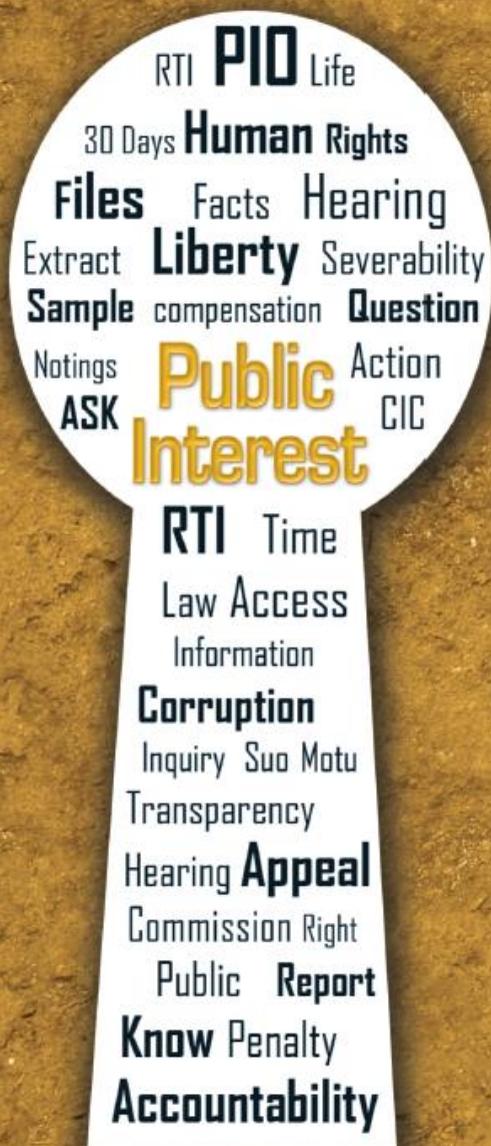


Adjudicating the RTI Act

Analysis of orders of the Central Information Commission



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Satark Nagrik Sangathan (SNS)

&

Centre for Equity Studies (CES)

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CONTRIBUTORS

This assessment is the collective effort of many people, including:

Anjali Bhardwaj (Co-ordinator)

Amrita Johri (Co-ordinator)

Indrani Talukdar

Aditi Dewedi

Ashok Kumar

Bhumika Kriplani

Tapan Vahal

Satark Nagrik Sangathan (SNS) is a citizens' group working to promote transparency and accountability in government functioning and to encourage active participation of citizens in governance. It is registered under the Societies Registration Act, 1860 as Society for Citizens' Vigilance Initiative.

Centre for Equity Studies (CES) was founded in August 2000 as an independent organization engaged in research and advocacy on a range of social and economic justice issues in India.

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Contact us: satarknagriksangathan@gmail.com, anjali.sns@gmail.com,
amritajohri@gmail.com

B- 76, SFS Flats, Sheikh Sarai Phase-1, New Delhi- 110017,
+919810273984

Previous assessments of the Right to Information Act, 2005:

'Report Card of Information Commissions in India', SNS & CES, 2018

(<http://snsindia.org/IC2018.pdf>)

'Tilting the Balance of Power - Adjudicating the RTI Act', RaaG, SNS & Rajpal, 2017

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(Executive summary at <http://snsindia.org/wp-content/uploads/2018/10/RAAG-study-executive-summary.pdf>)

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Chapter 1: Introduction and Methodology

1.1 Background

The Indian Right to Information (RTI) Act, passed in 2005, has empowered people to meaningfully participate in democracy and hold the government accountable. It has been used extensively by citizens to secure access to their rights and entitlements. By enabling people to question all public authorities, including the highest offices in the country, the law has initiated the vital task of redistributing power in a democratic framework.

Under the RTI Act, information commissions (ICs) are the final appellate authorities to adjudicate on appeals and complaints of citizens who have been denied their right to information under the law. Commissions have been set up at the central level (Central Information Commission) and in the states (state information commissions). Information seekers can file a second appeal under Section 19(3) of the RTI Act to the appropriate information commission if they are aggrieved by the decision of the first appellate authority or have not received the decision of the first appellate authority within the stipulated time-frame. Further, Section 18(1) of the law obligates commissions to receive complaints with respect to any matter relating to accessing information under the law.

A total of 22,523 appeals and complaints were registered by the Central Information Commission (CIC) between January 1, 2018 and December 31, 2018. The CIC has wide-ranging powers, including the power to require public authorities to provide access to information, appoint Public Information Officers (PIOs), publish various categories of information and make changes to practices of information maintenance. It is empowered to order an inquiry if there are reasonable grounds, and also has the powers of a civil court for enforcing attendance of persons, discovery of documents, receiving evidence or affidavits and issuing summons for examination of witnesses or documents. Section 19(8) and section 20 of the RTI Act empower the CIC to impose penalties on erring officials and recommend disciplinary action against PIOs for “persistent” violation of the Act. Further, under Section 19(8)(b) of the law, the CIC can, “*require the*

public authority to compensate the complainant for any loss or other detriment suffered”.

This report examines the quality of orders of the CIC. It assesses whether the orders are reasoned and record essential facts, are in compliance with the provisions of the law and progressively interpret the RTI Act. It also analyses the orders to scrutinize whether commissioners exercise powers available to them to impose penalties and ensure compliance with the law.

This initiative is part of an effort to undertake ongoing monitoring of the performance of information commissions across the country with the objective of improving the functioning of commissions and strengthening the RTI regime.

In light of recent amendments to the RTI law passed by Parliament in July 2019, the need to scrutinize the functioning of information commissions is perhaps greater than ever before. Security of tenure and high status was provided for commissioners under the RTI Act, 2005 to empower them to carry out their functions autonomously¹. The RTI Amendment Act of 2019, amended sections 13, 15 and 27 of the RTI Act, 2005 to empower the central government to prescribe through rules, the tenure, salaries, allowances and other terms of service of the

¹ As per the RTI Act, 2005, the tenure of information commissioners was fixed at five years, subject to the retirement age of 65 years. The law pegged the salaries, allowances and other terms of service of the Chief and commissioners of the Central Information Commission and the chiefs of state information commissions at the same level as that of the election commissioners. Election commissioner’s salary equals that of a judge of the Supreme Court, which is decided by Parliament. Those of the state information commissioners was the same as chief secretaries of the states. Deliberations of the Parliamentary Standing Committee, which examined the RTI Bill, 2004 before it was passed, show that the committee gave due consideration to the matter. The RTI Bill originally pegged the salaries and allowances of the central chief information commissioner at the level of a secretary to the government of India, and of the information commissioners at the level of a joint secretary or an additional secretary to the government of India. The committee observed that: “... *Information Commission is an important creation under the Act which will execute the laudable scheme of the legislation ...It should, therefore, be ensured that it functions with utmost independence and autonomy.*” It recommended that to achieve this objective, it would be desirable to confer on the central chief information commissioner and information commissioners, status of the chief election commissioner and election commissioners respectively. The committee’s recommendation to elevate the status of information commissioners was accepted and passed by Parliament.

chief and other information commissioners of the Central Information Commission and all state information commissions. This has led to an apprehension that the recent amendments could undermine the autonomy of commissions. Peoples' monitoring of the performance of commissioners is critical to ensure that information commissions work independently to fulfil their obligations and enable people to exercise their fundamental right to information.

1.2 Methodology

The findings of this report are based on an analysis of a randomised sample of orders of the Central Information Commission (CIC) for the period January 1, 2018 to December 31, 2018².

A total of 1,119 orders of the CIC were analysed for the purpose of the assessment. These include 985 orders which were selected based on random sampling and 134 orders pertaining to show cause proceedings initiated in these cases.

All orders were analysed in terms of their completeness and compliance with the provisions of the RTI Act, 2005. In second appeal cases, where disclosure of information was partly or fully denied, it was examined whether the denial of information was in keeping with the provisions of the RTI Act and whether the orders were well reasoned. In addition, it was assessed whether violations of the law were acted against by the commissioners in accordance with the provisions of the RTI legislation, in terms of imposition of penalty or recommendation of disciplinary action against erring officials.

Using the dates recorded in the orders, the average time taken by the CIC to dispose appeals/complaints was calculated. Further, all orders in the assessment were examined to see whether information sought in the RTI application was such that it should have been proactively disclosed by the public authority.

In addition to the sample of 1,119 orders, some significant orders passed by the CIC between January 2018 and December 2018, where commissioners exercised

² The orders were accessed from the website of the CIC.

their powers in a progressive manner to help people access their fundamental right to information, were also analysed.

Wherever relevant, the report draws on judgments of the high courts and the Supreme Court, which have a bearing on provisions of the RTI Act. It also draws on comparative findings of previous assessments by Research, Assessment, & Analysis Group (RaaG), Satark Nagrik Sangathan (SNS) and Centre for Equity Studies (CES).

Chapter 2: Backlog and delays in the CIC

One of the most important parameters for assessing the efficacy of orders of any adjudicatory body is the time taken to decide cases. Access to information is meaningful only if information is provided within a reasonable timeframe. Inordinate delays in disposal of cases by information commissions can render the law ineffective, especially for the poor and marginalized who use the RTI Act to try and access information about their basic rights like subsidized rations, old age pensions, medical facilities in hospitals and minimum wages. Whereas the RTI Act specifies timeframes for disposal of information requests (ordinarily 30 days) and first appeals (maximum 45 days), there is no such defined time period stipulated for disposal of second appeals by information commissions.³

2.1 Time taken by the CIC to dispose cases

The assessment found that **on average, the CIC takes 388 days (more than one year) to dispose an appeal/complaint from the date that it was filed before the commission.** In fact, a wide variation was observed in the time taken to hear matters. **Time taken for final disposal ranged from 24 days to 1,552 days** (more than four years). Assuming that cases are disposed chronologically, the reasons for this large variation are not clear. The specific cases in which disposal was inordinately quick, did not record any circumstances which would warrant the case being taken ahead of others.

It is worth mentioning here that section 7(1) of the RTI Act states that in cases where information sought for concerns the life or liberty of a person, information has to be provided within 48 hours of receipt of the application by the PIO. The CIC has, however, not made any provision for hearing complaints and appeals in such cases on an urgent basis.⁴

³ This appears to be a drafting oversight as the initial version of the RTI bill did define a time-frame, which seems to have been inadvertently omitted from the law passed in 2005. For details see Chapter 25, *Tilting the Balance of Power - Adjudicating the RTI Act*, RaaG & SNS, 2017

⁴ In response to an RTI application dated May 3, 2019, the CIC stated that, "...a complaint or appeal filed before the commission stating that information sought relates to the life or liberty of a person,

The issue of long waiting time for disposal of appeals and complaints has been consistently highlighted in previous national assessments. The assessment of information commissions published in 2018 had found that the estimated time required for disposal of an appeal/complaint by the CIC was 10 months⁵.

2.2 Vacancies and backlog of cases

The long delay in disposal of cases by the CIC is primarily a result of the central government's failure to take necessary steps to ensure appointment of information commissioners in a timely manner⁶. Section 12 of the RTI Act specifies that the Central Information Commission can consist of eleven information commissioners – one chief and upto ten commissioners.

As of January 1, 2018, the CIC was functioning with 8 information commissioners, including the Chief. With one commissioner finishing her term on January 15, 2018, the total number of vacancies went up to four. More than 23,500 appeals/complaints were pending at the time.

When the central government did not take any steps to fill the vacancies, a Public Interest Litigation⁷ (PIL) was filed in the Supreme Court in May 2018, seeking directions to ensure timely and transparent appointments of information commissioners.

is dealt with exactly in the same manner/fashion as another complaint/appeal filed before the commission wherein no such reference to life or liberty provision is made....”

⁵ Chapter 3, *Report Card of Information Commissions in India*, SNS & CES, 2018 (www.snsindia.org/IC2018.pdf)

⁶ With respect to the appointment of commissioners to the Central Information Commission, Section 12(3) of the RTI Act states that,

“(3) The Chief Information Commissioner and Information Commissioners shall be appointed by the President on the recommendation of a committee consisting of-

- (i) the Prime Minister, who shall be the Chairperson of the committee;
- (ii) the Leader of Opposition in the Lok Sabha; and
- (iii) a Union Cabinet Minister to be nominated by the Prime Minister.”

⁷ Anjali Bhardwaj and others v. Union of India and others (Writ Petition No. 436 of 2018), <http://judicialreforms.org/wp-content/uploads/2019/02/PIL-05-Final-filed.pdf>

Four more commissioners retired between November 21, 2018 and December 1, 2018, leading to **eight out of eleven posts in the CIC being vacant, including that of the Chief**. By January 1, 2019, the backlog increased to nearly 27,500 appeals/complaints.

Finally, on the directions of the Supreme Court, posts of four information commissioners in the CIC were filled with effect from January 1, 2019. The post of the Chief Information Commissioner was also filled by appointing one of the existing information commissioners as the Chief, with effect from January 1, 2019. Since then, the CIC has been functioning with 7 information commissioners, including the Chief. Four vacancies have persisted and the backlog of appeals and complaints has been rising every month since January 1, 2019. Table 1 presents the pendency of appeals/complaints on the first of every month since January 2019.

Table 1: Backlog of appeals and complaints in the CIC	
Date	Total number of appeals and complaints pending before CIC
January 1, 2019	27,364
February 1, 2019	28,840
March 1, 2019	29,472
April 1, 2019	29,981
May 1, 2019	30,510
June 1, 2019	30,877
July 1, 2019	31,330
August 1, 2019	31,862
September 1, 2019	32,099
October 1, 2019	32,784
<i>Source: CIC website</i>	

The large backlog of cases results in long delays before appeals/complaints are heard. The CIC website shows that appeals and complaints filed in 2017 are currently pending for disposal by the commission.

2.3 Commissioner-wise disposal of appeals and complaints

Backlogs are also linked to disposal rates, in terms of the number of appeals/complaints disposed by each commissioner. The Central Information Commission, in March 2011, stipulated a norm that each single bench of the commission will endeavour to dispose 3,200 cases per year. A comparison of the stipulated norm and the actual disposal between January 1, 2018 to December 31, 2018, shows that most commissioners met the norm (see Table 2). It is perhaps time to assess if commissioners can take advantage of advances in technology and e-governance to enhance their efficiency and revise the disposal target upwards.

Table 2: Commissioner-wise disposal of appeals and complaints between January 2018 to December 2018	
Mr. Sudhir Bhargava	3,415
Mr. Bimal Julka	3,289
Mr. Divya Prakash Sinha	2,316
Mr. R. K. Mathur*	2,910
Mr. Yashovardhan Azad*	3,572
Prof. M. Sridhar Acharyulu*	3,458
Mr. Amitava Bhattacharya**	2,505
Notes: *Up till retirement (November '18), **Up till retirement (December 1, 2018) Table does not include Ms. Manjula Prasher as she retired in January 2018. <i>Source: CIC website</i>	

2.4 Discussion

The maxim "justice delayed is justice denied" aptly describes the state of the transparency regime in the country. Backlog of appeals and complaints in information commissions is one of the most critical bottlenecks in the implementation of the RTI Act. The resultant inordinate delays in disposal of appeals/complaints violate the basic objective of the RTI Act.

The long time taken by the CIC to dispose cases can be traced largely to the failure of the central government to fill vacancies in the commission in a timely manner.

During the period under review in this assessment, at one point, the CIC was functioning with only 3 commissioners out of the sanctioned strength of 11 posts. 8 posts, including that of the Chief Information Commissioner, were vacant.

In February 2019, the Supreme Court in its judgment⁸ on a PIL regarding non-appointment of information commissioners, ruled that the proper functioning of information commissions with adequate number of commissioners is vital for effective implementation of the RTI Act. The court held that since the law states that information commissions should consist of a Chief and upto ten commissioners 'as may be deemed necessary', the number of commissioners required should be determined on the basis of the workload. In fact, the court emphasized that if commissions do not function with adequate number of commissioners, it may negate the purpose of the RTI Act, 2005.

Taking note of the unduly long time taken by the ICs to dispose cases, the Court ruled that in keeping with the spirit of the RTI Act to ensure time-bound access to information, commissions should decide appeals/complaints within the shortest time possible, which should normally be a few months from the date of service of complaint or appeal to the public authority. The Supreme Court also gave specific directions to ensure timely appointment of information commissioners. The Court held that it would be appropriate if the process for filling up of a vacancy is initiated 1 to 2 months before the date on which the vacancy is likely to occur. The relevant extracts of the judgement are reproduced below:

*"21) As per the RTI Act, the Commissions consist of the Chief Information Commissioner and upto 10 Information Commissioners, appointed by the President of India at the Central level and by the Governor in the States, on the recommendation of a Committee. In respect of CIC, such a provision is contained in Section 12 which stipulates that CIC shall consist of the Chief Information Commissioner and 'such number of Central Information Commissioners not exceeding 10 as may be deemed necessary'... **Such number of CICs/SICs would depend upon the workload as the expression used is 'as***

⁸ Anjali Bhardwaj and others v. Union of India and others (Writ Petition No. 436 of 2018), http://judicialreforms.org/wp-content/uploads/2019/02/15968_2018_Judgement_15-Feb-2019.pdf

may be deemed necessary'. The required number of CIC/SICs, therefore, would depend upon the workload in each of these Commissions.

xxx

24) ...Of course, no specific period within which CIC or SICs are required to dispose of the appeals and complaints is fixed. However, going by the spirit of the provisions, giving outer limit of 30 days to the CPIOs/SPIOs to provide information or reject application with reasons, it is expected that CIC or SICs shall decide the appeals/complaints within shortest time possible, which should normally be few months from the date of service of complaint or appeal to the opposite side. In order to achieve this target, it is essential to have CIC/SCIC as well as adequate number of Information Commissioners. It necessarily follows therefrom that in case CIC does not have Chief Information Commissioner or other Commissioners with required strength, it may badly affect the functioning of the Act which may even amount to negating the very purpose for which this Act came into force....

xxx

67(v) We would also like to impress upon the respondents to fill up vacancies, in future, without any delay. For this purpose, it would be apposite that the process for filling up of a particular vacancy is initiated 1 to 2 months before the date on which the vacancy is likely to occur so that there is not much time lag between the occurrence of vacancy and filling up of the said vacancy.” (emphasis supplied)

Other than the central government's failure to fill vacancies in the CIC in a time-bound manner, atleast two other factors contribute to the problem of large backlog in the commission. First, lack of penalty imposition by the CIC (see chapter 7) which fosters a culture of impunity and encourages PIOs to take liberties with the RTI Act. This results in many unanswered applications, and an equal number of delayed or illegitimately refused ones, leading to a large number of appeals/complaints being filed to the CIC and the consequent backlogs and delays. By not imposing penalties, the information commission increases its own workload.

The other factor is the poor implementation of section 4 of the RTI law, under which public authorities are obliged to proactively disclose information. This

assessment found that in nearly **50% of the appeals/complaints dealt with the by CIC, atleast part of the information was such that it should have been made public proactively**. Previous reports on the implementation of the RTI Act based on an analysis of random sample of RTI applications filed across the country have shown that nearly 70% of the applications seek information that should have been proactively made public without citizens having to file an RTI application⁹. Since governments are not fulfilling their statutory obligations under section 4 of the RTI Act, lakhs of people in India are forced to spend their time and resources to get information from public authorities. Unfortunately, the CIC has largely hesitated in invoking its powers to address the issue of violations of section 4.

These factors need to be comprehensively addressed to tackle the problems of large backlog and delays in the CIC.

2.5 Agenda for action

- i. The Central Government must ensure timely and transparent appointment of information commissioners of the CIC, in keeping with the directions of the Supreme Court in Anjali Bhardwaj and others v. Union of India and others (Writ Petition No. 436 of 2018).
- ii. There needs to be a review of the structure and processes of the CIC to ensure that it functions more efficiently. Perhaps learning from the experience of information commissions in other countries, the CIC needs to be infused with a trained cadre of officers to facilitate the processing of appeals and complaints.
- iii. The CIC must impose penalties mandated under the RTI Act for violation of the law after following due process, to ensure that PIOs and public authorities are held accountable for lapses in implementing the Act (see chapter 7 for more details). This would send a strong signal that violations of the law would invite penal consequences, which would result in fewer violations of the law thereby reducing the number of appeals and complaints filed with the CIC.
- iv. Poor compliance by public authorities with section 4 of the RTI Act forces information seekers to file applications for information that should be

⁹ Chapter 4, 'Peoples' Monitoring of the RTI Regime in India', 2011-2013, RaaG & CES, 2014

available to them proactively, consequently creating extra work for the concerned public authorities and for information commissions. The following steps need to be undertaken to improve proactive disclosures:

- a. The CIC must determine, for each matter coming before it for adjudication, whether the information being sought was required to be proactively made public or communicated to the applicant as an affected party. Where the answer is affirmative, the commissioners should issue directions to the concerned PA under section 19(8) of the RTI Act, to start disseminating the requisite information proactively and report compliance.
- b. One of the problems with ensuring implementation of section 4 of the law is that the RTI Act empowers the commission to impose penalties only on PIOs, while the responsibility of ensuring compliance with section 4 of the RTI Act is effectively with the public authority rather than with a specific PIO. Perhaps the most effective way of dealing with this problem is to make Heads of Departments (HoDs) personally responsible for ensuring compliance with provisions of section 4. This would be in keeping with general administrative practice, considering that the ultimate responsibility for the functioning of a public authority lies with the HoD.

Where a complaint is received by the CIC regarding non-compliance with provisions of section 4, the commission should institute an enquiry under section 18 against the HoD (or any other official responsible). Penalties must be imposed on the official for violation of the obligation for proactive disclosure, using the “implied powers” of the commission, as mandated by the Supreme Court in *Sakiri Vasu vs State of Uttar Pradesh, 2007*¹⁰, in which the Supreme Court held that once a statute gives a power to an authority to do something, it includes the implied power to use all reasonable means to achieve that objective.

- c. For each public authority under its jurisdiction, the CIC should ensure that annual audits of section 4 compliance are undertaken and the findings of these audits should be made public and placed before Parliament.

¹⁰ *Sakiri Vasu v State of Uttar Pradesh and Ors.* [(2008)2 SCC 409]

- d. The Central Government must ensure that proactively disclosed information is properly categorized and organised by public authorities in such a manner that it facilitates easy retrieval. Information on websites must be organised in a searchable and retrievable database to enable people access relevant records. The CIC should exercise the vast powers provided to it under the RTI Act to ensure that records are managed in a way to facilitate easy access the public.
- e. The Department of Personnel and Training (DoPT) must take appropriate steps to operationalise and implement the recommendations made in 2015 by the committee set up to examine proactive disclosures¹¹. The committee had recommended that compliance with section 4 be included as one of the performance indicators in the annual performance appraisal report (APAR) of the HoDs of all public authorities.

¹¹ Report available from <https://goo.gl/wc0c0b>

Chapter 3: Orders lacking essential facts and reasons

The Supreme Court (SC), in numerous judgments, has cautioned against the tendency of adjudicators to give cryptic, unreasoned orders. To sustain the credibility of an adjudicatory body like the Central Information Commission, the importance of orders that are clear, well-reasoned, and detailed cannot be exaggerated. This is especially so as the RTI Act is mainly used by common people to seek government accountability, mostly without the involvement of legal professionals. A previous assessment¹² of the orders of four information commissions, including the CIC, showed that more than 60% orders were so devoid of reasoning and factual details that it was often impossible to determine which sections of the law they were invoking to deny information or condone the PIO's decision, action or inaction.

3.1 Inadequately reasoned orders

Recording of reasons is meant to serve the wider principle that justice must not only be done, it must also be seen to be done. Courts have held that recording of reasons operates as a restraint on arbitrary exercise of judicial, quasi-judicial and administrative powers. Reasoned orders reassure people that discretion has been exercised by the decision-maker on relevant grounds. Transparency in decision-making not only makes adjudicators less prone to errors, but also makes them subject to broader scrutiny.

For sustaining peoples' faith in the Central Information Commission, it is critical that reasons in support of the decisions of commissioners be cogent, clear and succinct to demonstrate that relevant factors have been objectively considered while giving orders. It is important that in cases where commissioners rely on judgments of the Supreme Court or high courts, they must cite the judgments, preferably quoting the relevant extract. Otherwise it is impossible to understand the basis of the decision, given that people and public authorities cannot reasonably be expected to be aware of all judicial pronouncements and deduce

¹² Chapters 1 and 5 in '*Tilting the Balance of Power - Adjudicating the RTI Act*', RaaG, SNS & Rajpal, 2017, (<http://snsindia.org/Adjudicators.pdf>)

which one the commissioners might be relying upon. Also, it cannot be determined whether the judgement was interpreted and applied appropriately to the case at hand.

The assessment found that in many cases the CIC gave inadequately reasoned orders, which is especially problematic where information was denied to applicants. Some cases described below typify such orders.

An application under the RTI Act was filed to the Bharat Petroleum Corporation seeking a copy of the tender documents relating to the award of a contract for its Rourkela Depot. The PIO denied information citing section 8(1)(j) of the RTI Act. During the hearing, the respondent public authority, in addition to section 8(1)(j), also cited section 8(1)(d). The CIC dismissed the matter, upholding the denial by merely stating that the steps taken by the public authority were satisfactory.

The commission did not examine and record why tender documents are personal information, the disclosure of which would cause unwarranted breach of privacy (section 8(1)(j)), or how information sought constitutes commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party (section 8(1)(d)).

The CIC also failed to record the reason why the statutory exceptions to the exemptions listed in section 8, which would warrant disclosure even if the information was exempt, were not applicable. There are three types of overarching exceptions that the RTI Act provides to the exemptions to disclosure of information listed in the law. The first states that information, which cannot be denied to Parliament or to a state legislature, cannot be denied to any person. The second exception mandates that if information disclosure serves greater public interest than harm caused to the protected interests, then such information must be disclosed, irrespective of the exemptions in 8(1) of the RTI Act, and irrespective of the Official Secrets Act. The third exception removes, on information that refers to matters that are over twenty years old, the applicability of most of the exemption clauses listed in sub-section 8(1). The discussion and decision recorded in the CIC order is reproduced in full below:

“Discussion/ observation:

7. The steps/action taken by the respondent in dealing with the RTI application is satisfactory.

Decision:

8. No action is required in the matter at the level of this Commission.

The appeal is disposed of. Copy of the order be given to the parties free of cost.”
(CIC/ BPCLD/A/2017/117971 dated 5.2.2018)

In another case, six applications were filed under the RTI Act to the Oil and Natural Gas Corporation (ONGC) Ltd seeking information including: recovery date for provisional invoice for a sum of Rs. 58 crore raised on GAIL; number of days the gas pipeline was closed resulting in stoppage of gas supply to GAIL; and minutes of two board meetings of the ONGC. The public authority denied information sought in all the applications claiming that it was exempt under Sections 8(1)(d) and 8(1)(e) of the RTI Act, 2005.

Six appeals filed with the CIC were disposed of with a single order recording the decision in one line, *“No further intervention of the Commission is required in the matter.”* The order does not provide any reasons why the commissioner concluded that information was held in a fiduciary capacity (section 8(1)(e)) or how section 8(1)(d) was applicable. Further, the CIC in its decision omitted to adjudicate on the exceptions to the exemptions contained in section 8. Relevant portion of the order is reproduced below:

“Discussion/ observation:

17. The action/steps taken by the respondent in dealing with each RTI application are satisfactory.

Decision:

18. No further intervention of the Commission is required in the matter.

The appeals are disposed of. Copy of the decision be given free of cost to the parties.” (CIC/ONGCL/A/2017/135570 and others dated 7.2.2018)

Another inadequately reasoned order was passed by the CIC in a case where an RTI request was filed to the Kendriya Vidyalaya Sangathan. The appellant sought a copy of the application form submitted by an aspirant who appeared in an exam

for the post of a teacher and also sought a copy of documents relating to the application fees submitted along with the application form.

The PIO denied access to information merely on the grounds that applications were submitted online for recruitment of teachers and no “copy” was sought by their office. The PIO did not invoke any provision of section 8 or 9, the sections of the law which contain the exemption clauses, to deny information.

The CIC in its order referred to the definition of information u/s Section 2(f) of the RTI Act, 2005 which states: *“information” means any material in any form, including records, documents, ... data material held in any electronic form ...*”. The commissioner also referred to two Supreme Court judgments (CBSE v. Aditya Bandopadhyay, (2011) 8 SCC 497 and Khanapuram Gandaiah Vs. Administrative Officer & Ors. (2010) 2 SCC 1) which state that the RTI Act gives people the right to access information which is held by a public authority or is accessible to it under law.

However, inexplicably, without examining whether the information sought would be exempt under section 8 or 9 of the RTI Act, the CIC upheld denial of information. Even if the application process was conducted online, the public authority would surely have access to the application forms and supporting documents submitted by aspirants in electronic form. If the disclosure of information was not exempt under the law, the PIO could have been directed by the CIC to provide the information in electronic form or in printed form. (CIC/KVSAN/A/2017/193107 dated 15.2.2018)

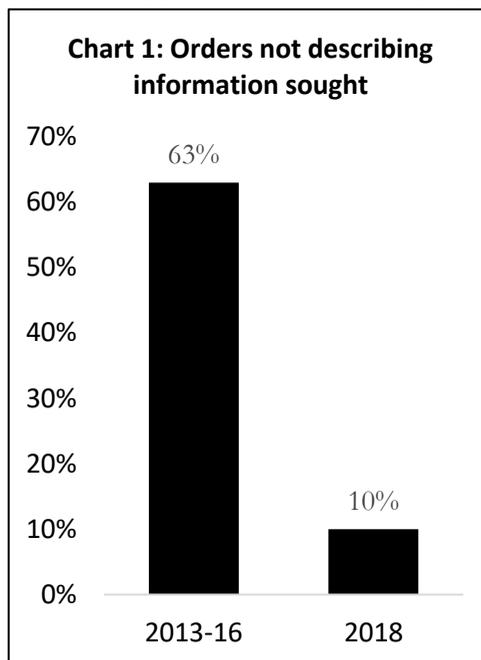
3.2 Orders lacking essential facts

In order to stand the test of public and judicial scrutiny, the orders of information commissioners must record all relevant facts. Most judicial orders follow a format which ensures that basic relevant facts are recorded in the order even before the merits of the case are discussed. Not recording basic facts like details of information sought is problematic for various reasons (see discussion below). For the decision to be a speaking one, especially in cases where information is denied, it is important that the commissioner’s order record what information was sought

and what was denied otherwise it becomes impossible to judge whether the denial was legitimate.

Despite the burden of numerous Supreme Court and high court judgments to the contrary, a 2017 assessment¹³ by RaaG and SNS found that the phenomenon of orders of information commissions lacking essential information, was rampant. The 2017 report had found that an overwhelmingly large percentage of the orders of four information commissions, including the CIC, were deficient in terms of documenting basic facts related to the case. The assessment had concluded that more than 60% of the orders analysed did not describe the information that was sought and many of the orders comprised just 2-3 lines - recording only the decision of the commissioner, without any reference to the background or the relevant facts of the case like dates, details of information sought, and decision of PIO/ FAA.

This assessment found a marked improvement in the orders of the CIC. **As compared to 63% in the earlier assessment, the analysis of orders of 2018 found that only 10% of the orders analysed contained deficiencies in terms of not recording critical facts like information sought by the appellant/complainant¹⁴** (see Chart 1).



¹³ Chapters 1 and 5 in *'Tilting the Balance of Power - Adjudicating the RTI Act'*, RaaG, SNS & Rajpal, 2017, (<http://snsindia.org/Adjudicators.pdf>)

¹⁴ The results of the 2017 assessment were shared and extensively discussed with commissioners of the CIC. Many commissioners have adopted a format for their orders to ensure that basic facts like dates and details of information sought are recorded.

Some cases listed below describe the cryptic and inadequate CIC orders found in the sample analysed for the purpose of this assessment.

In a matter involving an employee seeking information about circumstances around his suspension from Indian Overseas Bank, the CIC upheld partial denial of information. The order states that information was sought on eleven points, including, (i) copy of the complaint made by the bank to the police for filing of FIR (ii) grounds/basis/written evidence on which the bank filed the FIR and (iii) report of any inquiry conducted with relation to the charges of the FIR.

Without specifying the information sought in each of the eleven points, the commission upheld denial on “*point nos. (b), (c), (d), (h) and (k) of the RTI application*” observing that since the matter is under investigation by the Central Bureau of Investigation and the Enforcement Directorate, the disclosure of information would impede the process of investigation. It is impossible to assess the applicability of the exemption since there is no description of what information was actually denied. The relevant extract of the order is reproduced below:

“The appellant filed an application under the Right to Information Act, 2005 (RTI Act) before the Central Public Information Officer (CPIO), Indian Overseas Bank, Law Department, Central Office, Chennai seeking information on eleven points, including, inter-alia, (i) copy of the complaint made by the bank to the police for filing of FIR No. RC BDI 2016 E 0007 dated 08.08.2016 r/w 420 IPC & Sec 13(2) r/w 13(1) (d) P.C. Act, (ii) on what grounds/basis/written evidence did the bank file the FIR dated 08.08.2016 and (iii) report of any inquiry conducted with relation to the charges of the FIR dated 08.08.2016.

Xxx

Decision:

6. The Commission, after hearing the submissions of both the parties and perusing the records, observes that since the matter is under investigation by the CBI and the ED, the disclosure of information on point nos. (b), (c), (d), (h) and (k) of the RTI application would impede the process of investigation. ...”
(CIC/IOVBK/A/2017/101942 dated 27.2.2018)

In another case, an application under the RTI Act was filed to the Syndicate Bank, Nellore, Andhra Pradesh seeking information pertaining to insurance premium recovered from crop loans advanced to farmers. A second appeal was filed against the denial of information. In its order, the CIC upheld denial of information on points 6 and 7 while ordering disclosure on the rest of the points. However, the order fails to record what information was sought in points 6 and 7. The relevant extract is given below:

“1. The appellant filed an application under the Right to Information Act, 2005 (RTI Act) before the Central Public Information Officer (CPIO), Syndicate Bank, Chittamuru Branch. Nellore, Andhra Pradesh seeking information on eight points pertaining to insurance premium recovered from the crop loans advanced to the farmers, including, inter-alia (i) the total number of farmers from whom insurance premium on crop loans has been recovered year-wise, and (ii) total amount of premium recovered and remitted to insurance company year-wise.

Xxx

Decision:

6. The Commission, after hearing the submissions of both the parties and perusing the records, observes that the CPIO denied the information sought in totality on the grounds that the information sought is exempted from disclosure as per Section 8(1)(j) and 8(1)(d) of the RTI Act. The Commission further observes that the information sought vide point nos. 1 to 5 and 8 of the RTI application is statistical information pertaining to the total numbers of farmers whom the insurance premium on crop loans was recovered, the total premium recovered, the number of farmers benefitted, total amount of compensation paid and name of insurance company etc. The above-said information is disclosable under the RTI Act. The Commission, therefore, directs the CPIO to provide the information sought vide point nos. 1 to 5 and 8 of the RTI application to the appellant, within a period of four weeks from the date of receipt of a copy of this order under intimation to this Commission.

7. With the above observations, the appeal is disposed of.” (CIC/ SYNDB/A/2017/134436 dated 28.8.2018)

In an appeal pertaining to Khadi Gramoudyog Sangh, the commissioner held that information on two points need not be provided as the information sought did not fit within the definition of 'information' as defined in section 2(f) of the RTI Act. However, the information sought in these points is not reproduced in the order, making it impossible to verify the validity of the decision of the commission. The relevant extract is reproduced below:

"The appellant vide RTI application dated 15.03.2017 sought information on six points as under;

- 1. Since when Shri Shiv Shankar Jha is posted as a Manager in Bishnupur, West Bengal.*
- 2. Details of the M.D.A claim.*
- 3. Other related information.*

xxx

On perusal of the relevant case record, it was noted by the Commission that proper reply was not provided to the appellant on point nos. 1-4 of the said RTI application. A more comprehensive reply should have been provided to the appellant as all the sought for information is eminently disclosable under the relevant provisions of the RTI Act in the form of certified true copies of the documents sought e.g. note sheets, letters, correspondences, e-mails etc.

On perusal of the relevant case record, it was noted by the Commission that the sought for information on point nos. 5 and 6 is not covered u/s 2(f) of the RTI Act. The reply provided both by respondent CPIO and first appellate authority on this point is just, proper and comprehensive, interference of the Commission is accordingly not called for.

Be that as it may, since no desired information was provided to the appellant in the present case, the respondent CPIO, Dhanbad is directed to provide revised point wise reply on point nos. 1-4 complete in all respects to the appellant as available on record in the form of certified true copies of the documents sought e.g. note sheets, letters, correspondences, e-mails etc.(legible copies), free of charge u/s 7(6) of the RTI Act within 15 days of the receipt of the order. For this purpose, the concerned CPIO/PIO, can take assistance of any other office/department u/s 5(4) of the RTI Act...

With the above observation/direction/warning the appeal is disposed of."
(CIC/KVICO/A/2017/145268 dated 11.9.2018, emphasis supplied)

In another case of an order not recording essential facts, an appellant sought information from a public authority regarding action taken on his complaint. The CIC order does not record or summarise what information was sought in each point of the application, nor the reply provided by the PIO. A reading of the order suggests that the commissioner set aside the exemption cited by the PIO for information sought under three points, but ordered disclosure on only one point. The fate of other points remains unclear. The order is reproduced in full below:

“Information sought:

The Appellant sought details of action taken procedure on his complaint dated 28.06.2016.

Grounds for the Second Appeal:

The CPIO has not provided the desired information.

Relevant Facts emerging during Hearing:

The following were present:-

Appellant: Not present.

Respondent: Wg Cdr Suman Adhikari, CPIO, JWO J.P. Singh and S.K. Meena, ASO, Air HQ, Vayu Bhawan, New Delhi present in person.

CPIO submitted that the subject matter pertains to a Complaint filed by the Appellant against a serving Air Force officer which was enquired into by their competent authority and it was concluded that the allegations leveled were unsubstantiated. He further submitted that appropriate reply on the RTI Application informing the outcome of the enquiry has been provided to the Appellant. CPIO however tendered his unconditional regret for the erroneous denial of information under Section 8(1)(a) of RTI Act on paras 3, 4 and 7 of the RTI Application and stated that the reply on para 5 & 6 holds good for the para 3 as well as providing any further detail will impinge on the privacy of the third party against whom enquiry was conducted and is therefore exempt under Section 8(1)(j) of RTI Act.

Decision

Commission takes into consideration the regret of the CPIO for inappropriate denial of information on paras 3, 4, 7 of the RTI Application. It is also pertinent to note that no specific information has been sought on para 7 of the RTI Application, hence the denial of information was without any application of

mind of the then CPIO. Similarly, for para 4 of the RTI Application, neither Section 8(1)(a) nor 8(1)(j) of the Act is applicable as Appellant has merely sought to know the name and designation of officials who dealt with his complaint.

In view of the foregoing, Commission directs the CPIO to provide available information on para 4 of the RTI Application to the Appellant free of cost within 15 days from the date of receipt of this order. No scope of intervention lies with respect to the reply provided on remaining paras of the RTI Application. ..

The appeal is disposed of accordingly.” (CIC/IAIRF/A/2017/602898/SD dated 6.9.2018)

3.3 Discussion

The Supreme Court, in a judgment¹⁵ in December 2012 laid down in detail that judicial, quasi-judicial, and even administrative orders must contain detailed reasoning for their decisions. The judgment quoted extensively from an earlier SC order which listed various reasons why orders must be speaking and reasoned.

“18. In the case of Kranti Associates (P) Ltd. and Ors. v. Masood Ahmed Khan and Ors. [(2010) 9 SCC 496], the Court dealt with the question of demarcation between the administrative orders and quasi-judicial orders and the requirement of adherence to natural justice. The Court held as under:

“47. Summarising the above discussion, this Court holds:

(a) In India the judicial trend has always been to record reasons, even in administrative decisions, if such decisions affect anyone prejudicially.

(b) A quasi-judicial authority must record reasons in support of its conclusions.

(c) Insistence on recording of reasons is meant to serve the wider principle of justice that justice must not only be done it must also appear to be done as well.

(d) Recording of reasons also operates as a valid restraint on any possible arbitrary exercise of judicial and quasi-judicial or even administrative

¹⁵ Manohar s/o Manikrao Anchule vs. State of Maharashtra; AIR 2013 SC 681

power.

(e) Reasons reassure that discretion has been exercised by the decision-maker on relevant grounds and by disregarding extraneous considerations.

(f) Reasons have virtually become as indispensable a component of a decision-making process as observing principles of natural justice by judicial, quasi-judicial and even by administrative bodies.

(g) Reasons facilitate the process of judicial review by superior courts.

(h) The ongoing judicial trend in all countries committed to rule of law and constitutional governance is in favour of reasoned decisions based on relevant facts. This is virtually the lifeblood of judicial decision-making justifying the principle that reason is the soul of justice.

(i) Judicial or even quasi-judicial opinions these days can be as different as the judges and authorities who deliver them. All these decisions serve one common purpose which is to demonstrate by reason that the relevant factors have been objectively considered. This is important for sustaining the litigants' faith in the justice delivery system.

(j) Insistence on reason is a requirement for both judicial accountability and transparency.

(k) If a judge or a quasi-judicial authority is not candid enough about his/her decision-making process then it is impossible to know whether the person deciding is faithful to the doctrine of precedent or to principles of incrementalism.

(l) Reasons in support of decisions must be cogent, clear and succinct. A pretence of reasons or "rubber-stamp reasons" is not to be equated with a valid decision-making process.

(m) It cannot be doubted that transparency is the sine qua non of restraint on abuse of judicial powers. Transparency in decision-making not only makes the judges and decision-makers less prone to errors but also makes them subject to broader scrutiny. (See David Shapiro in Defence of Judicial Candor.)

(n) Since the requirement to record reasons emanates from the broad doctrine of fairness in decision-making, the said requirement is now virtually a component of human rights and was considered part of

Strasbourg Jurisprudence. See Ruiz Torija v. Spain EHRR, at 562 para 29 and Anya v. University of Oxford, wherein the Court referred to Article of the European Convention of Human Rights which requires, "adequate and intelligent reasons must be given for judicial decisions".

The phenomenon of the CIC not passing speaking orders or passing orders which don't record essential facts is problematic for at least four reasons. First, information seekers, the concerned public authorities, and the public at large, have no way of finding out the rationale for the decisions of the commissioners. People have a right to know not just the decision, but also the basis of the decision. In fact, even the RTI Act makes it obligatory for a public authority under section 4(1)(d) of the Act, to proactively "*provide reasons for its administrative or quasi-judicial decisions to affected persons*". In the case of an information commission's order, whereas information seekers and concerned public authorities are no doubt "affected persons", even the general public is an affected party, as often decisions have far reaching consequences on peoples' right to access information. Therefore, passing a non-speaking order, which only records the decision of the CIC but does not provide the reasons for its decisions or other relevant details, is a violation of peoples' right to information and goes against the fundamental principles of transparency.

Second, orders of ICs are often challenged before courts. The tests of legality, fairness and reasonableness become exponentially more difficult to pass when the orders don't speak for themselves and lack essential information, facts and reasoning. Deficiencies in IC orders burden the information seekers with the task of defending orders of the ICs before courts. Vague use of language, insufficient or incorrect recording of facts and not recording basis of orders, weigh in in favour of the petitioner assailing the order of the commission. If orders are well reasoned and give the basis of decisions, even if they were set aside by the courts, they would invoke public debate and would even encourage people to challenge judicial verdicts which set aside logical and properly reasoned orders.

Third, deficient orders prevent effective public scrutiny and accountability of the institution of information commissions and the performance of information commissioners.

Finally, deficient orders have little value in terms of furthering the cause of transparency outside the scope of the limited order. Rather than the decision itself, it is the enunciation of reasons, logic and basis of the decision which create public awareness and lead to public debates about enhancing the scope of transparency and accountability in the country.

Well-reasoned orders would go a long way in building public trust in the institution of the Central Information Commission and furthering the cause of transparency. Many high courts (HCs) have also stressed the need for reasoned orders, especially from information commissions. The Delhi High Court in a March 2013 judgment¹⁶ decried the lack of reasoning in a CIC order and remarked that reasons link the material placed before the adjudicatory authority with the conclusions it arrives at. The lack of reasons makes an order illegal.

“9.1...The order of the CIC is cryptic and sans reasons... Reasons are a link between the material placed before a judicial/quasi-judicial authorities and the conclusions it arrives at. (See Union of India vs. Mohan Lal Kapoor, MANU/SC/0405/1973 : 1974 (1) SCR 797 at page 819 (H) and 820 (B, C & D)]. The failure to supply reasons infuses illegality in the order, and thus deprives it of legal efficacy. This is exactly what emerges on a bare reading of the impugned order.”

In March 2013 the Punjab and Haryana High Court¹⁷ sent back an order to the CIC, as the HC’s considered view was that the order was not a reasoned one and the specific issue to be determined, whether the asked for information was exempt or not under section 8, was not even examined.

In May 2011, the Punjab and Haryana High Court¹⁸ held that an appellate authority was legally required to indicate valid reasons for arriving at a conclusion.

¹⁶ THDC India Ltd. v. T. Chandra Biswas 199(2013) DLT 284

¹⁷ Dr. M.S. Malik Versus Central Information Commission and Others Civil Writ Petition No. 3879 of 2011

¹⁸ Satpal Singh Versus State Information Commission, Haryana and Others Civil Writ Petition No. 5246 of 2009

*“17. Thus, the impugned order (Annexure P-13) is non-speaking, which lacks application of mind. **Such Appellate Authority ought to have discussed the material on record and was legally required to indicate the valid reasons, for arriving at a correct conclusion,** in order to decide the real controversy between the parties, in the right perspective. It is now well-settled principle of law that every action of such authority must be informed by reasons. **The order must be fair, clear, reasonable and in the interest of fair play.** Every order must be confined and structured by the rational and relevant material on record, because the valuable rights of the parties are involved.*

18. Exhibiting the importance of passing speaking and reasoned order, the Hon'ble Apex Court in case Chairman, Disciplinary Authority, Rani Lakshmi Bai Kshetriya Gramin Bank v. Jagdish Sharon Varshney and Others, (2009) 4 SCC 240 has held (Para 8) as under:-

*“**The purpose of disclosure of reasons, as held by a Constitution Bench of this Court in S.N. Mukherjee v. Union of India, is that people must have confidence in the judicial or quasi-judicial authorities. Unless reasons are disclosed, how can a person know whether the authority has applied its mind or not? Also, giving of reasons minimizes the chances of arbitrariness. Hence, it is an essential requirement of the rule of law that some reasons, at least in brief, must be disclosed in a judicial or quasi judicial order, even if it is an order of affirmation**”* (emphasis supplied)

3.4 Agenda for action

- i. The Central Information Commission needs to ensure that its orders are well reasoned and complete in all respects. All orders of the commission should be speaking orders and must be passed keeping in mind that the onus of justifying denial, delay, or any other violation of the RTI Act is on the PIO both for appeals and complaints.
- ii. It would be useful if the CIC adopted uniform formats for its orders, with uniform checklist of points needed to be considered before commissioners finalise their orders. Apart from checking each item on the checklist, the CIC must ensure that, wherever applicable, all reasons must be contained in the order. A suggested format and checklist has been given in Box 1 below.

Box 1: Suggested format for orders of the Central Information Commission

I. Factual information

1. Whether an appeal, a complaint, or both:
2. Particulars of the appellant/complainant:
3. Particulars of the Public Authority and CPIO, including name, designation and address:
4. Date of RTI Application, if any:
5. Date of response, if any:
6. Date of First Appeal, if any:
7. Date of order of First Appellate Authority, if any:
8. Date of second appeal/complaint filed with the Information Commission:
9. Date(s) and details of notice(s) issued:
10. Date(s) of hearing(s):
11. Particulars of those present in the hearing(s) (including authorised representatives, if any):
12. Date(s) of order(s) of the Information Commission:

II. Summary of case

1. Summary description of the information sought in the RTI application:
2. Summary description of response from PIO, if any, including reasons given for refusal, delay, other violations, if relevant:
3. Grounds for first appeal, if any:
4. Summary description of order of First Appellate Authority, if any, including reasons thereof:
5. Summary of issues raised in second appeal/complaint:
6. Summary of any additional material/arguments presented during hearing:

III. CIC Decision

1. Decision of CIC on each of the points raised in the appeal/complaint (giving legal basis and reasons for decision, including sections of RTI Act invoked):
2. Time frame within which the order/directions should be complied with and a status report filed to the Commission:

3. Whether information was provided in the form asked for (section 7(9):
4. Whether application was forwarded to other PA(s) (section 6(3)):
5. If part or whole of the information was denied, whether the exceptions to the exemptions (public interest test of 8(2), section 8(3) and proviso to section 8(1)) were examined:
6. Whether the exempt information can be severed (S. 10) and the remaining record provided:
7. Quantum of compensation awarded under section 19(8)(b), if any:
8. Whether the information sought should have been proactively disclosed under section 4:
9. Whether any of the following violations of the RTI Act have occurred as per section 20(1):
 - i. Refusal to receive an application:
 - ii. Delay in furnishing information:
 - iii. Denial of part/full information by the PIO which was subsequently overturned:
 - iv. Provision of incorrect , incomplete or misleading information:
 - v. Destruction of information which was the subject of any request:
 - vi. Obstruction in any manner to the furnishing of information:
10. Wherever the answer is “yes” or “maybe” to any one or more of the violations listed above (in 9) details of the show cause notice issued and hearings held:
11. Where penalty is imposed:
 - i. Quantum of penalty imposed:
 - ii. Name and designation of official on whom penalty is imposed:
 - iii. Reasons/legal basis for imposing penalty, including for determining quantum of penalty:
12. If penalty not imposed, reasons/legal basis for non-imposition of penalty:
13. Whether the PIO is persistently violating the RTI Act:
 - i. If yes, details of disciplinary action recommended by IC under section 20(2):

Chapter 4: Orders going beyond the law

Section 7 of the RTI Act states that information can be exempted from disclosure only under section 8 or 9 of the law. However, the assessment found a tendency among PIOs and information commissioners to exempt information from disclosure citing sections of the RTI Act that do not allow for such exemptions. Two sections of the law that were most often misused were section 11 (third party information) and section 7(9) (disproportionate diversion of resources), neither of which can, by themselves, be used to deny information. In some cases, information was denied on the grounds that it was not held by a public authority or was not available in the office of the PIO, despite the existence of sections 5(4) and 6(3) of the RTI Act, which allow the PIO to seek assistance of other officers, or in case an RTI application is more closely related to a different public authority, to transfer the application. Though less often, information was also denied on grounds that it pertained to matters pending adjudication.

4.1 Denials under Section 11

A number of RTI applicants seek information involving third parties, who can be public servants or members of the public or even a public authority other than the one from which information is sought. Section 11 essentially seeks to ensure that certain principles of natural justice are not violated. If the information intended to be disclosed is such that it pertains to, or has been supplied, and has been treated as confidential, by a third party, then section 11 mandates that the third party must be given an opportunity to be heard before a decision is finally taken to disclose such information.

Section 11 of the RTI Act states:

“11. (1) Where a Central Public Information Officer or a State Public Information Officer, as the case may be, intends to disclose any information or record, or part thereof on a request made under this Act, which relates to or has been supplied by a third party and has been treated as confidential by that third party, the Central Public Information Officer or State Public Information

Officer, as the case may be, shall, within five days from the receipt of the request, give a written notice to such third party of the request and of the fact that the Central Public Information Officer or State Public Information Officer, as the case may be, intends to disclose the information or record, or part thereof, and invite the third party to make a submission in writing or orally, regarding whether the information should be disclosed, and such submission of the third party shall be kept in view while taking a decision about disclosure of information:”

Provided that except in the case of trade or commercial secrets protected by law, disclosure may be allowed if the public interest in disclosure outweighs in importance any possible harm or injury to the interests of such third party.

(2) Where a notice is served by the Central Public Information Officer or State Public Information Officer, as the case may be, under sub-section (1) to a third party in respect of any information or record or part thereof, the third party shall, within ten days from the date of receipt of such notice, be given the opportunity to make representation against the proposed disclosure.

(3) Notwithstanding anything contained in section 7, the Central Public Information Officer or State Public Information Officer, as the case may be, shall, within forty days after receipt of the request under section 6, if the third party has been given an opportunity to make representation under sub-section (2), make a decision as to whether or not to disclose the information or record or part thereof and give in writing the notice of his decision to the third party.

(4) A notice given under sub-section (3) shall include a statement that the third party to whom the notice is given is entitled to prefer an appeal under section 19 against the decision.”

Unfortunately, it appears that section 11 is being widely misunderstood by PIOs and information commissioners. Among other things, the assessment found the commissioners upholding PIO’s decisions to invoke the clause to deny all third party information (not just information treated as confidential by the third party) and giving the third party a veto power (not just an opportunity to be heard). Some of these cases are presented below.

An RTI applicant sought information related to accounts of a gas agency. Without citing any of the exemption clauses under section 8 or 9, the commission held

that part of the information sought could not be provided on the grounds that it was third party information. Relevant extract of the decision of the CIC is given below:

“The Commission is of the view that the statement of the profit cannot be provided to the appellant, being third party information...”
(CIC/BPCLD/A/2017/145467 dated 15.3.2018)

Similarly, in a case relating to East Delhi Municipal Corporation, the PIO denied copies of building plans sought by the appellant, claiming that the information pertained to a third party. The CIC dismissed the appeal and upheld the reply, even though no exemption under section 8 or 9 of the RTI Act was cited by the public authority to deny information. (CIC/EMCDS/A/2017/117925 dated 18.6.2018)

In another case, the information commissioner held that the information sought by the appellant was the personal information of a third party. The commissioner directed the PIO to issue notice under section 11 of the RTI Act to the third party and held that information could be disclosed only if the third party consented to disclosure. This, despite the fact that section 11 does not give the third party a veto power. The relevant extract is given below:

“Be that as it may, on perusal of record, it was seen that the information sought by the appellant is related to personal information of third parties. The above stated information can be disclosed only after taking consent from the third parties concerned u/s 11 of the RTI Act.

The Commission therefore, directs the CPIO, Sr DCM to issue notice u/s 11 of the RTI Act to the third party(s) within five days from the receipt of this order, informing them of the Commission’s order and of the fact that the respondent is directed to disclose the information subject to their consent and invite the third party(s) to make submission in writing regarding whether the requisite information should be disclosed and the third parties within ten days from the date of receipt of such notice, shall inform the respondent authority about their stand. In case the third parties provide consent, the CPIO shall provide complete information within 3 days from the receipt of such consent to the appellant and if the third party(s) object, the same shall be intimated to the

appellant within the same time period under intimation to the Commission.”
(CIC/AB/A/2016/001114 dated 9.10.2018)

In a matter pertaining to the Office of the Pr. Commissioner, Central Excise, Customs & Service Tax, the public authority denied information sought by an applicant stating that information could not be provided until the third party consented to disclose the information. Despite the blatantly incorrect interpretation of section 11, the CIC held that a suitable reply had been provided and therefore, no intervention of the Commission was required. The relevant extract is given below:

“The FAA vide its order dated 16.01.2017 while stating that there was no intention on the part of the CPIO to withhold any information conveyed that with regard to point no. 05, consent of the third party was sought and information could not be provided until the ‘third party’ consented for disclosure...”

Decision

Keeping in view the facts of the case and the submissions made by both the parties, it is evident that a suitable reply had been communicated to the Appellant. No further intervention of the Commission is required in the matter...

The Appeal stands disposed accordingly.” (CIC/DGCEI/A/2017/105350 dated 15.3.2018)

A close reading of section 11 shows that a notice is required to be issued only when the PIO intends to disclose information that relates to, or is supplied by, a third party and treated as confidential by the third party. After the enactment of the RTI law, only those matters can be considered confidential that are exempt under one or more of the exemptions to disclosure provided for in the RTI Act. Therefore, in section 11 information being *“treated as confidential by the third party”*, can only be understood to mean information that is exempt from disclosure under the RTI Act. If this is so, then when any third party information is sought, the PIO has to first determine whether it is exempt under the RTI Act. If it is not, then it cannot be legitimately treated as confidential by anyone and no rights of the third party survive. The information can then be disclosed.

However, if information is exempt under any one of the exemptions listed in the law, then the PIO must determine whether under section 8(2) public interest justifies the disclosure, or the legislature proviso (in section 8(1)) dictates disclosure. If the PIO concludes that the information ought to be disclosed, then the law mandates that the PIO should give an opportunity to the third party to be heard before making a final decision. This is in keeping with the principles of natural justice.

This means that section 11 is activated only after the PIO has already considered the various exemptions and has concluded that although they prima facie apply, but the exceptions to the exemptions (public interest or legislature proviso) dictate disclosure. Therefore, the idea of section 11 is to give the third party an opportunity to be heard, and to present for the PIO's consideration facts and arguments pertinent to the matter. The only issue that the third party could contribute to in responding to the notice under section 11 is the quantum of harm that would be caused by the disclosure of the sought for information. This would help the PIO decide whether the harm would be greater or less than the public interest served by disclosing information sought.

The Gujarat High Court¹⁹ expressed a similar view in 2010:

“8.I am of the opinion that Section 11 only provides for a procedure, for dealing with the request for supplying information, when such information concerns a third party. In such a case, the Public Information Officer has to issue a notice to such third party, granting him hearing and pass an order, as may be found proper. Section 11 of the R.T.I. Act neither creates any substantial right to information in favour of an Applicant nor does it provide any independent exemption, making an exception to such a right to information. Such an exception has to be found in Section 8 of the R.T.I. Act, which provides for various exemptions from disclosure of information.....”

Further, section 7 of the RTI Act clearly states that the PIO is only obligated to keep in view the submission of the third party, and that the request for

¹⁹ Rajendra Vasantlal Shah vs. Central Information Commissioner and Ors. AIR 2011 Guj 70

information can be rejected only for reasons listed under section 8 or 9. Section 7 states:

“7. (1) ... Public Information Officer., on receipt of a request ..shall, as expeditiously as possible, and in any case within thirty days of the receipt of the request, either provide the information on payment of such fee as may be prescribed or reject the request for any of the reasons specified in sections 8 and 9.

Xxx

(7) Before taking any decision ...the ...Public Information Officer ..., shall take into consideration the representation made by a third party under section 11.”

Therefore, a composite reading of the third party clause, and the processes laid down in the law, makes it unambiguous that the third party can only make a representation regarding the decision of the PIO to disclose the information. Certainly, no veto power has been given to the third party. The Supreme Court in a 2013 judgment²⁰, clarified that section 11 does not provide a veto power to the third party.

“13. On the other hand Section 11 deals with third party information and the circumstances when such information can be disclosed and the manner in which it is to be disclosed, if so decided by the Competent Authority. Under Section 11(1), if the information relates to or has been supplied by a third party and has been treated as confidential by the third party, and if the Central Public Information Officer or a State Public Information Officer intends to disclose any such information or record on a request made under the Act, in such case after written notice to the third party of the request, the Officer may disclose the information, if the third party agrees to such request or if the public interest in disclosure outweighs in importance any possible harm or injury to the interests of such third party.”

In effect, the Supreme Court held that if the third party is willing, then no issue remains. However, even if the third party does not agree, the PIO can still release

²⁰ RK Jain v. Union of India [(2013) 14 SCC 794]

the information if public interest in disclosure outweighs possible harm to the third party.

Essentially, the views sent by the third party, in so far as they are relevant, would help the PIO to decide whether public interest outweighs potential harm to the protected interests. In no way does this provide a veto power to the third party. Also, the invocation of the third party would only occur if the information was such that it was both treated as confidential by the third party, and considered fit for disclosure by the PIO. If either of these two conditions are missing, then section 11 would not come into play.

4.2 Denying information citing section 7(9)

Section 7(9) of the RTI Act states that:

“7(9) An information shall ordinarily be provided in the form in which it is sought unless it would disproportionately divert the resources of the public authority or would be detrimental to the safety or preservation of the record in question.”

The RTI Act defines “information”, in section 2(f), to mean “any material in any form”. It goes on to give an indicative, though not exhaustive, list: *“including records, documents, memos, e-mails, opinions, advices, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models, data material held in any electronic form”*.

Further, in section 2(j), "right to information" is defined to include 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 in any other electronic mode or through printouts where such information is stored in a computer or in any other device;”*

Consequently, “information” is defined very widely in the RTI Act, accessible in various forms including inspection, certified copies, electronic form etc, with few limitations on its scope and application. This makes the right given to the

applicant under section 7(9) a very significant right - to receive information in the form in which it is sought, except under two specific circumstances: disproportionate diversion of the resources of a public authority; and threat to the safety of the record. There is no provision for denying information under the clause. Section 7(9) only permits this exception to be used for not providing information in the form asked for, but in some other form.

The assessment, however, found PIOs and information commissioners using this exception to deny information altogether, thereby illegitimately introducing a new exemption in the RTI Act. Also, it often seemed to be forgotten that section 7(9) specifically requires information to be “ordinarily” provided in the form asked for. Therefore, if section 7(9) is invoked to provide information in a form other than what was asked for, the PIO and the adjudicators must record reasons justifying it.

Some cases in which access to information was denied citing section 7(9) are described below.

An RTI application was filed to the Union Bank of India seeking the total number of demand drafts, cheques, cash receipts and pay-orders deposited through credit vouchers in its Rawatpur Branch on a particular date. The applicant also sought information on whether these credit vouchers were signed by the depositors. A second appeal was filed to the CIC as the CPIO denied information under Section 7(9) of the RTI Act stating that the exercise of checking the records to verify whether the credit vouchers submitted were signed by the depositors would disproportionately divert the resources of the bank. The CIC, in its order, upheld the denial of information under section 7(9) of the RTI Act, stating:

“The Commission, after hearing the submissions of both the parties and perusing the records, observes that an appropriate response has been furnished to the appellant by the respondent. Hence, no further intervention of the Commission is required in the matter.” (CIC/UBIND/A/2017/175601 dated 12.12.2018)

In another matter, an appellant sought information from the Prime Minister’s Office about projects mentioned by the Prime Minister in his speech. The public

authority denied the information sought, claiming that it was 'sweeping', 'generic' & 'vague' and was therefore exempt under section 7(9) of the Act.

The CIC held that some of the information was expected to be held in a compiled form and should be provided. For project-wise details, the CIC concurred with the denial of information stating that it would require examining of extensive records of 388 projects involving large number of ministries and hence may not be provided. No exemption under section 8 or 9 was invoked to deny disclosure of information. Further, it was not discussed whether information could be provided in a different form - for instance by allowing inspection of records, or whether the application could have been transferred under section 6(3) to the relevant ministries. The extract of the order is given below:

"ORDER

Facts:

'1. The appellant filed RTI application dated 05-07-2017 seeking following information:-

It is requested to provide the details of information regarding the projects which were mentioned in the speech on 15th August, 2016 by the Hon'ble Prime Minister of India, Shri Narendra Modi:-

A. Details of 118 projects (estimated cost of 7.5 Lakh Crores)

B. Details of 270 projects (estimated cost of 10 Lakh Crores)

Kindly provide project wise details on below mentioned parameters:-

1. Project Name & Sanction Date.

2. Project cost at the time of sanction.

3. Expenses on project till today.

4. Reason behind delay/stop.

5. Who was responsible for cost and time increase?

6. If the responsibility was judged then what punishment was given to the responsible Authority/Department/Person?"

Xxx

Hearing:

...6. The respondent stated that the request for information is 'sweeping', 'generic' & 'vague', and compilation of the same would entail a laborious search of several files held in the matter. Further, he stated that the

information sought by the appellant would involve searching of voluminous records by a significant number of officials and an attempt to compile the information in the manner sought would disproportionately divert the resources of the public authority from the efficient discharge of its normal functions. He referred to the decision of the Hon'ble Supreme Court of India in CBSE v. Aditya Bandopadhyay & Ors., (2011)8 SCC 497. Therefore, it attracts the provisions of Section 7(9) of the RTI Act, 2005, which reads as under:-

“(9) An information shall ordinarily be provided in the form in which it is sought unless it would disproportionately divert the resources of the public authority or would be detrimental to the safety or preservation of the record in question.”

Discussion/observation:

7. This Commission observed that prima facie information is expected to be available for points A and B of para 1 in compiled form and hence this may be provided. Further, information on point nos. 1 to 6 of para 1 would require examining of extensive records of 388 projects involving large no. of ministries. Therefore, this squarely falls under the ambit of Section 7(9) of the RTI Act i.e. information is voluminous in nature and hence may not be provided. The respondent should provide a revised reply to the appellant as per the RTI Act, within 30 days from the date of receipt of this order. (CIC/PMOIN/A/2017/178688 dated 11.7.2018)

4.3 Matters pending adjudication

Despite there being no provision in the RTI Act to deny information related to matters pending adjudication, the assessment found a tendency among commissioners to go beyond the law and uphold denials by public information officers on this pretext.

In a matter pertaining to the Office of the Commissioner of Income Tax, an information request was filed seeking information regarding leave taken by an official. Information was denied by the public authority stating, amongst other things, that it was sought in reference to a private civil dispute between the parties and that a writ petition was pending adjudication before the High Court of Andhra Pradesh.

In its decision, the CIC upheld the denial of information and stated that no further intervention of the commission was required, as the subject matter related to a dispute which was pending adjudication in the courts. The decision of the CIC is reproduced below:

“DECISION:

Keeping in view the facts of the case and the submissions made by both the parties, no further intervention of the Commission is warranted in the matter as the subject matter relates to a Civil Dispute which is pending adjudication at an appropriate forum.

The Appeal stands disposed accordingly.” (CIC/CCITB/A/2017/139144 dated 3.9.2018)

Denying information on the grounds that a matter is pending adjudication, or is sub-judice, perhaps emanates from a misunderstanding of sections 8(1)(b) and 8(1)(h). Section 8(1)(b) exempts from disclosure *“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.”* While section 8(1)(h) of the RTI Act exempts *“information which would impede the process of investigation or apprehension or prosecution of offenders”*

In 2011, the High Court of Andhra Pradesh²¹ clarified that just because information asked for from a bank pertains to a pending proceeding before a debt recovery tribunal, this is not enough to attract the provisions of section 8(1)(h). It has to be established that its disclosure would impede the process.

“8. Even on merits, this Court has no hesitation to hold that the information sought for by respondent No. 2 does not fall within the exempted category under Section 8(1)(h) of the Act because the information, which respondent No. 2 has sought, relates to pending proceedings before the Debt Recovery Tribunal. However, what is exempted under section 8(1)(h) is information, which would impede the process of investigation or apprehension or prosecution of offenders. It is not the pleaded case of the Bank that any

²¹ Public Information Officer, Syndicate Bank Vs Central Information Commission -Writ Petition No. 28785 of 2011

investigation or apprehension or prosecution of respondent No. 2 will be impeded by furnishing information sought for by him. Even if the information relates to a pending dispute before a Court or Tribunal, that would not fall under Section 8(1)(h) of the Act.”

Along the same lines, but with a very much more detailed consideration of the issues involved, is the June 2011 Delhi HC judgment²² which is discussed in greater detail in chapter 5. Therein, the Delhi High Court held that just the mere interconnectedness of documents with another ongoing enquiry is not enough to justify the application of section 8(1)(h). The additional threat of “hampering” or “interference” would also have to be established.

4.4 Other denials going beyond the law

Under Section 5(4) of the RTI Act, the PIO may seek assistance of any other officer he/she considers necessary for discharging duties under the law. Section 5(5) casts an obligation on all officers whose assistance is sought to provide the necessary assistance and further states that all such officers shall also be liable for penalties for violations of the RTI Act. Section 5(4) states:

“5(4) The Central Public Information Officer or State Public Information Officer, as the case may be, may seek the assistance of any other officer as he or she considers it necessary for the proper discharge of his or her duties.”

Further, section 6(3) puts an obligation on the PIO to transfer the information request, or such part of it, to another public authority if the information sought is more closely connected with the functions of the other authority. Section 6(3) states:

“6(3) Where an application is made to a public authority requesting for an information,—
(i) which is held by another public authority; or
(ii) the subject matter of which is more closely connected with the functions of another public authority, the public authority, to which such application is

²² B.S. Mathur Versus Public Information Officer W.P. (C) 295 and 608/2011

made, shall transfer the application or such part of it as may be appropriate to that other public authority and inform the applicant immediately about such transfer:

Provided that the transfer of an application pursuant to this sub-section shall be made as soon as practicable but in no case later than five days from the date of receipt of the application."

However, in several cases it was found that without using sections 5(4) and 6(3), PIOs denied information on the grounds that it was not held by them or was not available in their office and commissioners upheld such denials. Under the RTI Act, information can only be denied if it is exempt under section 8 or 9, or if the commissioner is of the opinion that information sought does not fall within the definition of "information" as stated in the law. In all other cases, PIOs are obliged to trace the records and provide them, or if the information sought is not held by the public authority, transfer the application to the appropriate public authority within the time period specified in the law.

An application under the RTI Act was filed to the Ministry of Rural Development seeking information regarding construction of a road in the Wayanad district of Kerala. Details including total cost of construction, amount spent and time required for completing the project etc. were sought.

Information was denied to the applicant and during the hearing of the matter at the CIC, the representative of the ministry stated that although the central government had provided part funding for the project, the execution of the project for construction of the road was done by the state government. The PIO held that the state government would be the appropriate authority to furnish information.

Completely ignoring section 6(3) of the RTI Act, the CIC dismissed the case with the observation that the reply given by the respondent was satisfactory and no further intervention of the commission was required. (CIC/SB/C/2016/900384 dated 27.12.2017)

In another case, an RTI applicant sought information from the Employees' Provident Fund Organisation, Lucknow under the RTI Act. In response, the PIO

stated that 3 points of the RTI application pertained to a different section. The CIC upheld the response and dismissed the appeal even though the requisite information was not provided. This, despite the fact that the RTI Act does not allow for denial of information merely because the information sought pertains to a different section. The PIO should have taken assistance of other officers to furnish the information as per the provisions of section 5(4). (CIC/EPFOG/A/2018/118003 dated 8.6.2018)

4.5 Dismissal of complaints on grounds not contained in the law

Under section 18 of the RTI Act, a complaint can be made to the information commission regarding any violation of the RTI Act. Unlike the appellate procedure under section 19, there is no need to approach the public authority prior to filing a complaint with the commission. In fact, section 18 contemplates several circumstances in which even filing an RTI application would not be necessary prior to filing a complaint, for instance if a PIO has not been appointed by a public authority. Whereas sections 18(1)(a) to (e) list the specific grounds on which complaints can be filed, section 18(f) provides a catch-all residual provision stating that a complaint may be filed in respect of any other matter relating to requesting or obtaining access to records under the Act.

Section 18(1) of the RTI Act states:

“18. (1) Subject to the provisions of this Act, it shall be the duty of the Central Information Commission or State Information Commission, as the case may be, to receive and inquire into a complaint from any person,—
(a) who has been unable to submit a request to a Central Public Information Officer or State Public Information Officer, as the case may be, either by reason that no such officer has been appointed under this Act, or because the Central Assistant Public Information Officer or State Assistant Public Information Officer, as the case may be, has refused to accept his or her application for information or appeal under this Act for forwarding the same to the Central Public Information Officer or State Public Information Officer or senior officer specified in sub-section (1) of section 19 or the Central Information Commission or the State Information Commission, as the case may be;

(b) who has been refused access to any information requested under this Act;
(c) who has not been given a response to a request for information or access to information within the time limit specified under this Act;
(d) who has been required to pay an amount of fee which he or she considers unreasonable; (e) who believes that he or she has been given incomplete, misleading or false information under this Act; and
(f) in respect of any other matter relating to requesting or obtaining access to records under this Act. “

The failure of a public authority to meet its statutory obligation under section 4, would fall within the scope of a complaint made under section 18(1)(f).

Despite the clear position in the RTI Act that a complaint can be directly filed to the commission, the assessment found that in several cases, the CIC refused to adjudicate on a complaint if the complainant had not approached the public authority.

An individual filed 37 complaints to the CIC regarding non-compliance with section 4 of the RTI Act by 37 different passport offices. The CIC dismissed the complaints holding that Section 18(1)(f) can only be invoked after approaching the public authority first. The commission held that as the complainant did not approach the public authority for requesting and obtaining the information, the CIC was not in a position to enquire into the matter under Section 18 of the RTI Act. Section 4 lays down an obligation on every public authority to proactively disclose information. Despite the clear failure of the public authority to implement the law, and despite there being no legal barrier to a complaint being made without approaching the public authority, the CIC dismissed the cases and held that no intervention of the commission was required. The relevant extract is given below:

“3. The counsel for respondents vehemently argued that the present complaint is not maintainable as the complainant has approached this Commission directly without even approaching the Public Authority(s). The counsel for respondents argues that the Commission is empowered to recommend/direct the Public Authority to take any such steps as may be necessary to secure compliance with the provisions of the RTI Act only if the complainant has

followed the procedure to file appeal/complaint as envisaged in the RTI law. Since the procedure has not been followed by the complainant in the present case, the complaint should be dismissed on the ground of non-maintainability.
XXX

Discussion/ observation: ...

6. The Commission observed that Section 18(1)(f) can be invoked after approaching the public authority first. The Commission further observed that in the matter at hand, it is an admitted fact that the complainant did not approach the public authority for requesting and obtaining the information. Thus, the Commission is not in a position to enquire into the matter under Section 18 of the RTI Act.

Decision:

7. In view of the above facts, no intervention of the Commission is required in the matter.

The complaints are disposed of. Copy of the decision be given free of cost to the parties.” (CIC/PASOF/C/2017/142118 dated 22.5.2018)

4.6 Discussion

Despite the RTI Act unambiguously stating that an information request can be rejected only for reasons provided in section 8 or 9 of the law, there has been a concerning tendency on the part of public information officers to frequently deny information to citizens citing other provisions of the law. These decisions of the PIOs have unfortunately been upheld in many cases by the commissioners of the CIC.

The Supreme Court in its judgment²³ on the RTI Act in February 2019, clearly noted that “*Rejection can be only for a reason specified in Sections 8 and 9 of the Act*”. Several Supreme Court and high court judgments discussed above have clarified that Section 11 does not provide any independent exemption. Similarly courts have held that information sought by citizens cannot be denied simply because it relates to matters pending adjudication, unless it can be established

²³ Anjali Bhardwaj and others v. Union of India and others (Writ Petition No. 436 of 2018)

that it's disclosure would hamper or impede the process of investigation or prosecution as laid down in section 8(1)(h).

For people to realise their right to information, it is imperative that the tendency of the CIC, of upholding denial of information by public authorities on grounds that go beyond the law, be curbed.

4.7 Agenda for action

- i. The CIC must use its powers under section 19(8) to clarify the correct use of section 7(9) - it can only be used to provide information in a different form, not deny it. The commission must ensure that public authorities are not allowed to resort to the "disproportionate diversion of resources" plea, unless they are properly maintaining, cataloguing, and indexing its records, in accordance with section 4(1)(a). A public authority must be required to give in writing, a detailed justification on how, even after taking the steps described above, provision of information in the form asked for would still involve a disproportionate diversion of resources or would be detrimental to the safety of the records in question.
- ii. Given the widespread misuse of section 11 of the law, the CIC should issue clear directions instructing PIOs on the correct interpretation of the provisions of this section. The acceptance of information as confidential must clearly be justified on the basis on one or more of the relevant clauses of section 8 or 9. Even then, the response of the third party must be treated only as an input to be considered in finally determining whether the information asked for should be disclosed or not.
- iii. The CIC should treat failure to transfer the RTI application as per the provisions of section 6(3) as a form of obstruction, and initiate proceedings as per section 20 of the Act.
- iv. In all such cases where PIOs are found to be denying information citing sections of the law which do not allow for exempting information, the CIC can use its powers under section 25(5) to recommend to the public authority to organise trainings for their PIOs.
- v. While dealing with complaints received under section 18 of the RTI Act, the CIC must exercise caution to ensure that complaints are not dismissed simply

because the complainant did not file an RTI application or first appeal before filing the complaint. Unlike the appellate procedure laid down under section 19, there is no requirement to approach the public authority prior to filing a complaint with the commission.

Chapter 5: Problematic interpretations of Section 8

Section 8 of the RTI Act lists the exemptions to disclosure of information. For a robust transparency regime, it is critical that the exemption clauses be properly interpreted to ensure that information that deserves protection is safeguarded, but the exemptions are not loosely applied in a manner that restricts peoples' right to information guaranteed under the RTI law.

The analysis of orders undertaken for the purpose of the study showed a tendency among public authorities and information commissioners to loosely interpret the exemptions contained in section 8 to deny information. Some of the provisions more commonly interpreted in this manner were: section 8(1)(g), which exempts information that would endanger the life or physical safety of any person; section 8(1)(h), which prohibits release of information that would impede the process of investigation or apprehension or prosecution of offenders; and section 8(1)(j) which exempts disclosure of information that would cause unwarranted invasion of privacy of an individual.

5.1 Section 8(1)(j)

Section 8(1)(j) of the RTI Act states:

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

(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:"

This is perhaps the most commonly used exemption in the RTI Act to deny information. **The assessment found that section 8(1)(j) was cited in 37% of the orders in which information was fully or partially denied.**

The RTI Act does not define the terms “personal information”, “public activity or interest” or “unwarranted invasion”. This has resulted in unjustified invocation of this exemption in many cases by PIOs, which are often upheld by the CIC. Some of these are described below.

An application was filed under the RTI Act to the Commissioner of Income Tax, Hazaribagh seeking information on two points regarding total arrear demand outstanding as on 01.12.2016 and total amount collected in December, 2016 with respect to Income Tax Range-1, Hazaribagh. The PIO denied information citing Section 8 (1) (j) of the RTI Act, 2005. The RTI applicant filed a complaint to the CIC against the denial of information. During the hearing, the respondent stated that no public interest/public activity was demonstrated in release of this information and therefore, it was denied under Section 8(1)(j).

The CIC upheld the denial of information and observed that the complainant was unable to contest the submission of the respondent. The order does not explain how disclosure of total arrears and total tax collection could cause unwarranted breach of privacy of any individual or qualify as personal information, the disclosure of which has no relationship to any public activity or interest. The order also does not state whose privacy would be undermined by disclosure of information. As per facts recorded in the order, only aggregate figures were sought.

Disclosure of information sought by the applicant also appears to serve public interest, as it relates to collection of public money and outstanding amounts. Further, the order states that the appellant was not able to substantiate grounds for imposition of penalty even though the RTI Act unambiguously puts the burden on the PIO in penalty proceedings to show that he/she acted reasonably and diligently. Finally, the order also did not weigh whether the information sought was such that it could be denied to the Parliament or state legislature. (CIC/CCAPT/C/2017/141721 dated 3.4.2018)

In another case, an application was filed under the RTI Act to the Uttar Bihar Gramin Bank, seeking copies of agreements between the bank and an NGO/company for opening Customer Service Point (CSP) centres. Year-wise details of payments made to the company and details of month-wise and district-

wise salary given to Bank *Mitras* was also sought. The PIO denied the information citing section 8(1)(j) of the RTI Act.

During the hearing of the second appeal, the public authority submitted that information sought related to the personal information of third parties, the disclosure of which had no relationship to any public interest and would cause an unwarranted invasion of the privacy of the third parties and hence, was exempt.

The CIC upheld the denial of information and disposed the appeal. The order does not record how the exemption under section 8(1)(j) is applicable in this case, and specifically whose privacy would be compromised if information was disclosed. Details of payments made to the company and *Bank Mitras* would in any case be part of the financial records of the public authority, which are disclosable under the RTI Act. In fact, much of the information would fall within section 4 of the RTI Act and would be required to be proactively disclosed. The agreements between the public authority and the NGO/company and the setting up of customer service points would relate to a public activity and would also require use of public funds and therefore, the denial of information does not appear to be in conformity with the Act. (CIC/RUGBK/A/2017/176763 dated 26.2.2018)

The issue of disclosure of information related to agreements between a public authority and a person/private entity was specifically examined by the Delhi High Court. In a November 2011 judgment²⁴, the Delhi High Court held that public authorities cannot *per se* have private information. It went on to hold that agreements made between a public authority and any other person or entity would certainly be a public activity and every citizen has a right to know on what terms the agreement has been reached.

“17. No public authority can claim that any information held by it is personal. There is nothing personal about any information, or thing held by a public authority in relation to itself. The expression personal information used in Section 8(1)(j) means information personal to any other person, that the public authority may hold.

XXX

²⁴ Jamia Millia Islamia Vs Sh. Ikramuddin [AIR 2012 Delhi 39]

21. ... The act of entering into an agreement with any other person/entity by a public authority would be a public activity, and as it would involve giving or taking of consideration, which would entail involvement of public funds, the agreement would also involve public interest. Every citizen is entitled to know on what terms the Agreement/settlement has been reached by the petitioner public authority with any other entity or individual. The petitioner cannot be permitted to keep the said information under wraps.”

Since the enactment of the RTI Act, there have been atleast two judgments of the Supreme Court²⁵ interpreting section 8(1)(j) in a manner which has restricted the scope of disclosure of information relating to the assets of public servants and their functioning and performance evaluation (discussed in section 5.4 in this chapter). Though legally binding, the interpretations by the Supreme Court need to be publicly debated as these have had the unintended effect of enabling public servants to evade accountability to citizens. The judgments clarified that in any given case, if the PIO or appellate authority is satisfied that larger public interest justifies the disclosure of information sought, appropriate orders could be passed. However, the assessment found that these judgments were often invoked by PIOs and commissioners to deny access to information under the RTI Act without adequately weighing the public interest clause and other provisions of the law.

For instance, an applicant sought information from the Life Insurance Corporation of India (LIC) regarding details about termination of services of an LIC agent. Information was also sought about whether the said person was continuing to work as an agent and the year of joining the LIC.

In its order, the CIC upheld the denial of information. The order made a reference to the judgment of the Supreme Court of India in the matter of Canara Bank v. C.S. Shyam [(2018) 11 SCC 426] in which the court had held that information about transfers, including date of joining and posting constitutes personal information and need not be disclosed as per the exemption in section 8(1)(j). Though this judgment is particularly restrictive and has been criticised for

²⁵ Girish Ramchandra Deshpand Versus Cen. Information Commr. & Ors [(2013) 1 SCC 212] and Canara Bank Rep. by its Deputy Gen. Manager v. C.S. Shyam, [(2018) 11 SCC 426]

narrowing the scope of the law without adequately taking into account other provisions of the law and its spirit, in this specific case, the judgment does not even apply to all the particulars of information sought. For instance, the judgment did not restrict disclosure of names of employees of a public authority or names of those whose services are terminated.

Further, people posing as insurance agents and cheating unsuspecting customers has been a huge problem and the LIC has put out advertisements and information on its website warning customers against fake agents²⁶. In such a scenario, disclosing names of people working as LIC agents assumes great public interest. (CIC/LICOI/A/2017/120965 dated 5.6.2018)

5.2 Section 8(1)(g)

Section 8(1)(g) of the RTI Act states that:

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

(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;”

While it is reasonable to exempt from disclosure information that might endanger the life or physical safety of anyone, at least four issues need consideration.

First, the threat must be a credible threat and not a vague apprehension of the sort that could be raised against the disclosure of most types of information. Second, the threat must be to a specific person, or to a specific category of people who have a shared enhanced threat perception (like people with a high security classification), rather than to a whole class of people who perform a common task. Third, such exemptions should only be imposed if the information sought to be exempted is such that it is not already in the public domain. Fourth, the

²⁶<https://www.firstpost.com/investing/how-to-spot-and-deal-with-fake-insurance-agents-693115.html>

exemption must be for a limited time period, while the threat is credible, and not forever.

Of course, where a person has agreed to assist a public authority for law enforcement or security purposes, on the explicit understanding that the person's identity would be protected, and there are good reasons to provide such protection, then all this might not apply.

An analysis of the orders in the assessment, however, showed that denial of information was upheld in several cases by commissioners under 8(1)(g) without examining whether any of these conditions were met.

In a matter pertaining to Bharat Sanchar Nigam Limited (BSNL), an applicant sought information regarding the time and email id on which CDR (call detail record) information of specific numbers was provided. The respondent denied the information stating that it is exempt under Section 8(1)(g) of the RTI Act, as the information sought related to a law enforcement agency.

The CIC upheld the denial of information stating that the reply was found to be satisfactory and recorded that no intervention of the commission was required. The order fails to record reasons as to how disclosure of said information 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, which are the essential ingredients of the exemption contained in section 8(1)(g). It merely states that the information is related to a law enforcement agency. In fact, the law enforcement agency is not even named. There is no provision under the RTI Act for denying information merely because it relates to a law enforcement agency. The commissioner also did not adjudicate on whether statutory exceptions to the exemptions applied – if there was larger public interest in disclosure of information or if the said information was such that it could be denied to the legislature. The full order is reproduced below:

“Facts:

- 1. The appellant filed RTI application dated 30.07.2017 seeking information regarding the time and email id on which the CDR information of the specific numbers mentioned in the RTI application has been provided etc.*

2. The appellant filed second appeal on 12.10.2017 before the Commission on the ground that information should be provided to him.

Hearing:

3. The respondent, Sh. Ramesh Chander participated in the hearing through VC. The appellant was absent.

4. The respondent stated that vide their reply dated 21.08.2017, they have informed the appellant that the information sought by him is exempted under Section 8(1)(g) of the RTI Act, as the information is related to law enforcement agency. The reply was read out during the hearing, which found to be satisfactory.

5. The respondent stated that vide order dated 16.09.2017, the FAA had also upheld the reply given by the CPIO.

Discussion/ observation:

6. The action/steps taken by the respondent in dealing with the RTI application is satisfactory.

Decision:

7. No further intervention of the Commission is required in the matter.

The appeal is disposed of. A copy of the order be given to the parties free of cost." (CIC/BSNLD/A/2017/171326 dated 20.6.2018)

5.3 Section 8(1)(h)

Section 8(1)(h) of the RTI Act states:

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

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

In order for the exemption under section 8(1)(h) to be invoked, the public authority must show that disclosure of information would impede investigation, apprehension or prosecution. Unfortunately, section 8(1)(h) is often invoked when information is sought about any ongoing investigation or prosecution,

without establishing whether disclosure of the asked for information would impede one or more of these processes.

An application under the RTI Act was filed to the Bank of India (BOI), Visakhapatnam seeking information on the number of branches of the bank which opened accounts for *Jeypore Sugar Company Ltd.* (JSCL), and whether the bank was aware of the loans availed by the company from other banks. An appeal to the CIC was filed as the PIO denied information under Section 8(1)(d), (e) and (h) of the RTI Act.

During the hearing of the second appeal, the respondent public authority submitted that the JSCL, in connivance with some bank officials, had fraudulently taken several loans in the names of farmers. A criminal case was registered and an investigation in the matter was pending with investigative agencies and in view of this, it was claimed that disclosure of information was exempted under Section 8(1)(h) of the RTI Act.

On the basis of these submissions, the CIC upheld the denial of information under section 8(1)(h). The order does not record how disclosure of information sought would impede the investigation- which is the essential ingredient of the exemption under section 8(1)(h). The CIC also did not adjudicate on whether there was larger public interest in disclosure of information or whether the said information is such that it can be denied to the legislature. The relevant extract of the decision of the CIC is reproduced below:

“Hearing:

4. The appellant submitted that he has sought information pertaining to the loans sanctioned to Jeypore Sugar Company Ltd. (JSCL). However, the CPIO denied information under Section 8(1)(d) (e) & (h) of the RTI Act.

5. The respondent submitted that JSCL in connivance with some bank officials, has fraudulently taken several loans in the names of farmers. Accordingly, a criminal case no. 277/2010 against JSCL has been registered and an investigation in the matter is pending with CB-CID, Rajahmundry. Hence, disclosure of the information sought would impede the process of investigation. In view of this, the disclosure of information is exempted under

Section 8(1)(h) of the RTI Act. The appellant was informed accordingly vide letter dated 24.01.2017.

Decision:

6. The Commission, after hearing the submissions of both the parties and perusing the records, observes that since an investigation in the matter is pending, disclosure of the information sought would impede the process of investigation. In view of this, disclosure of the information sought is exempted under Section 8(1)(h) of the RTI Act. Hence, no further intervention of the Commission is required in the matter.” (CIC/BK0IN/A/2017/601217 Dated 06.06.2018)

In various judgments, the high courts have held that even if investigation is ongoing, in order to deny information under Section 8(1)(h), there must be evidence to establish that the disclosure of information would impede the process of investigation. In its judgment dated December 3, 2007, the Delhi High Court²⁷ held:

*"13. Access to information, under Section 3 of the Act, is the rule and exemptions under Section 8, the exception. Section 8 being a restriction on this fundamental right, must therefore be strictly construed.....Under Section 8, exemption from releasing information is granted if it would impede the process of investigation or the prosecution of the offenders. It is apparent that the mere existence of an investigation process cannot be a ground for refusal of the information; **the authority withholding information must show satisfactory reasons as to why the release of such information would hamper the investigation process.** Such reasons should be germane, and the opinion of the process being hampered should be reasonable and based on some material. Sans this consideration, Section 8(1)(h) and other such provisions would become a haven for dodging demands for information." (emphasis supplied)*

Similarly, in a judgment²⁸ in June 2011, the same Court held:

²⁷ Bhagat Singh v. Chief Information Commissioner and Ors. [146 (2008) DLT 385]

²⁸ B.S. Mathur Versus Public Information Officer W.P. (C) 295 and 608/2011

*"19. ...A public authority which seeks to withhold information available with it has to show that the information sought is of the nature specified in Section 8 RTI Act. As regards Section 8(1)(h) RTI Act, which is the only provision invoked by the Respondent to deny the Petitioner the information sought by him, **it will have to be shown by the public authority that the information sought "would impede the process of investigation."** The mere reproducing of the wording of the statute would not be sufficient when recourse is had to Section 8(1)(h)RTI Act. The burden is on the public authority to show in what manner the disclosure of such information would 'impede' the investigation...*

xxx

*22. ... The mere pendency of an investigation or inquiry is by itself not a sufficient justification for withholding information. **It must be shown that the disclosure of the information sought would "impede" or even on a lesser threshold "hamper" or "interfere with" the investigation.** This burden the Respondent has failed to discharge." (emphasis supplied)*

5.4 Discussion

Taking note of the tendency of information officers to loosely use provisions of section 8 to deny people information that they should be able to access under the RTI Act, the Supreme Court, in its December 16, 2015 judgment²⁹ observed:

"64. In the context of above questions, it had long since come to our attention that the Public Information Officers (PIO) under the guise of one of the exceptions given under Section 8 of RTI Act, have evaded the general public from getting their hands on the rightful information that they are entitled to."

This problem has been exacerbated by information commissioners upholding such decisions of PIOs in many cases, resulting in denial of information which people have a right to know.

Needless to say, where there is a genuine concern that in a specific case disclosure might endanger the life or physical safety of anyone, information must be protected under section 8(1)(h). Again, it is completely reasonable that

²⁹ Reserve Bank of India Vs. Jayantilal N. Mistry, [(2016) 3 SCC 525]

information must not be given if disclosure would impede the process of investigation, apprehension or prosecution of offenders. However, it is incumbent upon commissioners to ensure that these clauses are not misused to deny people their rightful access to information.

In any case, it is not enough to determine that some harm could occur if information exempt under any of the clauses of section 8(1) was made public. What is required is to determine how likely its occurrence is in the specific case under consideration and if public interest outweighs potential harm to protected interest.

Interpretation of section 8(1)(j) by adjudicators – information commissions and the judiciary - has been extremely contentious. There are contradictory judgments of the Supreme Court on matters related to disclosure of personal information of public servants – especially about disclosure of information related to assets of public servants, their functioning and performance evaluations. In particular, in two judgments³⁰ the apex court offered restrictive interpretations vis-à-vis section 8(1)(j), which have been invoked extensively by public authorities to deny information to citizens.

Candidates standing for elections in India are required to declare their assets and liabilities to the Election Commission, which in turn displays this information on its website. The Supreme Court mandated this through two judgements pre-dating the enactment of the RTI Act. In 2002, the SC³¹ directed the Election Commission to call for information about assets from all candidates seeking election to Parliament or a State Legislature, including details of assets of their spouses and dependants. The order stated that: “...*there are widespread allegations of corruption against the persons holding post and power. In such a situation, question is not of knowing personal affairs but to have openness in democracy for attempting to cure cancerous growth of corruptions by few rays of light.*” Similarly, in 2003, while examining the plea that contesting candidates should not be required to disclose the assets and liabilities of their spouses as it

³⁰ Girish Ramchandra Deshpand Versus Cen. Information Commr. & Ors [(2013) 1 SCC 212] and Canara Bank Rep. by its Deputy Gen. Manager v. C.S. Shyam, [(2018) 11 SCC 426]

³¹ Union of India v. Association for Democratic Reforms, [AIR 2002 SC 2112]

would violate the right to privacy of the spouses, the SC³² held that the fundamental right to information of a voter and citizen is promoted when contesting candidates are required to disclose the assets and liabilities of their spouses and dependent children. The SC ruled that when there is a competition between the right to privacy of an individual and the right to information of the citizens, the former has to be subordinated to the latter right, as the latter serves a larger public interest.

However, in 2013, while dismissing a Special Leave Petition, the Supreme Court³³ stated that a public servant's emoluments and assets, including income-tax returns and details of gifts received, were exempt under section 8(1)(j) of the RTI Act, unless larger public interest justifies the disclosure of such information (Girish Ramchandra Deshpande case).

People's right to access information about assets of public servants is extremely important, as one of the few recognised ways that a public servant can be convicted for corruption under the Prevention of Corruption Act is if their assets are disproportionate to their known sources of income. Given that often ill-gotten wealth is held in the name of family members, public disclosure of the income and assets of public servants and their spouses and dependent children is essential. The conundrum arising from the judgments is that while both elected representatives and employees of central ministries, are public servants under the Prevention of Corruption Act 1988, the Supreme Court has held that assets and liabilities must be publicly disclosed for candidates desirous of becoming elected representatives but has not ruled in favour of disclosure for the latter.

Again, making sure that meritorious public servants are promoted and deviant ones are punished is critical for good governance. In a democracy, where governments are ultimately answerable to the citizens, people have a right to monitor this aspect and demand accountability. The ability of the public to monitor the suitability of critical appointments, at the state and central levels,

³² People's Union for Civil Liberties vs. Union of India [AIR[2003] SC 2363]

³³ Girish Ramchandra Deshpand Versus Cen. Information Commr. & Ors [(2013) 1 SCC 212]

requires that people have access to information regarding the performance, experience and appraisals of public servants.

In 1994, the Supreme Court³⁴ while holding the right to privacy as being implicit in Article 21 of the Constitution (right to life and liberty), carved out important exceptions. The court held that *“once a matter becomes a matter of public record, the right to privacy no longer subsists”* and it also ruled that public officials cannot assert a right to privacy with respect to their acts and conduct related to their official duties. The court held:

“In the case of public officials, it is obvious, right to privacy, or for that matter, the remedy of action for damages is simply not available with respect to their acts and conduct relevant to the discharge of their official duties.”

The principles laid down by the Supreme Court in this judgment (referred to as the R. Rajagopal judgment) have been further fortified by the landmark verdict of the 9 judge bench of the Court, commonly referred to as the ‘privacy judgement’³⁵. However, the principles laid down in the R. Rajagopal judgment appear not to have been considered by the Supreme Court in the Girish Ramchandra Deshpande judgment. In the Girish Ramchandra Deshpande case, the SC stated that information regarding copies of memos of censure or show cause notices and enquiry reports regarding a public servant are exempt under section 8(1)(j) of the RTI Act, as the performance of an employee in an organization is primarily a matter between the employee and the employer and is governed by the service rules which fall under the expression “personal information”, the disclosure of which has no relationship to any public activity or public interest.

In a 2017 judgment related to Canara Bank³⁶, the Supreme Court went further to rule that information about transfers, including date of joining and posting of clerical staff of a nationalized bank, constitutes personal information and is exempt from disclosure under section 8(1)(j). Perhaps, the provisions of the RTI

³⁴ R Rajagopal v State of Tamil Nadu [(1994) 6 SCC 632]

³⁵ Judgment dated August 24, 2017 in K. S Puttaswamy (Retd.) & Anr. v. Union of India & Ors. [Writ Petition (Civil) No. 494 of 2012]

³⁶ Canara Bank Rep. by its Deputy Gen. Manager v. C.S. Shyam, [(2018) 11 SCC 426]

Act were not properly put forth before the apex court as the RTI Act mandates public authorities to proactively disclose a directory of officers and employees which would certainly reveal information related to postings. Section 4(1)(b)(ix) of the RTI Act requires every public authority to *“publish within one hundred and twenty days from the enactment of this Act... a directory of its officers and employees;”* and update the publication every year. When there is a specific clause requiring proactive disclosure of information about officers and employees working in the public authority, it is not clear how the SC considered this information to be exempt from disclosure.

5.5 Agenda for action

- i. Information commissioners must ensure that exemptions are properly and specifically applied and a rationale is given for why the information being sought is being denied under one or more exemptions listed in section 8.
- ii. While determining the applicability of section 8(1)(g), the PIO and CIC must verify whether the information sought to be denied is not already in the public domain, and whether the perceived threats are specific and serious enough to justify secrecy. These must be justified in detail, and in writing, in all orders.
- iii. In terms of use of section 8(1)(h), the CIC needs to take cognisance of the actual wording of the law and judicial orders on this exemption while dealing with appeals and complaints.
- iv. What should be private and what should not, and under what circumstances, needs an extensive public debate. This is especially required for determining the extent of the applicability of section 8(1)(j) to information related to public servants, especially information related to their official work. The data protection legislation which is going to be introduced in Parliament soon, is likely to provide an opportunity for extensive discussion on the kind of personal data that should be accessible under the RTI Act and what should be protected. Public interest must be the primary test of all privacy claims and in a country like India, where people’s ability to access their basic rights is dependent on access to information, claims for privacy should be carefully weighed against public interest.

Chapter 6: Exceptions to the exemptions

There are three types of overarching exceptions that the RTI Act provides to the exemptions listed in Section 8 of the law.

The first qualifies all the exemptions under section 8(1) by laying down that information that cannot be denied to Parliament or to a state legislature cannot be denied to any person. The idea essentially being that the Parliament and state legislatures represent the people, so whatever they are entitled to know, the people, whom they represent, are also entitled to know. The proviso to section 8(1) states, *“Provided that the information which cannot be denied to the Parliament or a State Legislature shall not be denied to any person.”*

The second overarching exemption mandates that the final and all pervasive test for disclosing information is public interest. If information disclosure serves greater public interest than harm caused to the protected interests, then such information must be disclosed, irrespective of the exemptions in 8(1) of the RTI Act and irrespective of the Official Secrets Act.

“8(2) Notwithstanding anything in the Official Secrets Act, 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.”

The third exception removes, on information that refers to matters that are over twenty years old, the applicability of most of the exemption clauses listed in sub-section 8(1).

“8(3) Subject to the provisions of clauses (a), (c) and (i) of sub-section (1), any information relating to any occurrence, event or matter which has taken place, occurred or happened twenty years before the date on which any request is made under section 6 shall be provided to any person making a request under that section:

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.”

6.1 The legislature access proviso

The override to the exemptions listed in section 8(1), that no person can be denied information that cannot be denied to Parliament or the state legislature, is a powerful exception. Unfortunately, this is not widely known or invoked, which might partly be due to the fact that though in the official version of the RTI Act this provision is correctly shown to be a part of sub section 8(1)³⁷, in many commercial copies of the RTI Act it has been shown to be right-indented and aligned with 8(1)(j), thereby wrongly suggesting that it is a part of 8(1)(j), and therefore not applicable to the whole of 8(1) but only to 8(1)(j). Perhaps this inadvertent printing error has denied this provision its rightful place in jurisprudence.

The assessment found that the legislature access proviso was rarely examined by the commissioners of the CIC while upholding denial of information. **Of the orders of the CIC that were analysed for the purpose of this assessment, in less than 1% of the cases where information was denied, was the legislature access proviso discussed.**

For instance, in several applications filed to the Joint Commissioner of Income Tax of Bokaro, an applicant sought information about the number of cases in which notices under different sections of the IT Act had been issued to assesses for recovery of tax during specific months. The public authority denied disclosure of information citing Section 8(1)(j) of the RTI Act. The RTI applicant filed a complaint to the CIC against the denial of information. During the hearing, the complainant stated that there was public interest in the matter, as officials were conducting investigations in an arbitrary manner and there was corruption in the department. The public authority denied the allegations and said that the complainant had failed to demonstrate public interest and the applications were filed out of personal vendetta.

³⁷ <http://rti.gov.in/rti-act.pdf> - page 7

The commissioner upheld the denial of information without explaining how disclosure of statistical information about the number of notices issued under the Income Tax Act would attract an exemption under section 8(1)(j). The order also does not specify whose privacy would be compromised. Further, the CIC completely overlooked the applicability of the legislature access proviso. In fact, this kind of statistical information is routinely part of annual reports of public authorities, which should ordinarily be proactively available on their website, and certainly cannot be denied to the Parliament or state legislature. (CIC/DOREV/C/2017/185399 dated 9.3.2018)

There are high court orders that have taken cognisance of the legislature access clause. In 2012, **the Delhi High Court** ordered³⁸ disclosure of information being denied to the respondents under section 8(1)(e), especially because the information being sought could not be denied to a state legislature or to the Parliament:

“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.”

Similarly, in 2011, the High Court of Punjab and Haryana³⁹ held that the information asked for by a respondent, relating to number of LPG consumers, procedures for booking commercial cylinders, etc. cannot be exempted either on the plea of commercial confidence or of fiduciary relationship. The HC went on to conclusively hold that as this information could not be denied to Parliament or a state legislature, it cannot be denied to the respondent:

³⁸ Union of India & Ors. Versus Col. V.K. Shad WP (C) 499/2012, Delhi High Court, judgment dated 9 November, 2012

³⁹ Hindustan Petroleum Corporation Ltd. Versus The Central Information Commission and Ors. Civil Writ Petition No. 1338 of 2011, High Court of Punjab and Haryana, decided On: 24.01.2011

*“20. To my mind, the information sought by Respondent No. 2 ... 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)*

A similar understanding of the law is reflected in the 2013 judgment⁴⁰ of the Madras High Court wherein the HC held that whenever a decision was being taken to deny information under section 8(1)(e), among other things it must be determined whether the information was such that it could be denied to Parliament and state legislatures.

“53. It cannot be gainsaid that Section 8(1) of the Right to Information Act, 2005 deals with 'exemption' from disclosure of information in regard to matters falling under (a) to (j) ...While denying the information as required under Section 8(e) of the Right to Information Act, 2005, the undermentioned facts can be taken into account by the concerned authority. They are as follows:

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(b) Whether the information is such that can be refused/denied to Parliament or State Legislature; ...;”

What follows from this, at the very least, is the requirement that all orders denying any information under section 8(1), or upholding such a denial, must contain a definitive statement that the denied information is such that it would

⁴⁰ The Registrar General Versus R.M. Subramanian and The Registrar Writ Petition No. 19314/2012 (GM-RES), Madras High Court, judgment dated 14.06.2013

also be denied to Parliament or to a state legislature and give relevant reasoning to support this judgement.

The Delhi High Court in 2017⁴¹ set aside a CIC order which had upheld the denial of information under section 8(1)(j) about the action taken by the Central Vigilance Commission on complaints made against the Chairman-cum-Managing Director of M/s Power Finance Corporation Ltd. The High Court referred to the legislature proviso to section 8(1) of the RTI Act and the public interest override and ordered disclosure of the information sought. The relevant extract is given below:

*"9. The proviso of Section 8 (1) of the Act is also important and reads as under:
" Provided that the information, which cannot be denied to the Parliament or a State Legislature shall not be denied to any person."*

10. By virtue of the aforesaid proviso to Section 8(1) of the Act, it is enacted that information which cannot be denied to the Parliament or a State Legislature shall not be denied to any person.

In the circumstances, this Court directs the respondent to disclose to the petitioner as to what action had been taken pursuant to his complaint and other similar complaints made against the then CMD."

6.2 Public interest override

Perhaps section 8(2) is the most powerful of the overrides, for it gives absolute discretion to the public authority and the information commission to set aside any of the exemptions listed in 8(1), if it was thought that public interest so warranted.

Section 8(2) is applicable to all clauses under section 8(1) – from 8(1)(a) through to 8(1)(j). It is also applicable to information exempted under the Official Secrets Act, 1923, and reinforces section 22 of the RTI Act, which states somewhat more categorically that *"The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in the Official Secrets Act, 1923...."*

⁴¹ Kamal Bhasin vs Radha Krishna Mathur & Anr. W.P.(C) 7218/2016, Delhi High Court, decision dated 1.11.2017

Despite the various judgments by the higher judiciary stating that public interest must be weighed in cases where information is held to be exempt, **the assessment found that in more than 60% of the cases in which information was denied, the CIC did not examine whether there was public interest in disclosure which would override the exemption clauses.**

An application under the RTI Act was filed to the Indira Gandhi National Open University, seeking information on three points: name and address of doctors from Assam who had done “PG Diploma in Clinical Cardiology” since the year 2000; whether this diploma could be studied at the time the RTI application was filed; and whether such diploma holders were eligible to install pacemakers.

The PIO denied the disclosure of information citing section 8(1)(j) of the RTI Act and the first appellate authority upheld the denial of information. During the hearing of the second appeal at the CIC, the appellant’s representative explained that several doctors who had obtained a PG Diploma in Clinical Cardiology had opened centres in Assam for implanting pacemakers, and the applicant was trying to ascertain whether such diploma holders were qualified and permitted to do so.

The CIC upheld the denial of information. The order does not record any discussion or provide any reasons as to why the information sought qualifies to be exempt under section 8(1)(j). Further, both section 8(1)(j) and section 8(2) of the RTI Act state that if public interest in disclosure of information outweighs the harm to protected interests, the information should be disclosed. The CIC failed to examine whether there was greater public interest in the disclosure of information. This omission is especially problematic given the huge public interest apparently involved in informing the people of Assam whether those carrying out the said medical procedure were indeed qualified to do so. The decision of the CIC is reproduced below:

“DECISION

Keeping in view the facts of the case and the submissions made by both the parties, it is evident that a suitable reply had already been furnished by the CPIO/FAA in the matter. No further intervention of the Commission is required

in the matter. For redressal of his grievance, the Appellant is advised to approach an appropriate forum.

The Appeal stands disposed accordingly.” (CIC/IGNOU/A/2017/104984 dated 12.3.2018)

One problem appears to be that commissioners are of the mistaken view that public interest has to be examined only if the appellant/complainant invokes it. In its 2015 judgment⁴², the Supreme Court recorded the clear position that every clause of section 8(1) had a public interest override applicable to it. This has certain implications - most importantly, that all orders denying, or upholding the denial, of any information under 8(1) must contain a specific statement that the public interest test has been applied and mention the basis on which it was decided that the public interest in disclosure does not outweigh the harm to the protected interests.

In April 2019, the SC again gave a significant judgment⁴³ upholding the importance of the public interest provision of the RTI Act. A review petition was filed against a judgment of the Supreme Court dismissing petitions seeking a court-monitored probe into the deal signed by the Indian government with France to purchase 36 Rafale fighter jets. The government raised objections against the review petitions claiming that they contained privileged documents which had been illegally obtained. The government asked the court to remove the said documents from the record on the grounds that the documents were protected under the Official Secrets Act and were also exempt from disclosure under section 8(1)(a) of the RTI Act.

The Supreme Court dismissed the objections through two separate, but concurring, judgments. In his judgment, Justice K.M. Joseph made some important observations about the RTI Act. He hailed section 8(2) as a legal revolution and clarified that information must be disclosed, even if it is apparent that some harm will be caused to protected interests, as long as relatively higher public interest is established in disclosing the information sought.

⁴² Reserve Bank of India Vs. Jayantilal N. Mistry, [(2016) 3 SCC 525]

⁴³ Yashwant Sinha & Ors. Versus Central Bureau Of Investigation & Anr., Review Petition (Criminal) No. 46 of 2019 in Writ Petition (Criminal) no. 298 of 2018

“Section 8(2) of the Act manifests a legal revolution that has been introduced in that, none of the exemptions declared under sub-section(1) of Section 8 or the Official Secrets Act, 1923 can stand in the way of the access to information if the public interest in disclosure overshadows, the harm to the protected interests.”

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“It is true that under Section 8(1)(a), information the disclosure of which will prejudicially affect the sovereignty and integrity of India, the security and strategic security and strategic scientific or economic interests of the State, relation with foreign State or information leading to incitement of an offence are ordinarily exempt from the obligation of disclosure but even in respect of such matters Parliament has advanced the law in a manner which can only be described as dramatic by giving recognition to the principle that disclosure of information could be refused only on the foundation of public interest being jeopardised. What interestingly Section 8(2) recognises is that there cannot be absolutism even in the matter of certain values which were formerly considered to provide unquestionable foundations for the power to withhold information. Most significantly, Parliament has appreciated that it may be necessary to pit one interest against another and to compare the relative harm and then decide either to disclose or to decline information. It is not as if there would be no harm. If, for instance, the information falling under clause (a) say for instance the security of the nations or relationship with a foreign state is revealed and is likely to be harmful, under the Act if higher public interest is established, then it is the will of Parliament that the greater good should prevail though at the cost of lesser harm being still occasioned.”

The judgment reiterated that as per section 22, the RTI Act will override the provisions of the Official Secrets Act.

“In no unambiguous terms Parliament has declared that the Official Secrets Act, a law made in the year 1923 and for that matter any other law for the time being in force inter alia notwithstanding the provisions of the RTI Act will hold the field.”

6.3 Twenty year exception

The third override to the exemptions is the provision that removes, on information that refers to matters that are over twenty years old, the applicability of most of the exemption clauses listed in sub-section 8(1).

The language of (section 8(3) makes it clear that it is applicable to all the exemptions contained in section 8(1) other than those listed in (a), (c) and (i). Despite this, it was found that the exception was largely ignored by public authorities and the CIC alike.

An RTI application was filed to the Indira Gandhi Institute of Physical Education & Sports Sciences, seeking information related to the appointment of an accounts officer 27 years prior to the date of filing of the information request. Information sought included: nature of appointment (permanent or ad-hoc); copies of documents submitted by the applicant at the time of appointment; copy of advertisement for the post; details of selection committee; educational qualification and experience requirements for the post; copies of educational qualifications submitted by the applicant; minutes of governing body confirming the appointment.

While the PIO provided a copy of the order relating to appointment, information on other points was denied. The Commission upheld the denial of information. The relevant extract of the CIC order is given below:

“2.5 The Commission observes that the information as sought by the appellant in respect of appointment of Shri Gopal Singh, Assistant pertained to more than 27 years old record and personal information of third party. The CPIO had appropriately replied to the appellant and provided disclosable and available information to the appellant within the stipulated period... The Commission upholds the decision of the respondent authority. The appeal is disposed of.”
(CIC/IGPES/A/2017/311620/MOHRD dated 2.1.2018)

The CIC did not examine the record retention schedule to check the period for which the information sought was required to be maintained. Further, information denial was upheld stating that information sought pertained to personal information of third party. If this was understood by the commissioner

to mean that information was denied under section 8(1)(j), the denial should have been overturned as section 8(3) of the RTI Act states that section 8(1)(j) cannot be used to deny information relating to any matter which took place twenty years before the date on which the request for information was made.

6.4 Agenda for action

- i. The CIC needs to start ensuring that the public interest test is rigorously applied and it is verified that information being denied is not such that could have been provided to the Parliament or state legislature. It needs to start directing public authorities to do the same. In each case where the CIC upholds denial of information citing an exemption under section 8, it must record that the overarching exceptions in section 8(2) and the proviso to section 8(1) were considered, and why they were not found to be applicable.
- ii. To ensure that the exceptions to exemptions are not overlooked, a section should be specifically dedicated to them as an essential part of the format of the orders passed by commissioners (see Box 1).
- iii. It must be ensured that the correct version of the RTI Act, which shows the Parliament and state legislature test as applicable to the whole of section 8(1), is displayed in all official websites and is disseminated to the public.
- iv. Every public authority must be required to proactively disclose its rules and processes relating to the management and destruction of records. Public authorities must list records that have been sent to the archives or opened up after 20 years. The CIC must systematically review the prevailing rules and practices of public authorities relating to the management and destruction of records, to ensure that all relevant documents survive the twenty-year period and are preserved and accessible thereafter as per the provisions of section 8(3).

Chapter 7: Imposition of penalty

The statutory provision for imposition of penalty on erring officials is widely seen as crucial for ensuring effective implementation of the RTI Act. Section 19(8) and 20(1) of the RTI Act state:

“19(8)...In its decision, the Central Information Commission or State Information Commission, as the case may be, has the power to—

XXX

(c) impose any of the penalties provided under this Act;

XXX

20. (1) Where the Central Information Commission or the State Information Commission, as the case may be, at the time of deciding any complaint or appeal is of the opinion that the Central Public Information Officer or the State Public Information Officer, as the case may be, has, without any reasonable cause, refused to receive an application for information or has not furnished information within the time specified under sub-section (1) of section 7 or malafidely denied the request for information or knowingly given incorrect, incomplete or misleading information or destroyed information which was the subject of the request or obstructed in any manner in furnishing the information, it shall impose a penalty of two hundred and fifty rupees each day till application is received or information is furnished, so however, the total amount of such penalty shall not exceed twenty-five thousand rupees:

Provided that the Central Public Information Officer or the State Public Information Officer, as the case may be, shall be given a reasonable opportunity of being heard before any penalty is imposed on him:

Provided further that the burden of proving that he acted reasonably and diligently shall be on the Central Public Information Officer or the State Public Information Officer, as the case may be.”

The imposition of penalties is perhaps the most vexatious issue relating to the proper enforcement of the RTI Act. There are numerous court orders⁴⁴ that

⁴⁴ For a discussion of these orders see Chapter 28, ‘*Tilting the Balance of Power - Adjudicating the RTI Act*’, RaaG, SNS & Rajpal, 2017, (<http://snsindia.org/Adjudicators.pdf>)

reiterate that it is mandatory to impose a penalty, as prescribed in section 20(1) of the RTI Act, if a PIO has violated the RTI Act in any one or more of the following ways:

- i. without any reasonable cause refused to receive an application
- ii. without any reasonable cause delayed furnishing information
- iii. malafidely denied the request for information
- iv. knowingly given incorrect information
- v. knowingly given incomplete information
- vi. knowingly given misleading information
- vii. destroyed information which was the subject of any request
- viii. obstructed in any manner the furnishing of information

It is a settled legal position that the commission's orders must be speaking orders and must contain detailed reasons (see chapter 3). Therefore, whenever an appeal or a complaint provides evidence that one or more of the violations listed above has occurred, the commission must initiate penalty proceedings under section 20 of the Act. Subsequently, the commission must either impose the prescribed penalty, or give reasons why in its opinion the PIO has been able to establish that the relevant exception is applicable (reasonable cause, no mala fide, or not knowingly, as described above). This is especially so because sections 19(5) and 20(1) of the RTI Act mandate that the PIO has the onus to prove that (s)he did not commit a penalizable offence.

Despite this, in an overwhelming proportion of orders, information commissioners have failed to impose penalties and have failed to even ask the PIOs to give their justification for violating the law. Consequently, in a majority of the cases, there has been no determination of whether there were justifiable reasons to waive penalties.

7.1 Show cause notices issued and penalty imposed

The analysis of CIC orders for this assessment found that **59% orders recorded one or more violations listed in Section 20 of the RTI Act**, based on which the commission should have triggered the process of penalty imposition. However, in **only 27% of these cases did the IC issue a notice to the PIO** asking him or her

to show cause why penalty should not be levied. Of the cases in which show cause notices were issued, the subsequent order which would record the final directions of the commissioner in terms of whether or not penalty was imposed, could not be located for 10% of the cases. In these it appears, that after issuing a show-cause notice, there was no subsequent follow-up. **Finally, penalty was imposed in only 5% of the cases in which it was imposable.**

The commissioner-wise break up of show cause notices issued and penalty imposed (percentage) in the sample of orders analysed for the assessment is provided in table 3.

Table 3: Commissioner-wise break up of show cause notices issued and penalty imposed in the sample of orders (percentage)		
Information Commissioner	Show Cause Notices issued	Penalty imposed
Mr. R. K. Mathur	10%	0%
Mr. Yashovardhan Azad	12%	24%
Prof. M. Sridhar Acharyulu	35%	42%
Mr. Sudhir Bhargava	13%	3%
Mr. Bimal Julka	3%	0%
Mr. Divya Prakash Sinha	6%	0%
Mr. Amitava Bhattacharya	21%	31%

Some orders of the CIC that typify the phenomenon of the commission's reluctance to impose penalties are discussed here.

A former employee of Air India sought information regarding a letter written by him to the office of the Chairman and Managing Director, regarding refund of a contribution made by him towards a scheme at the time of retirement and details of the action taken on the letter. During the hearing of the case, the CIC observed that a proper reply was provided by the PIO a few days prior to the date of the hearing of the second appeal - after a delay of more than 500 days (eighteen months). Despite the inordinate delay in providing the requisite information, the CIC did not issue a show cause notice to initiate penalty proceedings, though

taking note of the delay in providing information, the commissioner awarded compensation to the appellant for detriment caused to him. The relevant extract is presented below:

“On perusal of the relevant case record, it was noted by the Commission that proper reply was not provided to the appellant earlier...

On perusal of the relevant case record, it was noted by the Commission that the reply dated 03.09.2018 is however just, proper and comprehensive but delayed by about one and half years.

In view of the delay caused in providing final reply to the appellant, the appellant submitted that he should be compensated for that detriment caused to him. Hence, suitable compensation u/s 19(8)(b) of the RTI Act should be paid to him.

In view of the above, Commission consider that Rs 3000/- is a fair enough compensation although it will still be a token amount which should be paid to the appellant as compensation by the respondent public authority within 7 days from the receipt of this order u/s 19(8)(b) of the RTI Act for detriment caused to him because of the delay in furnishing final reply by about one year and 6 months since the receipt of the above stated RTI application by the concerned respondent authority in this case. The said amount is to be paid to the appellant within a maximum period of 15 days from the receipt of this order .

The respondent CPIO is directed to send a compliance report of the direction given in this order to the Commission within 07 days thereafter for record. With the above direction, the appeal is disposed of.” (CIC/AIRIN/A/2017/149298 dated 7.9.2018)

In another case, an application under the RTI Act was filed on August 25, 2014 to the Central Information Commission seeking a copy of an administrative order issued by the Commission and other details about the order. The complaint, against the failure to provide the requisite information, was heard by the CIC on January 10, 2018. The CIC order notes that the information was handed over during the hearing i.e. more than 1200 days late, yet the Commission only expressed displeasure over the delay and did not issue a show cause notice for initiating penalty proceedings against the PIO. The order notes that as the

complainant did not wish to press for action, the case was closed. This is despite the fact that initiating penalty proceedings in cases where violations listed in section 20 have occurred is not dependent on views of the information seeker. The relevant extract is given below:

“During the hearing, rep. of CPIO (GA) handed over the copies of documents and regretted for the delay. Complainant stated in view of the submission of the rep. of CPIO that he does not wish to press the matter further.

Decision

*Commission expresses serious displeasure over the conduct of the CPIO in having delayed the provision of information inordinately. However, in view of the fact that Complainant does not wish to press for action, case is closed.”
(CIC/SB/C/2016/000228/SD dated 15.1.2018)*

7.2 Creating new grounds for not imposing penalties

The RTI Act stipulates that in cases where information is not provided within the defined time-frame, the commissioner has to adjudicate on whether there was any reasonable cause for delay. On the other hand, in cases where access to information is denied, penalty can be levied only if the commissioner holds that the denial was *malafide*. However, despite this unambiguous distinction between different types of violations, in several cases of delay in provision of information, it was found that the CIC set aside the penalty notice on the basis that *malafide* could not be established. This practice was found to be prevalent despite the Delhi High Court holding in a 2012 judgment⁴⁵ that *mala fide* did not have to be established each time a penalty was to be imposed. The court held that only where a request was denied did the need to determine that there was mala fide become relevant. In other cases, other factors became relevant.

Some cases of delayed information provision, where the CIC held that penalty could not be imposed as *malafide* intention could not be established, are described below.

⁴⁵ Prem Lata Versus Central Information Commission W.P. (C) 2458 of 2012, Delhi High Court decision dated 26.4.2012

In a complaint regarding delay of more than 7 months in furnishing of information, the CIC disposed the complaint observing that there was nothing on record to suggest *malafide* intention of the PIO in causing the delay. In fact, no notice asking the PIO to show cause as to why penalty should not be levied for the delay was issued. The relevant extract is given below:

“Commission observes that there is nothing on record to suggest that there was any malafide intention on part of the CPIO in having delayed the provision of information, nor has the Complainant argued on any such grounds. Commission accepts the submissions of the CPIO and condones the delay.”
(CIC/IARMY/C/2017/165514/SD dated 17.9.2018)

In another case, a person filed an RTI application to the Delhi High Court seeking information regarding status of his application for legal aid. A complaint against the failure to furnish the information was filed to the CIC, following which the PIO provided the requisite information. Even though the information was provided 89 days after the expiry of the stipulated time-frame, the IC did not issue notice for initiating penalty proceedings as the CIC noted that there was no *malafide* on part of the PIO.

“Discussion/ observation:

5. This Commission is of the view that there is no malafide on the part of the CPIO. Therefore, delay is condoned. No case of penalty is made out in the matter. Further, the action/steps taken by the respondent in giving information in response to the RTI application is satisfactory.

Decision:

6. No further intervention of the Commission is required in the matter.

7. The Competent Authority of the Hon’ble High Court is advised to put in place a mechanism so that RTI application(s) are replied within the stipulated period prescribed under the RTI Act.

The complaint is disposed of. Copy of the order be given to the parties free of cost.” (CIC/HCDEL/C/2017/158239 dated 24.4.2018)

An application under the RTI Act was filed on 14-06-2017 to the Election Commission of India seeking information on the proposal to reduce the minimum voting age from 18 years to 16 years. Upon not receiving any information despite

filing a first appeal, the applicant filed a second appeal to the CIC. During the hearing of the matter in June 2018, it emerged that the PIO had provided the requisite information only one day prior to the hearing i.e. after a delay of more than 300 days. Without issuing a notice for penalty, the CIC condoned the delay with the observation that there was no *malafide* on the part of the PIO. The relevant extract is given below.

“Discussion/observation:

6. This Commission observed that whatever information could be provided to the appellant has been given to him as per the RTI Act. Further, this Commission is of the view that there is no malafide on the part of the PIO. Therefore, delay is condoned. No case of penalty is made out in the matter.

Decision:

7. No further intervention of the Commission is required in the matter. The appeal is disposed of. Copy of the order be given to the parties free of cost.”
(CIC/ECOMM/A/2017/608992 dated 27.6.2018)

7.3 Burden of proof

The RTI Act states that during appeal proceedings and penalty proceedings, the burden of proving that the PIO has acted as per the provisions of the Act shall be on the PIO. Despite this, in several cases the commissioners held that the information seeker could not establish *malafide* and therefore penalty proceedings could not be initiated, thereby reversing the burden of proof.

In a matter pertaining to Hindustan Paper Corporation Limited, the PIO denied information sought citing section 8(1) (d) of the RTI Act. The CIC in its decision overturned the denial of information and directed the Chairman-cum-Managing Director to furnish the requisite information.

The commissioner noted that there was dereliction of duties by concerned officials but did not issue any show cause notice to the erring officials. Instead, the order recorded that the appellant could not substantiate *malafide* denial or establish there was no reasonable cause for delay in providing information.

“The Appellant could not substantiate his claims regarding malafide denial of information by the Respondent or for withholding it without any reasonable cause.

The Respondent was not present to contest the submissions of the Appellant or to substantiate their claims further.

DECISION:

Keeping in view the facts of the case and the submissions made by the Appellant, the Commission directs the Chairman-cum-Managing Director, Hindustan Paper Corporation Limited, Kolkata to examine the matter and furnish the desired information to the Appellant within a period of 15 days from the date of receipt of this order as also fix responsibility and accountability of the concerned officials for dereliction of their duties in accordance with the provisions of the RTI Act, 2005.

The Commission also instructs the Respondent Public Authority to convene periodic conferences/seminars to sensitize, familiarize and educate the concerned officials about the relevant provisions of the RTI Act, 2005 for effective discharge of its duties and responsibilities.

The Appeal stands disposed accordingly.” (CIC/HPCLT/A/2017/143988 dated 20.9.2018)

7.4 Initiating disciplinary proceedings

Section 20(2) empowers information commissioners to recommend disciplinary action against a PIO for “persistent” violation of one or more provision of the Act.

The SC⁴⁶ has clarified the legal position by stating:

“30. ...In other words, besides finding that any of the stated defaults have been committed by such officer, the Commission has to further record its opinion that such default ... was committed persistently and without a reasonable cause.

The SC goes on to state that:

⁴⁶ Manohar s/o Manikrao Anchule vs. State of Maharashtra; [AIR 2013 SC 681]

“We would hasten to add here that wherever reasonable cause is not shown to the satisfaction of the Commission and the Commission is of the opinion that there is default in terms of the Section it must send the recommendation for disciplinary action in accordance with law to the concerned authority. In such circumstances, it will have no choice but to send recommendatory report. The burden of forming an opinion in accordance with the provisions of Section 20(2) and principles of natural justice lies upon the Commission.” (Paragraph 30)

In order to be in conformity with section 20(2), as interpreted and clarified by the SC, the CIC must maintain a database of the PIOs brought before the commission so that commissioners may assess which of them is a persistent offender. This does not appear to be happening at the moment.

In fact ,in one case pertaining to the Northern Railways, the CIC after issuing a show cause notice for inordinate delay in replying to the RTI application, recommended disciplinary action against the concerned PIOs. There is nothing recorded in the order to suggest that the violations were persistent and therefore warranted the use of section 20(2). The relevant extract is given below:

“However, none of the PIOs was able to assist the Commission by submitting the reason for such inordinate delay in replying to the said RTI application. The Commission is of the opinion that the CPIOs of the Lucknow Division of the Northern Railway did not submit proper written explanations to the Commission for the delay involved in this case. The Commission recommends disciplinary action against the then CPIOs involved in this case, i.e. the CPIO (Personnel), CPIO (Mechanical) and CPIO (Accounts) in the year 2015, u/s 20(2) of the RTI Act as per the service rules applicable to them.” (CIC/CC/C/2016/000026 dated 4.1.2018)

7.5 Discussion

The provision to allow for imposition of penalties under the RTI Act is widely seen as the clause that is most critical for ensuring effective compliance with the transparency law. Non-imposition of penalties by commissions in clearly deserving cases sends a signal to the PIOs that violating the law will not invite any

serious consequences. This destroys the basic framework of incentives and disincentives built into the RTI law and promotes a culture of impunity.

Non-imposition of penalties causes a loss to the public exchequer. But, even more important than the revenue lost is the loss of deterrence value that the threat of penalty was supposed to have provided. This has resulted in PIOs denying information, sending information late, not responding at all, or violating other provisions of the RTI Act with impunity, and without fear of consequences.

The analysis done in an earlier report⁴⁷ showed that, on an average, information was only provided to 45% of the RTI applicants, and that the average time taken to provide information was 60 days, while the legally mandated maximum is 30 days.

The laxity in imposing penalties allows PIOs to take liberties with the RTI Act, at the cost of the public. This leads to many unanswered applications and an equal number of delayed or illegitimately refused ones, resulting in a large number of appeals and complaints to the commission, and the consequent long wait before appeals and complaints come up for consideration. Therefore, by not imposing even the legally indicated and mandatory penalties, information commissions are increasing their own work-load and encouraging delays and illegitimate denials for the public.

In effect, the reluctance of information commissioners to impose penalties is threatening the very viability of the information regime in India. If a penalty is imposed each time an RTI application is ignored or illegitimately denied, as is legally required, there would hardly be an application that would be delayed, ignored, illegitimately denied, or otherwise illegally dealt with. Therefore, the mandatory imposition of penalties, as laid down in the law, would most likely change the whole incentive base of PIOs and significantly tilt the balance in favour of the public and of transparency.

⁴⁷ Page 70, Chapter 6, *'Peoples' Monitoring of the RTI Regime in India'*, 2011-2013, RaaG & CES, 2014

7.6 Agenda for action

- i. Commissioners of the CIC need to collectively resolve to start applying the penalty provision of the RTI Act more rigorously.
- ii. The CIC must adopt a standardized format for its orders. Each order needs to be a speaking order and must include information on: whether the actions of the PIO/officer attract a penalty under any of the grounds laid down in section 20 of the Act; the course of action adopted by the commissioner (including issuing a show cause notice); and legal grounds relied upon by a commissioner if a penalty is not imposed despite existence of any of the circumstances mentioned in section 20.
- iii. The CIC should maintain a detailed database of the penalties imposed, including the name and designation of the PIO, quantum of penalty imposed and date of imposition. This would enable commissioners to identify repeat offenders so that they can recommend the initiation of disciplinary proceedings against erring PIOs as per provisions of section 20.
- iv. The CIC must put in place a mechanism to enforce and monitor the implementation of its orders in terms of imposition of penalty and recommendation of disciplinary action. In cases where PIOs or PAs refuse to comply, the CIC must initiate appropriate legal proceedings, including approaching the courts if necessary, for recovery of penalties and enforcement of their directions.

Chapter 8: Significant orders

Information commissions have a critical role in ensuring effective implementation of the RTI Act. The assessment found many progressive orders of the CIC, which facilitated peoples' access to information and re-affirmed the important role commissions can, and do, play in furthering the transparency regime in the country. This chapter examines some of these significant orders of the CIC. The orders covered in this chapter are restricted to the timeframe under consideration for the purpose of this assessment i.e. January 2018 to December 2018. They are largely from the sample of orders that were analysed in this report, though some have also been included from outside the sample.

8.1 Information related to demonetisation

In November 2016, the Prime Minister announced the decision on demonetisation wherein ₹ 500 and ₹ 1000 notes, which constituted 86% of the total currency in circulation at the time, ceased to be legal tender with immediate effect. These were replaced by new ₹ 2000 and ₹ 500 currency notes, but their erratic supply saw empty ATMs and long lines of people outside banks trying to cope with rationing of currency.

An application was filed under the RTI Act to the Reserve Bank of India (RBI) seeking information on: (i) the total no. of currency notes of ₹ 2000 printed daily between 09.11.2016 and 30.11.2016; (ii) the total no. of currency notes of ₹ 500 printed daily between 09.11.2016 and 30.11.2016. The RBI denied information citing Section 8(1)(a) of the RTI Act, claiming that the process of printing currency notes is a highly confidential activity, the disclosure of which would prejudicially affect the sovereignty, integrity, security, strategic and economic interests of the country.

During the hearing of the second appeal at the CIC, the RBI further submitted that currency printing and allied activities call for utmost exclusivity and confidentiality. Information pertaining to overt and covert features of the Indian banknote - its raw material, printing, stocking, transport details etc. cannot be shared with the public at large, lest it results in proliferation of counterfeit

currency and economic chaos. Representatives of the RBI stated that even disclosure of details related to quantity manufactured during a specific period of printing cannot be made public, in order to safeguard the integrity of the currency and to guard against counterfeiters.

The CIC rejected the denial of information and held that the RBI had failed to establish how disclosure of information sought would prejudicially affect the interests of the country. Relevant extract of the decision is reproduced below:

“Decision

6. The Commission, after hearing the submissions of the respondent and perusing the records, notes that on point nos. 1 and 2 of the RTI application, the appellant has sought the total number of currency notes of Rs. 2000 and Rs. 500 printed daily for the period from 09.11.2016 to 30.11.2016.

The Commission observes that the information i.e. the total number of currency notes printed daily is not so sensitive as to attract the exemption provisions under Section 8(1)(a) of the RTI Act as it relates to a past event and it cannot be presumed that its disclosure would lead to divulging the other non-disclosable information pertaining to printing of currency notes i.e. raw material, printing, stocking and transport details.

Further, the CPIO was unable to establish as to how disclosure of the said information would prejudicially affect the economic interests of the country.

The Commission, therefore, directs the CPIO to provide the information sought vide point nos. 1 and 2 of the RTI application, to the appellant within a period of four weeks from the date of receipt of a copy of this order under intimation to the Commission.” (CIC/RBIND/A/2017/156948 dated 6.12.2018)

8.2 Disclosure of educational qualifications of elected representatives

An application under the RTI Act was filed to DAV College, Chandigarh seeking information regarding the educational qualifications of a sitting MLA of the Punjab Legislative Assembly. The applicant sought information about the registration number and copy of degree of the MLA, who had declared in his election affidavit that he had graduated from the college in 1984. The PIO denied the information stating that consent of the MLA was sought, and based on his refusal access to information was denied.

The Commission overturned the decision of the PIO and observed that the denial of information by public representatives to verify the declarations made in their election affidavits defies the spirit of transparency and accountability solicited from a public representative. The order states that there is larger public interest in disclosure of the sought information and reluctance of the elected representative to share information would raise a reasonable doubt in the minds of his constituents regarding his credibility. The relevant extract of the decision is given below:

“Decision

Commission is of the considered opinion that the fact that a public representative denied disclosure of such information which has been declared by him in his affidavit filed with nomination papers for election to the Legislative Assembly defies the very spirit of transparency and accountability solicited from a public representative. The public representative is reposed with the trust of his people who elect him into office based on the declarations made in the nomination papers and other verbal affirmations deeming such individual to be worthy of representing them. The aspect of larger public interest in disclosure of the information regarding a public representative who is expected to work towards the welfare of his/her constituency yields to the protection of right to privacy. When a public representative is making a declaration on affidavit, there ought to be no reason why he should refuse to give his consent for disclosure of the same under RTI Act rather such hesitation raises a reasonable doubt in the minds of his/her constituents regarding the credibility of the representative. The present set of facts tend to the famous idiom that ‘Caesar’s wife should be above suspicion’ as a mark of ensuring probity in public life but ‘it is not enough if Caesar’s wife is above suspicion, Caesar himself should be above suspicion’.”

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“Adverting to the cumulative essence of the above observations, it is established beyond any reasonable doubt that disclosure of the information sought in the instant RTI Application is in larger public interest as has been also stated by the Appellant in his grounds of Second Appeal. Besides, the irony in the denial of consent of the public representative to disclose the information under RTI Act even as he has declared the same on affidavit is perturbing.

In view of the foregoing, Commission directs the CPIO to liaise adequately with the probable holder of information (Chandigarh University) to ascertain availability of the copy of degree as sought in para 2 of the RTI Application. In doing so, it shall be noted that even in the absence of copy of degree, record showing registration number of the individual should be available with the College or University and the same should be made available to the Appellant in response to para 1 of the RTI Application.

Further, in the event, copy of degree remains untraceable and/or unavailable; the same should be stated by the CPIO on an appropriately filed affidavit to be sent to the Commission with its copy duly endorsed to the Appellant. Information to be provided in compliance of this order should be free of cost and a compliance report of the aforesaid directions should be sent to the Commission within 30 days from the date of receipt of this order.” (CIC/UTOCH/A/2017/163289/SD dated 1.10.2018)

8.3 Disclosure of details of loan defaulters

In recent years, the issue of Non Performing Assets (NPAs) of the Indian banking sector has become the subject of much discussion and scrutiny. As of March 31, 2018, estimates suggest that the total volume of gross NPAs in the economy stood at Rs 10.35 lakh crore. About 85% of these NPAs were from loans and advances of public sector banks. Many of these NPAs have been linked to fraudulent practices, where it turned out that adequate guarantees were not secured by banks prior to advancing loans and in some cases, people escaped scrutiny by fleeing the country. NPAs, when not recoverable through guarantees, are ultimately written off as losses.

An application was filed under the RTI Act seeking information about: wilful defaulters of bank loans of Rs 50 crore and above, with or without guarantees; the names of guarantors, where applicable; details of sanction of loans; and details of NPA accounts.

The public authority stated that information sought could not be disclosed as it was prohibited under the laws and rules of the RBI. The CIC, in its order, ruled that such contentions were examined and roundly rejected by the Supreme Court in the case of RBI vs Jayanti Lal N Mistry (judgment dated 16th December, 2015).

The court had held that the RTI Act has overriding effect as per the provisions of section 22 and gave a landmark ruling upholding directions of the CIC to disclose inspection reports of the RBI, names of wilful defaulters and information about loan defaulters in public sector banks.

The CIC held that the RBI could not withhold information on flimsy grounds. It stated that the disclosure policy adopted by the RBI failed to take into account the directions of the Supreme Court and was therefore misleading and contrary to the law.

The commission directed disclosure of information sought and also directed the RBI to revise its disclosure policy to bring it in line with the provisions of the RTI Act and the 2015 judgment of the Supreme Court.

The relevant extract is given below:

“50. Why the RBI is fighting tooth and nail to defend defaulters saying, failure to repay the dues by the borrower does not always reflect as a ‘willful intent’ as to non-payment? ...Disclosing the details of accounts where defaults have been found irrespective of the reasons, therefore, may have an adverse impact for the business and in a way may accentuate the failure of the business rather than nurse it back to’ health.

This contention is absolutely unreasonable and not provided by any legal foundation. If the RBI is sure that all defaulters are not willful defaulters, they can segregate the class of willful defaulters and provide their details to the public. The ground that disclosure may have adverse impact on their business is hypothetical and runs against fair and transparent financial administration norms. If they are sure that some disclosure would cause adverse affect they have to convince the Commission about the same and if Commission is satisfied, it can permit the RBI to hide it, but RBI cannot build iron walls around willful defaulters on this loose and baseless assumption of adverse impact on business. Does RBI has responsibility of protecting business interests of defaulters at the cost of national financial discipline and economic stability? The Commission feels deeply pained at this kind of litigation by Government and RBI against the people and CIC on an issue of transparency in the name of unfounded confidentiality.”

Xxx

“75. Several categories of information were declared by the RBI as not disclosable as part of their ‘disclosure policy’ and RBI calls the exceptional clauses under RTI Act as ‘enabling’ provisions and denies. It is against the RTI Act, the collective intention of the Parliament, affront to democracy, reflecting disrespect to Supreme Court’s directions in RBI v Jayantilal N Mistry case. The RBI has a strong Legal Team with experienced legal experts and meritorious graduates from National Law Schools, yet has audacity to openly defy RTI Act, CIC directions and judgment of Supreme Court.”

Xxx

“77. In spite of Supreme Courts direction that Section 22 of RTI Act will override RBI Act and other Acts, the RBI again quoted those Acts and declared that it would not give information as per those legislations. The RBI has totally ignored these two provisions of RTI Act. Each of such denial need to be reviewed by the First Appellate Authority and then justified by the CPIO of RBI before independent Information Commission, if not, they will be compelled to disclose. This kind of declaration of non-disclosure in the name of ‘disclosure’ policy’ is also in contradiction of various Office Memorandum and guidelines issued by the Department of Personnel and Training DoPT under RTI Act. If this is the way the RBI interpreted RTI Act, for RBI it becomes “No Right to Information Act”. As this declared policy of RBI is obstructing the compliance of CIC orders (as confirmed by the SC), the institution of the CIC is duty bound to correct these illegalities in their anti transparency policy of the RBI.” (CIC/DGEAT/A/2018/117567 dated 16.11.2018)

8.4 Proactive disclosure of information regarding MPLADS

An application under the RTI Act was filed in 2016, seeking details of development works recommended in Hathras Lok Sabha constituency through the Member of Parliament Local Area Development Scheme (MPLADS) funds. Information was sought about the details of agencies who executed the works, payments made, physical status/progress of works recommended in the constituency, details of MPLADS fund utilization and status of works recommended and executed.

Instead of providing the requisite information, the Ministry of Statistics & Programme Implementation (MoSPI) replied that MPs send recommendations of works directly to their respective nodal district authorities. MoSPI contended that its role was limited to disbursement of funds and all details of actual utilisation were held by the district authorities and the ministry was, therefore, not responsible for providing such information.

In the second appeal hearing at the CIC, the appellant submitted that residents of the constituency were not aware of how development funds were being utilized. The CIC noted that as per the website of MoSPI, more than Rs. 12,000 crore of MPLADS funds were lying unspent and very few agencies were actually submitting the requisite utilisation certificates in breach of the prescribed procedures. The CIC observed that even though substantial public money was spent on the scheme, the actual usage of it left much to be desired. It noted that aggregate figures put out by the ministry do little to inform people about the usage of these funds.

“12. Since the constitution of the 16th Lok Sabha in May 2014, the government has released Rs. 1,757 crore for MPLADs, of which Rs 281 crore has been utilised by 543 MPs. This means only 16% of the money has been spent. As on May 15, 2015, it was reported that Rs. 1,487 crore was unspent, though deposited with various district authorities. The data shows that not a single rupee was spent in 278 constituencies (51 per cent) in 2014-15. Of these, 223 MPs did not recommend any amount. Considering that MPs have a recommendatory role in the scheme, it is surprising to see that 41 per cent of them haven't even recommended any amount for their constituency. In the remaining 55 constituencies, the MP recommended works, but no money was spent by the district authority. In all, the average amount of recommendations made was worth Rs. 2.16 crore, while the average expenditure incurred was mere Rs. 57 lakh.

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16. These 'figures' do not reveal the actual details of works. Ground realities are hidden behind lifeless statistics. None can understand what works were taken up and what assets were created. Such a deliberate ambiguity is a kind of malicious denial of information.”

The CIC highlighted the numerous instances of irregularities and illegalities in MPLADS recorded by the CAG and various media reports. The commission directed the MoSPI to procure details from concerned district administrations and put in place proper mechanisms to publish MP-wise details of works executed through MPLADS proactively, under Section 4 of the RTI law.

"The Commission requires under Section 19(8)(a)(iii) of RTI Act, the public authority (Ministry of Statistics and Program Implementation) to make necessary changes to publish MP-wise, constituency-wise and work-wise details, with names of beneficiaries, and reasons for delay, if any, after duly procuring from the concerned district administration and ensure its voluntary disclosure under Section 4." (CIC/MOSPI/A/2017/195498 dated 16.10.2018)

8.5 Attendance record of public servants to be disclosed under the RTI Act

The Uttarakhand Gramin Bank denied information under the RTI Act about the details of leave taken by its employees on the grounds that disclosure is exempt under Section 8(1)(j) of the RTI Act, since it relates to the personal information of a third party.

The CIC in its decision overturned the denial and held that the leave record of a public servant is information related to performance of a public activity, as it conveys the availability of the official for duty. Such information cannot, therefore, be denied under section 8(1)(j) of the RTI Act. The decision of the CIC is extracted below:

"Decision:

6. The Commission, after hearing the submissions of both the parties and perusing the records, observes that leave/attendance record of a public servant conveys information regarding his availability for duty and hence, relates to public activity. In view of this, the information sought is disclosable under the RTI Act...." (CIC/RUGBK/A/2017/102125 dated 26.4.2018)

8.6 Proactive disclosure of performance indicators of the Medical Ethics Committee of MCI

In a matter pertaining to the Medical Council of India (MCI), the CIC invoked its powers under section 19(8) of the RTI Act and directed the council to proactively disclose on its website, the number of cases disposed and pending before the Medical Ethics Committee of the MCI.

Assessments have shown that much of the information that is sought under the RTI Act is such that it should, in any case, have been proactively disclosed. This assessment found that in nearly 50% of the CIC orders analysed, atleast some part of the information should have been proactively disclosed. Unfortunately, commissioners seldom examine whether information that is the subject matter of a second appeal/complaint is such that it should be disclosed under section 4 of the RTI Act. Giving appropriate directions to public authorities to implement section 4, should form an integral part of adjudicating on appeals/complaints.

The relevant portion of the order is reproduced below:

“However, as regards the statistical data which serves as the performance indicator of the Medical Ethics Committee of MCI, larger public interest warrants disclosure of the data of cases pending before/ disposed by the committee. The statistical details segregated yearly shall be put in public domain/ website by MCI. The directions are issued in exercise of powers under Section 19(8) of the RTI Act, 2005. Endeavour shall also be made to keep the data in dynamic form by updating the same on a monthly basis. Compliance shall be made within 4 weeks of receipt of this order.”
(CIC/MEDCI/A/2017/119809 dated 10.5.2018)

8.7 Proactive disclosure of information related to compliance with directions of the apex court

In a judgment in 2015, the Supreme Court of India directed the Life Insurance Corporation (LIC) to frame a scheme for regularisation of temporary employees (who had been given *ad-hoc* appointment for 85 days). Following the judgment,

a large number of RTI applications, and subsequently second appeals to the CIC, were filed by people who had worked for LIC. They sought copies of records of their service to prove their *bonafides* for applying for regularisation of employment. Many of these records pertained to more than 20 years ago and LIC, in several cases, informed the commission of its inability to trace records.

The CIC directed the LIC to ascertain the availability of records and, if the said records could not be located, furnish an affidavit to the appellant explaining the factual status. Taking cognisance of the large number of people affected, the Commission also directed the LIC to proactively publicly disclose names of those who had been granted employment in compliance with the Supreme Court judgment. The relevant provisions of the order are reproduced below:

“However, considering the large number of Second Appeals/ Complaints received by the Commission regarding granting of permanent status to temporary employees as per the directives of the Apex Court, the Commission felt that information relating to name of the persons granted appointment in compliance with the aforementioned decision should be disclosed in the public domain for the ease and convenience of all the stakeholders. In this context, the Commission observed that voluntary disclosure of all information that ought to be displayed in the public domain should be the rule and members of public who having to seek information should be an exception. An open government, which is the cherished objective of the RTI Act, can be realised only if all public offices comply with proactive disclosure norms. Section 4(2) of the RTI Act mandates every public authority to provide as much information suo-motu to the public at regular intervals through various means of communications, including the Internet, so that the public need not resort to the use of RTI Act.

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Keeping in view the facts of the case and the submissions made by both the parties, the Commission advised the Respondent to re-ascertain the availability of records failing which an affidavit be furnished to the Appellant within a period of 15 days from the date of receipt of this order explaining the factual status in the matter.” (CIC/LICOI/A/2017/148984 dated 4.10.2018)

8.8 Redacting information under Section 10

There is a tendency among public authorities to claim that a record cannot be provided because part of it is exempt under section 8. This is despite the existence of section 10 of the RTI law, which obliges a public authority to provide the asked for document after redacting the portion(s) that might be exempt, instead of denying an entire document to an applicant.

In a matter pertaining to information sought from Indian Oil Corporation Limited about an application for distributorship, the CIC ordered that a copy of the application should be disclosed, and only personal details of the third party should be redacted. The relevant portions of the order are reproduced below:

“6. The respondent stated that information on point nos. (a) and (b) of the RTI application related to M/s. Anand Gas Agency was denied under Section 8(1)(j) of the RTI Act as the information sought is personal information of third party. The respondent stated that the information on point no. (c) of the RTI application has been provided to the appellant.

Discussion/ observation:

7. After perusal of the RTI application, reply of the respondent and statements made by the appellant and the respondent during the hearing, the Commission is of the view that the respondent should provide to the appellant complete information as per his RTI application dated 16.12.2016 after redacting personal details of third party.

Decision:

8. The respondent is directed to comply with para no. 7 above, within 15 days from the date of receipt of this order.” (CIC/IOCLD/A/2017/178469 dated 24.8.2018)

8.9 Requiring proof of records being weeded out

Often public authorities, in a bid to escape accountability, claim that the records being sought under the RTI Act have been weeded out. In such cases, it becomes critical that public authorities be asked to produce proof that the records have indeed been weeded out and that this was done as per the rules regulating the preservation and destruction of records.

In a matter pertaining to the Department of Posts, an appellant sought information about investments made by his deceased mother. The PIO claimed that the information could not be provided as it had been weeded out since the requisite preservation period for the record was over. The CIC directed the PIO to facilitate inspection of records reflecting that the information sought by the applicant had indeed been weeded out. The relevant extract is reproduced below:

“Decision:

2. Mr. P.B. Selurkar, CPIO submitted that the maturity amount for the account with maturity date 17.06.2000 was paid to the appellant. The details and records regarding the account in which Mrs. Namdev Patil invested after receiving the payment on 17.06.2000 had been weeded out as the preservation period for the same was over.

3. The CPIO has not produced any record reflecting the weeding out of the records mentioned by the appellant. The Commission directs the CPIO to facilitate inspection of the records related to weeding out of the documents of the certificate in name of Mrs. Namdev Patil, within 15 days from this date.”
(IC/POSTS/A/2017/142663 dated 8.3.2018)

8.10 Summoning records

Under the RTI Act, information commissions have the power to summon records. This can be especially useful where the CIC needs to make a determination of whether the record sought is exempt, entirely or partly, under the RTI Act. This power is seldom used. In the sample of orders analysed for this assessment, one such order found related to the Ministry of Defence.

An application was filed under the RTI Act to the Ministry of Defence (MoD), seeking a copy of the investigation report and action taken report in the case of an investigation conducted by Secretary of MoD against a major general. The PIO invoked section 8(1)(h) to deny information stating that the investigation was still pending. The CIC summoned the relevant records and after perusing the records determined that the investigation was over and part of the record could be disclosed. The relevant extracts are given below:

“Upon Commission’s inquiry as to the rationale behind invoking Section 8(1)(h) of RTI Act without any explanation, CPIO submitted that they are waiting for certain inputs from higher ups therefore the departmental investigation is deemed as still pending. CPIO was also of the firm belief that he is not required to explain anything beyond the application of Section 8(1)(h) of RTI Act. Commission further inquired into the stage at which the investigation is at present and other dates of reference based on which information has been denied.

CPIO submitted that the inquiry was constituted vide DO letter dated 10.11.2016 and its report was submitted on 20.12.2016 but it is pending final decision.

In light of the CPIO’s contradictory statements, Commission summoned the relevant case file as well as inquiry report for perusal and observed that the fact finding report has been completed and submitted which proves that the investigation per se is over. CPIO has not provided any reasons for invoking Section 8(1)(h) even as the inquiry report has been submitted.

Decision

Commission accepts the prayer of the Appellant and treats the instant matter as Second Appeal. Commission takes grave exception to the ignorance of the CPIO regarding the provisions of RTI Act.

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In view of the foregoing, Commission rejects the application of Section 8(1)(h) of RTI Act and directs the CPIO to provide the extract of the finding from page 17 of fact finding report (as perused by the bench during hearing) to the Appellant free of cost...” (CIC/DODEF/C/2017/183304/SD dated 15.11.2018)

8.11 Accessing information related to private bodies

Perhaps one of the most significant, but rarely used, provision of the RTI Act, which empowers people to access information about any private body using the RTI Act, is unobtrusively hidden in the last few words of section 2(f). Using this provision, citizens can obtain *“information relating to any private body which can be accessed by a public authority under any other law for the time being in force”*. It is relevant to point out that this section is not limited to such information which a private body is required to statutorily submit to a public authority, as that

would, in any case, be information held by the authority. It includes all such categories of information which a public authority can access under any law.

In a matter pertaining to the Directorate of Education of the Government of Delhi, the CIC gave a comprehensive order based on an analysis of the provisions of the relevant statutes and rules outlining the powers of the department which authorize it to access information from private schools. A teacher of an unaided private school in Delhi filed an RTI application to the Directorate of Education seeking a copy of her own annual confidential report and service book. The department informed her that the private school was not covered under the definition of public authority under the RTI Act, and that the department was not the custodian of the information being sought. In the second appeal hearing, the CIC cited an earlier order in which it had detailed the various provisions under the Delhi School Education Act & Rules, 1973 that empower the department to access information from private schools. For instance, the rules required every school to maintain annual confidential reports of all teachers and stated that the department could inspect records held by the school and its management committee. Based on an analysis of the provisions of the Education Act, which outlined the categories of information private schools are required to submit to the government and which the department can access from private schools, the CIC concluded that the department was required to obtain the information from the school and provide it to the RTI applicant. An extract of the order is given below:

“Before concluding the case however, the Commission cautions the Respondent- Directorate of Education to be more prudent and stringent in exercise of their powers in future in accessing relevant information from the Schools and monitoring the operational aspects like the record maintenance, appointment/s made by the School, salary of staff and teachers, ACRs of employees etc.” (CIC/DIRED/A/2017/149371 dated 22.10.2018)

8.12 File affidavit if records not traceable

Public authorities claiming that records sought under the RTI Act are not available, or cannot be traced, has become a common excuse for evading transparency. As government records are public property, their loss is a serious

matter and responsibility must be fixed on those who are negligent or hide, steal or destroy documents. If commissions do not take appropriate action in such cases, and there are no repercussions on the concerned officials, it could potentially defeat the purpose of the Act as more and more PIOs would feel encouraged to deny information on the pretext that files have gone missing or cannot be traced.

In a case where the Airport Authority of India claimed records related to an online examination were not available, the CIC ordered the PIO to undertake a thorough search for the records sought and if the requisite records could not be found, to file an affidavit with a copy endorsed to the appellant. The relevant extract of the CIC order is given below:

“The respondent authority is directed either to file an affidavit that no record is available on point no. 5 or to provide information in this regard.

Be that as it may, since no desired information was provided to the appellant in the present case, the respondent CPIO is directed to provide revised reply on point no. 5 as discussed during the hearing complete in all respects to the appellant as available on record (legible copies), free of charge u/s 7(6) of the RTI Act within 15 days of the receipt of the order.

The respondent CPIO is further directed to send a report containing the copy of the revised reply and the date of despatch of the same to the RTI appellant within 07 days thereafter to the Commission for record.

OR

In case the relevant records are not available even after thorough search, the present respondent CPIO, is directed to submit an affidavit indicating that no such record is available as sought on point no. 5 within one month of the receipt of this order with a copy duly endorsed to the appellant within the same time period.

With the above observation/direction, the appeals are disposed of.”
(CIC/AAOIN/A/2017/128683 dated 30.7.2018)