

## RIGHT TO INFORMATION ACT VIS-A-VIS OFFICIAL SECRETS ACT

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*'Boni Judicis Est Ampliare  
Jurisdictionem'*

**'Law must keep pace with society to retain its relevance'**

The above statement always reminds us that law will command respect if it is relevant and respond to popular aspirations. It is true that every legal system requires a certain degree of stability with scope for change. Keeping this in mind here is an attempt to analyze the revolutionary changes brought about by the Right to Information Act, 2005.

Legal system is a coordinated and purposive activity. Unlike Bentham and Austin's, belief that a legal system is only the sum total of laws, it represents the pattern of inter-relation of legal material and justice in adapting to the change as an integral part of a legal system. Adaptability is truly a condition sine-qua-non of the continued existence of a legal system. The concept of law always presupposes a 'legal system'. Policy precedes law, and law is not designed to be in force for an instant or only for today, but to operate over a period of time. There is a vital need for the law to adapt itself to social change, if it is to survive"<sup>1</sup>.

Human Rights Movement got momentum as never before in the twentieth century which considered that human dignity and human liberty are most precious for the development of personality of an individual. Modern history shows its genesis to 'Magna Carta' in the thirteenth century and developments in United States of America in the seventeenth and eighteenth centuries, French Declaration of the Rights of Man in the nineteenth century and their ideals which culminated in the Universal Declaration of Human Rights in 1948.

India being a democratic country has adapted welfare state policy and accepted the duty to protect and enhance the welfare of the people. In order to examine and

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1. Dr. A. Raghunatha Reddy, "Legal Reforms: Towards International Unification and Harmonization Of Law", *Indian Bar Review*, July-Dec 2005, P. 409

audit the performances of the government, people are to be well informed of the policies, actions and failures. An informed citizenry is a condition precedent to democracy.<sup>2</sup> Hence history cannot only be called a class struggle, as Marxists put it or attaining equality as by Blacks fight against White people but, it was also for acquiring knowledge. Knowledge is synonymous with power and power includes liberty. Equal access to knowledge has been an important issue in the struggle for social and economic equality. Until the end of Second World War, struggle for access to knowledge has been universal.<sup>3</sup> The knowledge as quoted by our Apex Court in *S.P.Gupta Vs Union of India*,<sup>4</sup> quoting James Madison, “knowledge will for ever govern ignorance and people who meant to be their own governors must arm themselves with the power, knowledge gives. A popular government without popular information or the means for obtaining it is but a prologue to force or tragedy or perhaps both”. The citizens’ right to know the facts, the true facts, about the administration of the country, is thus one of the pillars of a democratic state. And that is why the demand for openness in the government is increasingly growing in different parts of the world.<sup>5</sup> Hence there is a demand for transparency in government world over. Despotism and oppression thrive on secrecy and lack of information. Terrorism thrives on secrecy and hatred, but both need to be combated through information.<sup>6</sup> Lesser the secrecy greater will be the faith in the government. Secrecy in governance has been the culture in most of the governments all over the world with India being no exception.<sup>7</sup> Right to know of the Government policies and programs is a democratic right. Thus the accent in modern democracy is towards an open Government.<sup>8</sup>

Keeping in mind the international developments, framers of the Constitution of India incorporated these principles in chapter III of the Constitution. But one must be aware of the truth that the Constitution has not only guaranteed rights, but it has also protected them. Article 19 (1) (a) guarantees freedom of speech and expression to all, but the philosophy of the Preamble assures liberty of thought, expression, belief, faith ..... etc. The constitutional mandate of freedom of speech and expression, which includes right to know the information, is well reflected in the new enactment called the Right to Information Act, 2005.

There are many issues which are required to be addressed in relation to the Right to Information Act, 2005, which is a piece of legislation based on the above said democratic principle.

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2. S.P.Sathe: *RTI*, Lexis Nexis Butterworths, 2006, P.2

3. *Ibid*, P.3

4. AIR 1982, SC 149

5. *Ibid*, P.3

6. S.P.Sathe, *Ibid*, P.4

7. Justice N Santhosh Hegde, “An overview of Right To Information Act with reference to Official Secrets Act”, *Nyayadeep*, Volume VII, Issue I, Jan, 2006, P.15

8. M. P. Jain & S. N. Jain, *Principles of Administrative Law*, Wadia & Co., Nagpur (1993), P. 890.

- a. Does one require a separate legislation like 'Right to Information Act' to enforce the freedom of speech and expression guaranteed under the Constitution?
- b. Whether the provisions of the RTI Act are practically feasible for enforcement?
- c. Whether the RTI Act is an effective legislation for regulating corruption in the system?
- d. Whether the movement from Secrecy to Transparency is socially acceptable and legally justifiable?
- e. Is RTI Act a destructive weapon or constructive tool in the governance of the State?
- f. Whether welfare grammar of the government can be implemented effectively through the RTI Act?

To examine all these, one has to analyse, the relevance of the RTI Act in the context of Public Administration and public necessity for access to public documents.

### **The Right to Information Act**

The Preamble of the Act states that it has been enacted "for establishing the practical regime of right to information for citizens to secure access to information which is under the control of the public authorities in order to promote transparency and accountability in the working of every public authority, the constitution of Central Information Commission and State Information Commissions and for matters connected therewith or incidental there to." Further, its objects are: to have informed citizenry and bring in transparency in Governmental functioning and also to contain corruption and hold Governments and their instrumentalities accountable to the governed. It also refers to exemptions and accepts that its revelations may in actual practice be likely to conflict with other public interests including efficient operations of the Government's optimum use of limited physical resources and the preservation of confidentiality of sensitive information. It also facilitates for harmonizing these conflicting interests while preserving the paramountcy of the democratic idea.

### **Applicability:**

The Act applies to both Central and State Governments and all public authorities. It covers all authorities which are established or constituted by or under the Constitution, by any other law made by Parliament, or State Legislature. Public Authorities include bodies and Non-Governmental Organizations, which are owned, controlled or substantially financed, directly or indirectly by appropriate Governments.<sup>9</sup>

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9. Section 2 (h) of RTI Act 2005

The term 'Information' has been defined under section 2 (f) of the Act which means any material in any form including, *records, documents, memos, emails, opinions, advices, press releases, circulars, orders, log books, contracts, reports, papers, samples, models, data material, held in any electronic form and information relating to any private body which can be accessed by a public authority under any other law for the time being in force. Records as defined in Section 2 (i) includes*

- (i) *any document, manuscript and title*
- (ii) *any microfilm, microfiche and facsimile copy of a document,*
- (iii) *any reproduction of image or images embodied in such microfilm (whether enlarged or not) and*
- (iv) *any other material produced in a computer or any other device.*

The term 'Right to Information' has also been defined under the Act<sup>10</sup> which means the information accessible under this Act, held by or under the control of any public authority and includes the right to –

- (i) *inspection of work, documents, records;*
- (ii) *taking notes, extracts or certified copies of documents or records;*
- (iii) *taking certified samples of material;*
- (iv) *obtaining information in the form of diskettes, floppies, tapes, video cassettes or any other electronic mode or through print-outs where such information is stored in a computer or in any other device.*

The above provisions of the Act imposes legal obligation on every public authority to maintain all records.<sup>11</sup> It also makes it mandatory that every Public Authority should publish them for their dissemination widely. Every Public Authority requires that when a request is made for disclosure of information, it should be provided within 30 days.<sup>12</sup> But where the information sought for concerns the life and liberty of a person, the same should be provided within 48 hours to the applicant.<sup>13</sup> This clearly indicates that, Public Authorities (Public Information Officer) cannot discard the application made for getting the information asked for, unless they are prohibited from disclosure under the Act. Inadequately of the staff or man power is not a ground for refusal to provide the information sought by the applicant.

### **Right to Information as a Fundamental Right**

The Judiciary in India has already recognized the Right to Information as a fundamental right within the ambit of freedom of Speech and Expression<sup>14</sup>

10. Sec 2(j) of RTI Act, 2005.

11. Sec. 4 of RTI Act, 2005.

12. Sec. 7 of RTI Act, 2005

13. Ibid.

It is appropriate at this juncture to have a look at the judicial opinion given in various cases. In *Sakal Newspaper Ltd Vs Union of India*<sup>15</sup> the Court accepted the decision of 'preferred freedoms' of Stone C.J. of United States of America in *United States Vs Corolene Products Co.*<sup>16</sup> In *Bennet Coleman Co. Vs Union of India*<sup>17</sup>, the Court observed that the right of the readers to get information was held to be an integral part of the right to freedom of speech and expression guaranteed by Article 19 (1) (a)<sup>18</sup>. Further the Court opined that commercial information is indispensable, as the economic system in a democracy would be handicapped without there being freedom of commercial speech.<sup>19</sup> The airwaves were held to be public property and hence distribution of these waves between Government and private channels was to be done on an equitable basis.<sup>20</sup> Besides the court also pointed out that voters have a right to know information about the candidates contesting for election as it is also recognized as a fundamental right<sup>21</sup> and attempt to deviate from it through an amendment to the Representation of Peoples Act 1951 was held to be unconstitutional in *Peoples Union for Civil Liberties (PUCL) Vs Union of India*.<sup>22</sup>

Whatever be the Constitutional guarantee of the right to information as a part of right to Freedom of Speech and Expression, the Right to Information excludes some of the information, from disclosure<sup>23</sup>, such as –

- 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;<sup>24</sup>
- 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;<sup>25</sup>
- information, the disclosure of which would cause a breach of privilege of Parliament or the State Legislature;<sup>26</sup>
- information including commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of the

14. Art. 19(1) (a) of COI.

15. AIR 1962 SC 305

16. 304 US 144, 152, (1937) as quoted in S. P. Sathe Ibid 2. P. 64.

17. AIR 1973 SC,106.

18. Ibid, P.121.

19. *Tata Press Ltd Vs Maharashtra Telephone Nigam Ltd*, AIR 1995 SC 2438.

20. *Secretary, Ministry of I&B Government of India Vs Cricket Association of Bengal*, (1995) 2 SC 161

21. *Union of India Vs Association for Democratic Reforms* (2002) 5 SCC 294.

22. (2003) 4 SCC 399.

23. Sec.8 RTI Act, 2005.

24. Sec.8 (a) RTI Act, 2005.

25. Sec.8 (b) RTI Act, 2005.

26. Sec.8 (c) RTI Act, 2005.

third party, unless the Competent Authority is satisfied that larger public interest warrants the disclosure of such information;<sup>27</sup>

- 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;<sup>28</sup>
- information received in confidence from foreign Government;<sup>29</sup>
- information, the disclosure of which would endanger the life or physical safety of any person or identity the source of information or assistance given in confidence for law enforcement or security purposes;<sup>30</sup>
- information which would impede the process of investigation or apprehension or prosecution of offenders;<sup>31</sup>
- 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 on 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.<sup>32</sup>

- 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;<sup>33</sup>

The exemptions made in the RTI Act remind us of the colonial legislation dealing with the same subject matter, i.e., the Official Secrets Act, 1923.

### **The Official Secrets Act, 1923**

One of the legislations which went against the democratic principle is The Official Secrets Act, 1923, which was enacted during the colonial era, dealing with

27. Sec.8 (d) RTI Act, 2005.

28. Sec.8 (e) RTI Act, 2005.

29. Sec.8 (f) RTI Act, 2005.

30. Sec.8 (g) RTI Act, 2005.

31. Sec.8 (h) RTI Act, 2005.

32. Sec.8 (i) RTI Act, 2005.

33. Sec.8 (j) RTI Act, 2005.

spying or State Security. However, it historically nurtured a culture of secrecy and non-disclosure. Unfortunately the executive in India followed this culture of secrecy in its administrative functions until the Indian Judiciary identified and recognized the right to have information from the public authority as an integral part of right to freedom of Speech and Expression.

It is pertinent here to mention the observations made by Sri Rajeev Dhavan, Senior Advocate, Supreme Court of India in this regard as mentioned below:

Imperial British rule in India scripted its own history with volumes of documentation. Pages upon pages came to be written. Those in England wrote to those in India who wrote to each other and those in England. Files, letters and memoirs built themselves into governance. In a sense, they kept a check of what was going on – but only amongst the elite and for the purpose that suited them. In Britain, the populace was kept alive on propaganda even though the larceny of information was developing as a threat; and the press and its leadership was acquiring a taste of what was forbidden. However, following the Marvin (1878) and Anderson (1889) incidents which revealed that there was no offence known to the law which covered instances where the information in a document or the document itself was simply borrowed, the British enacted the Official Secrets Act, 1889 for Britain; and replicated it for India in the same year to apply to the British territories and princely states and “all native Indian subjects of Her Majesty without and beyond British India”<sup>34</sup>.

The RTI Act recognizes the confidentiality requirements in matters of the State and section 8 of the Act exempts all such matters from disclosure. However, Official Secrets Act 1923 is a ‘convenient smoke- screen’<sup>35</sup> that shields the decision makers from challenge and criticism.

### “Catch-all” Provision

Section 5 of the Official Secrets Act is so comprehensive that it includes any kind of information, if it can be classified as ‘secret’. However, nowhere has the word ‘secret’ or the phrase “official secret” been defined. This has conferred wide discretion to the public servants to classify anything as secret according to their subjective satisfaction. But such discretion if used arbitrarily and capriciously, then the same may be declared as invalid.

Though the objective of OSA 1923 is to provide protection to the sovereignty and integrity of the State, but in terms of section 5 ‘any’ kind of information may attract secrecy if the terms security and sovereignty of the State are used.

34. Information & Democracy in India by Rajeev Dhavan Journal of the Indian Law Institute, Vol. 47, July to September, 2005, P.295.

35. “Eminent Citizens demand Right to Information” available at, [www.gisdevelopmentnet/policy/India/right/indu.002.htm](http://www.gisdevelopmentnet/policy/India/right/indu.002.htm) visited on 10. 03. 08.

The Supreme Court in *Sama Alana Abdulla Vs State of Gujarat*<sup>36</sup> has held that the word 'secret' in clause (c) sub-section (1) of section 3 as "official code or password and not any sketch, plan, model, article, note, document or other document or other information".

### Law Commission's Views

The observation of the Law Commission in respect of the defects as exists in Section 5 of the Official Secrets Act is more noteworthy.

The wide language of section 5 (1) may lead to some controversy. It penalizes not only the communication of information useful to the enemy or any information which is vital to national security but also includes the act of communicating in any unauthorized manner any kind of secret information which a Government servant has obtained by virtue of his office. Then, thus every noting in the secretariat file to which an officer of the secretariat has access is intended to be kept secret. But it is notorious that such information is generally communicated not only to other Government servants but even some of the non-official public in an unauthorized manner. Every such information will not necessarily be useful to the enemy or prejudicial to national security.

Though the RTI Act now over-rides these provisions, the restrictions imposed by OSA, Conduct Rules, etc, remain as a 'real challenge' to the effective implementation of RTI Act 2005.<sup>37</sup> Information is a pre-requisite to enable people to make enlightened choices in the decision-making process, and thereby to promote a participatory democracy. OSA 1923 historically perpetuates a culture of secrecy while RTI Act brings in an era of transparency, predictability, stability and accountability in the governance. Therefore, OSA in its current form is unsuitable to the emerging needs of a democratic State. The need of the hour demands for amending the OSA, as in the words of Former Supreme Court Judge, Justice, V.R. Krishna Iyer "that Government serves the people best which has the least secrets to hide." Referring to a statement by Winston Churchill to the effect that "the Official Secrets Act is invariably used to defend ministers who tell lies", Justice Krishna Iyer said that, "it is crucial, nay fundamental, to the survival of democracy that we must have absolute freedom of information except slicing out a small portion which is impinging on the security of the country."

The people of this country have a right to know every public act, various policies and programmes of the Government and how and why are they being followed by the Government. RTI Act is a major step towards that goal and its objectives can be ensured only when there is an alteration in the culture of secrecy and aloofness in Government.

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36. (1996) 1 SCC 427.



### **Administrative Reforms Commission's View on RTI and OSA**

The second Administrative Reforms Commission has been constituted to prepare a detailed blue-print for revamping the public administrative system. The Commission is also empowered to analyze the implementation of the RTI Act and to make suitable recommendations to fulfill the objectives of the Act. The Commission focused on two broad categories of issues, namely,

1. relating to changes in other laws and practices involving State Secrets, Civil Service Conduct Rules and classification of documents, and
2. implementation of the RTI Act itself.

The terms of reference made by the Commission relating to the freedom of information, are mentioned below:

- a. to review the confidentiality classification of Government documents specially with reference to OSA;
- b. to encourage transparency and access to non-classified data;
- c. disclosure of information and transparency as a supplement to the Right to Information of the citizen<sup>38</sup>.

After having gone through the Official Secrets Act and the Right to Information Act, the administrative commission has made the following observations:

1. The OSA 1923 has to be repealed and substituted by a chapter in the National Security Act, containing provisions relating to official Secrets.
2. Ministers on assumption of office may take an oath of transparency along with the oath of office and taking of oath of secrecy must be dispensed with.
3. Suo motu disclosure should also be available in the form of printed, priced publications in the official language, revised periodically.
4. Training programmes for
  - a. all Government functionaries
  - b. awareness programme to general public
  - c. bringing out guides and comprehensible information material.

### **Conclusion**

The Right to Information Act 2005 is a landmark legislation conferring right to have access to information in all Public Authorities to redesign governance and to provide transparency in the process of governance. It is an important beginning

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37. "OSA, a convenient smoke screen", available at [www.hindu.com/2005/12/12/stories/2005/R12-129\\_90300.htm](http://www.hindu.com/2005/12/12/stories/2005/R12-129_90300.htm) visited on 10/03/2008.

38. "Right to Information, "Master key to Good Governance", Second Administrative Reforms Commission, June 2006.

towards having a deeper and more meaningful democracy. The objectives of the Act can be fulfilled only when there is a transformation from the prevailing culture of secrecy to a new culture of transparency. The Right to Information Act, 2005, acts as an instrument to enforce the constitutional mandate of right to freedom of Speech and Expression. In a welfare state, every individual is required to know how the government spends money for welfare programmes, how the tax payers money is been spent judiciously, how the governance of the state is being carried on with transparency and to know the antecedents of the candidates who contest for elections. This is one of the valuable rights of every person in a democratic state for the development of his personality. The Act facilitates the march from secrecy to transparency, to uphold the democratic way of governance of the State. The priority, therefore, is to draw a balance between 'secrecy' and 'open governance', without compromising on sovereignty, security and stability of the country, and which will enable people to access relevant information for the meaningful enjoyment of all their rights and freedoms guaranteed by law and the Constitution, thereby giving true meaning to democracy in its letter and spirit. What is needed is to strike a correct balance between Secrecy and Transparency to achieve the goals enshrined in the Constitution of India.