.

Where the third party test above is satisfied, the third party has the right to be consulted about whether the information should be released. The PIO needs to send a written notice within 5 days inviting the third party to make a submission regarding disclosure.

Issue No. 16 Can Third Parties be Heard during Requester's Appeals?

Where, after hearing from a third party, a PIO or Departmental Appellate Authority decides not to disclose information, the requester has a right to appeal and continue to seek disclosure of that information.

Section 19(4) of the Act gives third parties the right to make representations to either the Departmental Appellate Authority or the Information Commission during an appeal which "relates to third party information". This makes practical sense because an appeal body will be once again considering the issue of whether or not information should be disclosed, and just as before in relation to an application, a third party should have a chance to explain any reasons they may have for wanting to keep the information secret.

However, section 19(4) does not specifically lay down a consultation process for appeals which relate to third party information. Rather, the Act only requires that third parties are given a "reasonable opportunity of being heard". To meet this requirement, Departmental Appellate Authorities and Information Commissions would be well advised to follow the general guidelines of s.11 as much as possible, by contacting a third party as soon as possible, in writing and/or by telephone or fax, and inviting them to make a written or oral submission which will then be considered during the appeal. The third party needs to be given notice of any hearing with sufficient time to organize their attendance if they wish to be present.

Even where a third party makes a representation during an appeal by a requester, it is still up to the Departmental Appellate Authority or Information Commission whether or not to release the information and - as always - information may only legitimately be withheld if it falls under one of the exemptions in sections 8 or 9 AND the public interest in disclosure does not outweigh the public interest in keeping the information secret.

Not all third party information will attract the consultation process in section 11.

There is a wide variety of third party information held by public authorities which can be regularly and un-controversially released. For example, the results of tender processes and contracts negotiated with private companies, although sensitive during the tender and contracting process, can - and should - be released by public authorities once negotiations are complete. Companies' annual reports, shareholder lists, environmental assessments or hazardous waste disposal plans held by public authorities can all be released. They relate to third parties but they were not provided confidentially. They do not attract any exemption and in any case, the public interest clearly weighs in favour of their disclosure. Lists of recipients of government subsidies or beneficiaries under rural development schemes must even be proactively published under s.4 of the Act. In any case, the information was not supplied confidentially so there can be no objection to disclosure.

Under section 19(2), third parties themselves may also submit appeals against a decision of a PIO. Notably, while a third party has a right to be heard however, the Information Commission retains the ultimate right to decide on disclosure. A refusal of a third party to consent to disclosure does not, in the absence of anything else, mean that information should be withheld. Even if a third party claims confidentiality, the information cannot be withheld unless it clearly comes within a stated exemption and it is in the public interest to withhold the information.

Issue No. 17 Can I Access Information about Private Companies From Public Authorities?

You can access information about private companies from public authorities. Apart from getting information from public authorities under the Act, you can also request information from a public authority which relates to a private body if the public authority can access that information under an existing law. For example, industries are required by the Ministry of Environment and Forests to submit "Environmental Statements" (ES) to the State Pollution Control Boards (SPCBs). These statements are used to determine the efforts made by an industry to minimize pollution and conserve resources. You can use the RTI Act to access these statements. The point of this provision is that public authorities should not be able to reject your request just because they have not done their duty under the law. If they should have collected the information by law, then under the RTI Act they are required to go out and retrieve the information - and then pass it on to you. Ideally, this will mean that they must also act on the information they collect.

Issue No. 18 Do I need to explain why I Want Information?

You do not need to explain why you want information. The Act makes it very clear that there is no need for you to give reasons for why you want a particular piece of information. You can request any kind of information without saying why or for what purpose you want the information in your application. This reflects the fact that the right to information is your right, and you do not need to justify your request. Secrecy is now what needs to be justified.