

**‘SUNLIGHT IS THE BEST DISINFECTANT’•
A REVIEW OF THE RIGHT TO INFORMATION ACT, 2005**

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I. PRELIMINARY

The Indian Constitution does not explicitly recognise the fundamental right to information and in the absence of enabling legislation, no statutory guarantee for this right has ever existed in India. Over the years, the Supreme Court has read the right to information into the fundamental rights part of the Constitution, under the right to free speech and expression¹ and right to life². The Right to Information Act, 2005 (RTIA) is therefore a significant debut for a statutory guarantee to the right to access information³. It is evident that though constitutionally the right to know was recognised by the Supreme Court as early as 1950⁴, it was never an enforceable right wherein citizens could seek information through the administration or the courts⁵. The first glimmer of hope was in the *Election case* in 2002 when the Supreme Court directed the Election Commission to secure to voters information pertaining to each candidate contesting election to Parliament and to the State legislatures⁶.

An effective right to information regime needs to formulate three components: (a) an access to information policy, (b) a disclosure of information policy, and (c) an information regime. The RTIA provides suitable disclosure powers which the government may exercise *suo moto* and an access regime that may be utilised for information not already disclosed. It is the first real effort made by the government towards a comprehensive access policy. This legislation is the outcome of the weak Freedom of Information Act, 2002 (FOIA)⁷, which was never implemented, and the impositions of the National Common Minimum Programme (CMP) of the United Progressive Alliance (UPA) government⁸. Previous attempts to provide a statutory

· A phrase used by Justice Louis Brandeis of the United States Supreme Court to emphasise the importance of transparency on governance.

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¹ S. P. Gupta v. Union of India, (1981) Supp. SCC 87, ¶ 67. The Supreme Court in this case read right to information as part of Article 19(1)(a) of the Constitution dealing with right to free speech and expression.

² Essar Oil Ltd. v. Halar Utkarsha Samiti, AIR 2004 SC 1834. In this case the court by further expanding the horizon of Article 21 of the Constitution read right to information as part of right to life.

³ The Right to Information Act, 2005 received Presidential assent on June 16, 2005 and came into effect on October 12, 2005.

⁴ Romesh Thappar v. State of Madras, AIR 1950 SC 124.

⁵ State of Uttar Pradesh v Raj Narain, (1975) 4 SCC 428, at 453; Reliance Petrochemicals Ltd. v. Proprietors of Indian Express Newspapers Bombay (P) Ltd., (1988) 4 SCC 592, at 612 ; S. P. Gupta v Union of India, (1981) Supp SCC 87.

⁶ See Union of India v. Association for Democratic Reforms, (2002) 5 SCC 294, at 302.

⁷ The FOIA has been repealed by Section 31 of the RTIA.

⁸ Government of India, *National Common Minimum Programme*, available at <http://pmindia.nic.in/cmp.pdf>.

guarantee either remained in the draft stage or were never operationalised due to a lack of political will, despite its universal demand from different civil society groups.

II. BACKGROUND: THE DEVELOPMENT OF ACCESS TO INFORMATION LAWS

A. Events Leading to Enactment of RTIA

There have been many proposals for an access to information law. The first proposal was made by the Janata Party in 1977, in reaction to the preceding Emergency, and promised an “open government” by looking at the existing access to information laws⁹. The step was not towards enacting an access to information law, but only to modify the Official Secrets Act, 1923. This issue gained importance again in 1989 as the National Front Government¹⁰ headed by Mr. V. P. Singh announced¹¹ its commitment towards an open government, borrowing from the election manifesto of the Janata Party. The government appointed a Cabinet Committee which was, however, dissolved in August 1990 without any report or recommendations.

In 1993, a draft right to information law was proposed by the Consumer Education and Research Council, Ahmedabad (CERC). Despite the considerable internal confusion that the draft law faced within the ruling Congress party, the government made a small attempt at easing information laws by enacting the Public Records Act, 1993. This was followed in 1996 by a Press Council of India draft of a right to information legislation. It was the first time a clear model law had been drafted and lobbied for with the government.

The Press Council draft law was later revised by the National Institute of Rural Development and renamed the Freedom of Information Bill, 1997. Unfortunately, none of these draft laws were seriously considered by the government. After sustained civil society pressure, the Central Government appointed a Working Group under Mr. H. D. Shourie in 1997 to officially propose fresh legislation on freedom of information. The Shourie Committee's Report and draft Bill, which were prepared in 1997, eventually resulted in the Freedom of Information Bill, 2000 despite considerable dilution of its original provisions. The Bill was introduced in Parliament and passed in December 2002. It received Presidential assent in January 2003 and took effect as the Freedom of Information Act, 2002. However, the Act was weak and never notified. Important lessons were learned from the FOIA fiasco, chief among them was the necessity for political will to liberalise an area of democratic governance, thence the exclusive preserve of the government's massive bureaucracy.

⁹ S. Maheshwari, *Secrecy in Government in India*, 1979, 25 IJPA 1101.

¹⁰ Election Manifesto of the Janata Party-led National Front Government, 1989. See also, Jaytilak G. Roy, *Right to Information: A Key to Accountable and Transparent Administration*, available at <http://unpan1.un.org/intradoc/groups/public/documents/EROPA/UNPAN014329.pdf>.

¹¹ Prime Minister V. P. Singh in his first broadcast to the nation in December 1989 said, “We will have to increase access to information. If the government functions in full public view, wrong doings will be minimised. To this end, Official Secrets Act will be amended and we will make the functioning more transparent. Right to information will be enshrined in our Constitution”. Cf. ROY, *id.*

In comparison, Mr. Ram Jethmalani, Law Minister in the then National Democratic Alliance (NDA) government in 1998, ordered that photocopies of all the records and documents of his department would be made available to any citizen upon demand¹². However, this move was opposed by the Cabinet Secretary and order was forced to be withdrawn¹³.

The current RTIA was born out of the UPA government's CMP commitments that resulted, on December 23, 2004, in the introduction of a draft Bill in Parliament by the Minister of State for Personnel, Public Grievances and Pensions, Mr. Suresh Pachauri. The exercise was ostensibly aimed at redressing the ignominy of the FOIA and to improve upon its weak provisions. The Right to Information Bill, 2004 that was tabled in Parliament was based on the suggestions of the National Advisory Council (NAC) though it ignored many of the suggestions proposed by it. Members of the NAC and other individuals protested the dilution of their suggested draft law and the Bill was sent to a Parliamentary Standing Committee for clarifications and review. The Standing Committee reintroduced many of the propositions of the NAC. The Bill was finally passed by the Lok Sabha on May 11, 2005, by the Rajya Sabha on May 12, 2005 and received the assent of the President on June 15, 2005 to become the Right to Information Act, 2005. The Act was notified in the Official Gazette on June 21, 2005 and it came into force on the one hundredth and twentieth day of its enactment¹⁴.

B. Freedom of Information in the States

In the meanwhile, various states were also enacting their freedom of information laws. Tamil Nadu, Goa and Madhya Pradesh were the first states to enact a right to information legislation in 1997 despite a relative absence of civil society pressure within their states. In April 1998, the Madhya Pradesh Governor reserved the Bill for Presidential assent which was denied on the ground of legislative incompetence. However, Madhya Pradesh government drafted another Bill¹⁵ which, in January 2003, was enacted as the *Madhya Pradesh Jankari Ki Swatantrata Adhiniyam, 2002* and received the assent of the Governor. Chattisgarh applies the right to information law of Madhya Pradesh¹⁶.

In 2000, following a campaign by the noted social activist Mr. Anna Hazare¹⁷, Maharashtra enacted its own Right to Information Act, 2000. However, this enactment faced considerable criticism and was replaced with a Right to Information Ordinance, 2002 that lapsed in January 2003. In March 2003, the Maharashtra Government passed a

¹² Rajeev Dhavan, *Mr. Jethmalani Springs a Surprise*, HINDU, Oct. 9, 1998.

¹³ M. Kishwar, *Yes Minister*, MANUSHI, 108, Sep.–Oct. 1998.

¹⁴ Right to Information Act, 2005, § 1(3).

¹⁵ See Kalpana Sharma, *Digvijay Singh cornered on Right to Information*, HINDU, Apr. 6, 2001.

¹⁶ Madhya Pradesh Reorganisation Act, 2000, §§ 78, 79.

¹⁷ See Bharat Rawal, *The Second Freedom Struggle: An Interview with Anna Hazare on the State of RTI Laws*, available at <http://www.indiatogether.org/2005/feb/rti-hazare.htm>.

new Maharashtra Right to Information Act which replicated the 2002 Ordinance and received Presidential assent on August 10, 2003¹⁸.

Karnataka and Delhi enacted access to information laws in 2000 and 2001 respectively without much controversy. In Rajasthan, the *Mazdoor Kisan Shakti Sangathan* (MKSS) movement gathered enough momentum to force the Chief Minister into promising the enactment of legislation as early as 1997. Following various executive orders, a consolidated Rajasthan Right to Information Act was enacted in 2000.

While the north eastern states remained isolated from the right to information debate, Assam enacted its right to information law in 2002 without adequate consultation with civil society groups and other stakeholders¹⁹. Jammu and Kashmir, constitutionally shielded from the automatic application of national laws²⁰, enacted its own Right to Information Act, 2004²¹. Other States, including Orissa²², Andhra Pradesh²³, Kerala²⁴, Jharkhand²⁵ and Uttar Pradesh²⁶ had also drafted their access to information laws.

III. LEGISLATIVE COMPETENCE AND CENTRAL AND STATE LAWS

An important component of India's federal structure is preserved in the Seventh Schedule of the Indian Constitution that delineates the various subjects upon which the Centre and the States can legislate upon. These subjects are listed in three legislative Lists — the Union List (List I), the State List (List II) and the Concurrent List (List III). The Centre is competent to enact laws on subjects entered in the Union List or the Concurrent List, or matters which are ancillary or incidental²⁷ to Entries in the Union or Concurrent List. Similarly, the State has competence to enact laws on entries in the State List or Concurrent List or matters incidental to entries in such Lists²⁸. The right to information is not specifically covered under any of the three Lists in the Seventh Schedule of the Constitution.

A specific entry on freedom of information laws is not mentioned in any of the three lists. The enactment of the RTIA presents a situation where a parliamentary enactment, applicable throughout the territory of India, exists in parallel with several State legislations regarding freedom of information. Can these enactments co-exist?

¹⁸ See Manjiri Madhav Damle, *Hazare writes to Advani on Right to Information Bill*, TIMES OF INDIA, Aug. 3, 2003.

¹⁹ Barun Das Gupta, *Assam Plans Right to Information Bill*, HINDU, Aug. 29, 2001.

²⁰ INDIAN CONST., art. 370.

²¹ Staff Reporter, *Jammu and Kashmir Passes Right to Information Bill*, HINDU, Dec. 19, 2003.

²² Draft-Bill for Orissa Right to Information Act, 2002.

²³ Andhra Pradesh Right To Information Bill, 2001.

²⁴ Kerala Right to Information Bill, 2002 & Kerala Transparency in Public Purchase Bill, 2002.

²⁵ Jharkhand Right to Information Bill, 2001.

²⁶ Code of Practice on Access to Information, Government of Uttar Pradesh.

²⁷ *Kesoram Industries Ltd.*, (2004) 10 SCC 201, ¶¶ 31, 74, 138.

²⁸ INDIAN CONST., art. 246.

An argument, which found support in the NDA government, was that since Right to Information is not mentioned in any of the three entries, only the Centre has the competence due to its Residuary Power to enact laws not mentioned in any of the lists under Article 248 read with Entry 97 of List I of the Seventh Schedule of the Constitution²⁹. This provision may come into play if the law pertains to good governance in general³⁰.

An alternate view³¹ is that since there is no specific entry in the Union, State or Concurrent Lists dealing with the Right to Information, “It would be open to any legislative body to provide for access to information on any subject on which it has legislative competence”, further that both central and state laws may coexist “the Central Act will override the State Acts, where there is a conflict between the two”³². This argument is essentially that providing information is an ancillary matter in the governance of the subjects under centre and state. This means that the Right to Information laws are ancillary and important for the governance of the areas under state control and similarly right to information is ancillary to good governance at the central level. If this view is correct then the more important issue is: Can the Central law impose a duty on the State to provide access even in departments and matters which are only under the State List on which the Centre may not enact legislations? This question arises because the RTIA covers Public authorities under both the Central and the State Governments in Section 2 of the Act.

If the Union claims that its legislation is under its residuary power³³, enacting freedom of information legislation would fall exclusively within its sphere to the exclusion of the States. This is not a satisfactory situation. Thus, the only solution is coexistence so that the Union operates in its sphere and States in their spheres. One clear solution is that the RTIA and state laws fall under Entry 12 in the Concurrent List pertaining to matters on public acts and records. This would give both the Centre and the States the power to enact freedom of information laws. However the Central law would have predominance over the state laws in case of any inconsistency unless the state specially seeks presidential assent³⁴. This interpretation makes most clauses of the state laws void as they are inconsistent with the central law. To address this issue, the NAC had suggested that, where there is a state law then the citizens can access information under the state law and the central law if the information pertains to a subject under the State List³⁵. However this suggestion was not included in the RTIA and it is still unclear whether the centre or the states have competence.

²⁹ See *Union of India v. H. S. Dhillon*, AIR 1972 SC 1061.

³⁰ R Dhavan, *Freedom of Information Bill, 2000, An Appraisal*, 2000 (unpublished working paper) (on file with PILSARC, No. 22, 2000 series).

³¹ This view has been forwarded by Mr. Prashant Bhushan, Advocate, Supreme Court of India.

³² S. Vincent, *One step forward two steps back*, available at <http://www.indiatogether.org>.

³³ INDIAN CONST., Entry 97, List I, Seventh Schedule.

³⁴ *Id.* Article 254(1) & 254(2). See also *Hoechst Pharmaceuticals v. State of Bihar*, AIR 1983 SC 1019.

³⁵ National Advisory Council Draft for The Right to Information Bill, 2004, § 1(4).

IV. 'OFFICIAL SECRETS' AND THE CITIZENS' RIGHT TO INFORMATION: AN INCONSISTENT DICHOTOMY

While the right to information movement has gained strength in the country, the Indian government continues to wield the Official Secrets Act, 1923 (OSA). The product of a colonial government's attempt to marshal information, the OSA's coexistence with modern right to information laws presents a puzzling contradiction. The first Official Secrets Act, 1889 applied to British India and almost replicated the British Official Secrets Act, 1882. This was amended once in 1904; and, later, the Official Secrets Act, 1911 was enacted by the British in India not as a permanent law, but specific to wartime. The Act of 1911 was strengthened in 1920 to make it as effective as is British counterpart. The stated object of the Official Secrets Act, 1923 was to consolidate all the laws relating to 'official secrecy' in India. Its more insidious purpose was to protect the colonial government from the large amount of information leaking out through its civil servants and also to protect executive secrets. Post-independence, the OSA was amended in the aftermath of the India-Pakistan War of 1965 post Indo-Pak war in 1967 to strengthen some aspects to deal effectively with the increasing number of spies.

The OSA was a regressive law, passed as a temporary measure in England in 1911 in one day and replicated in India in 1923. A Committee in England in 1972 suggested it be "pensioned off"³⁶. But it took some time for England to get rid of this imperial relic and in 1977 Mrs Thatcher declared the Crohan Memorandum following the recommendations of the Franks Committee³⁷. In India, insistent suggestions that the OSA was not consistent with democratic ideal did not result in its repeal. Clearly the OSA and RTIA have differing and contradictory objectives. The former criminalises persons of any unauthorised information. The latter strives towards maximising information being made available. No doubt, technically the two can co-exist, since information made available under RTIA is authorised. But specific provisions are needed to keep the OSA in check so that it does not affront democracy.

The OSA's prime consideration is the countering of espionage. Section 3(1) of the OSA, which prescribes the penalties for spying, makes it an offence for a person with a "purpose prejudicial to the safety or interests of the State", and Section 3(2) qualifies the necessity of the prosecution to show a prejudicial interest to prove the guilt of the accused by allowing a conviction if from his conduct it appears that his purpose was prejudicial to the safety or interests of the State. Section 4 makes it unlawful to communicate with foreign agents or "any person reasonably suspected" of being a foreign agent.

However, the ability of the OSA to be used as a tool by the government to silence people who are not spies arises from Section 5. Dealing with the wrongful communication of information, Section 5 of the OSA corresponds to Section 2 of the

³⁶ The 1972 Report of the Franks Committee on Section 2 of the (British) Official Secrets Act, 1911 refers to the observation of Caulfields, J. that Section 2 should be pensioned off.

³⁷ Under the Crohan Memorandum, memos were sent from the Prime Minister's Office to all departments requiring them to publish all important information especially those concerning public interest.

British Official Secrets Act, 1889 that was described as a “catch all”³⁸ clause and “pensioned off” following the recommendations of the Franks Committee³⁹. Section 5 makes it an offence, punishable with imprisonment for a term which may extend to three years, or with fine, or both, for any person holding office under any government agency to wilfully communicate any official information to anyone other than an authorised person. It has since been amended even in Britain. Section 5 has been often employed to scare and punish whistleblowers within the government⁴⁰. Not only does it punish current or retired government officers, it also leaves it up to the government to authorise information and each government can determine how secretive or open it chooses to be. With Section 5 the OSA’s departs from the valid realm of counter-espionage and unnecessarily concerns itself with a whole range of policy matters that affect citizens and require public participation. Until recently, even the Annual Budget was deemed an official secret inviting criminal sanction under the OSA until it was actually presented⁴¹. An important question arises here: How will the OSA and the RTIA affect each other what will be its impact on the same bureaucracy that is expected to disclose information under the RTIA?

As a first step towards a credible Indian freedom of information regime, the RTIA must override the OSA on non-espionage matters and the OSA’s omnibus Section 5 must be done away with. In the former regard of overriding the OSA, Section 22 of the RTIA states that RTIA will have effect notwithstanding anything inconsistent with the OSA. In regard of the latter, no repeal of Section 5 OSA has taken place.

Therefore RTIA overrides the OSA where a provision is repugnant to the RTIA. But, this only means that if a Government official or a citizen in possession of information was to divulge information which fell under “catch all” provision of the OSA they would still be liable for prosecution under the OSA unless the information was received or passed on under the RTIA or otherwise officially divulged by the Government. The “catch all” provision must therefore be repealed.

The RTIA also makes provision for further disclosure under its proviso to Section 8 which states that notwithstanding anything in the OSA a public authority may allow access to information, if public interest in disclosure outweighs the harm to the protected interests. Under this provision for public interest override information may be disclosed under the RTIA even where the OSA and RTIA are not inconsistent with each other as required by Section 22 of the RTIA. But the provisions for public interest override are most often subject to interpretation and this provision may not disclose information in greater public interest if the OSA continues to exist and prejudice officials.

Therefore, although on the face of it the RTIA legally overrides the OSA, the continued existence of OSA presents an inconsistent dichotomy in India’s freedom of

³⁸ The 1972 Report of the Franks Committee on Section 2 of the (British) Official Secrets Act, 1911.

³⁹ Rajeev Dhavan, *Only the Good News: On the Law of Press in India* (1987, Manohar).

⁴⁰ M. S. Siddhu, *The Workings of the Official Secrets Act*, MANUSHI, 108, Sep.–Oct. 1998.

⁴¹ Nand Lal, 1965 (1) Cri LJ 393.

information regime that will undermine the effectiveness of RTIA at the time of its implementation and hinder any participation between citizens and the bureaucracy.

V. JOURNEY FROM A 'FREEDOM' TO A 'RIGHT'

The FOIA was a weak law and was neither notified nor were any rules for its implementation formulated. In 2004, the UPA government responded to calls for an effective right to information regime by promising, in its CMP, that, “the Right to Information Act will be made more progressive, participatory and meaningful”⁴². Many civil society campaigners and experts were also not satisfied with the mere ‘freedom’ to access information, but wanted instead a ‘right’ and a statutory guarantee to enforce that right. As an endeavour to increase transparency and enable citizens’ right to know, it would be fair to say that the RTIA has succeeded and come a long way from the FOIA.

The FOIA was very weak on many fronts that the RTIA has improved upon. The first and biggest flaw with the FOIA was that it came into force only on notification and not immediately⁴³. The absence of a time-bound period for implementation resulted in the FOIA remaining in executive abeyance for over eighteen months under the pretext that the rules for its implementation were being formulated. The RTIA addresses this problem by ensuring that a few of its provisions come into effect immediately and the rest on the one hundredth and twentieth day of its enactment⁴⁴.

The second area where the FOIA was weak and inadequate was its *suo moto* disclosure policy which has been improved to some extent in the RTIA. Under the FOIA, only the particulars of an organisation; its functions, powers and the duties of its officers; norms; rules and regulations; list of records available to citizens; details of facilities to get information; facts related to any decision; reasons for its decisions, and, project schemes were to be disclosed *suo moto*⁴⁵. The RTIA, on the other hand, contains powers to review the Act’s disclosure policy that are vested with an Information Commission. The Commission has the authority to add to the list of information to be disclosed *suo moto*. In addition, the RTIA enables the publishing of more routine and detailed information at regular intervals⁴⁶. To the FOIA, the RTIA has added various other groups of information which are required to be published *suo moto*.⁴⁷

⁴² National Common Minimum Programme, *supra* note 8.

⁴³ Freedom of Information Act, 2002, § 1(3).

⁴⁴ Right to Information Act, 2005, § 1(3).

⁴⁵ Freedom of Information Act, 2002, § 4(2).

⁴⁶ Right to Information Act, 2005, § 4(1) (b).

⁴⁷ The following have been added in the RTIA as an improvement over the *suo moto* clause in FOIA:

- a) the particulars of any arrangement that exists for consultation with the public in relation to the formulation of its policy or implementation;
- b) statements of the boards, councils, committees and other bodies and whether the meetings of those boards, councils, committees and other bodies are open to the public, or the minutes of such meetings are accessible for public;
- c) a directory of all officers and employees of every government department;
- d) the monthly remuneration of such officers and employees, including the system of remuneration;
- e) the budget allocated to each government agency, indicating the particulars of all plans, proposed expenditures and reports on disbursements made;

The FOIA only required information to be maintained and indexed to meet operational requirements⁴⁸ but was weak on a uniform documentation policy. Other than maintaining and indexing records, the RTIA also requires public authorities to ensure that all records that are appropriate to be computerised and connected through a network all over the country so that access is facilitated⁴⁹. This provision is a step towards the promise of the UPA in the CMP to enable ‘electronic governance’.

The third area where the FOIA left much to improve on was the number of specific, general and blanket exclusions that blocked a citizen’s access to information. The exclusions under the RTIA are fewer and more specific. The four general exemptions under Section 9 of FOIA⁵⁰ have been deleted in the RTIA.

While the blanket exclusion the FOIA provided to intelligence and security agencies⁵¹ has been retained in the RTIA,⁵² information relating to human rights violations and corruption charges in these agencies is not exempt following NAC recommendation to that effect. This is a major step towards making the exclusion to intelligence agencies compatible with the norms of transparency and good governance.

The specific exemptions of the FOIA⁵³ have been retained in the RTIA with two exclusions. These are: (a) the exemption provided to matters affecting Centre–State relations has been removed in the RTIA and the decision–making process for any policy is privy only during deliberation but must be disclosed after the decision is taken; and, (b) information received from foreign governments and information which would constitute contempt of court on disclosure has been excluded under the RTIA. Safeguards to protect

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- f) the manner of execution of subsidy programmes, including the amounts allocated and the details of beneficiaries of such programmes;
 - g) particulars of recipients of concessions, permits or authorisations granted by government departments or agencies;
 - h) details of all information available to such departments or agencies reduced into an electronic form;
 - i) the particulars of all facilities available to citizens for obtaining information; and,
 - j) the names, designations and other particulars of Public Information Officers and such other information as may be prescribed.

⁴⁸ Freedom of Information Act, 2002, § 4(2).

⁴⁹ Right to Information Act, 2005, § 4(1)(a).

⁵⁰ Section 9 — “A public information officer may reject a request for information also where such request–

(a) is too general in nature or is of such a nature that, having regard to the volume of information required to be retrieved or processed would involve unreasonable diversion of the resources a public authority or would adversely interfere with the functioning of such authority.

Provided that where such request is rejected on the ground that the request is too general, it would be the duty of the Public Information Officer to render help as far as possible to the person making request to reframe his request in such a manner as may facilitate compliance with it.

(b) relates to information that is required by law, rules, regulations or orders to be published at a particular time and such information is likely to be so published within thirty days of the receipt of such request.

(c) relates to information that is contained in published material available to public.

(d) relates to information which would cause unwarranted invasion of the privacy of any person.”

⁵¹ Freedom of Information Act, 2002, § 16.

⁵² Right to Information Act, 2005, § 24(1).

⁵³ *Supra* note 51, 43 § 8(1).

privacy of individuals have been included in the RTIA⁵⁴. Despite a greater number of exemptions in the RTIA, their brevity and preciseness serve it better than the FOIA. Incidentally, none of the exemptions of the FOIA were subject to the public interest override clause, which has been provided for in the RTIA. For the information excluded currently, the de-classification period has also been reduced from 25 years in the FOIA to 20 years in the RTIA⁵⁵.

The fourth area where the RTIA largely improves upon the FOIA is the provision for penalising officers who refuse information or give incorrect information. Interestingly, such a provision does not exist in many similar laws of other countries, but the experience of the states' right to information laws and the general mindset of the Indian bureaucracy have made it an important aspect of the RTIA.

On almost every aspect the RTIA has improved on the FOIA, but the most crucial is the creation of the Information Commissions at the Centre and States⁵⁶. This ensures that there is an apex authority to form rules, review and implement the RTIA in India. This will also introduce a system of independent appeals to the Information Commission for each transaction under the RTIA.

VI. ANALYSING THE PROVISIONS OF RIGHT TO INFORMATION ACT, 2005

A. Preamble

The Preamble of the RTIA sets out to set up a practical regime of right to information to promote transparency and accountability. It is well settled that a Preamble can have important interpretative value for the law in question⁵⁷. The Preamble of the RTIA clearly sets out the intention of the legislature to create an effective right to information regime. This is a marked improvement over previous right to information draft laws. By declaring the intent of the law to increase transparency and accountability in public authorities, the Preamble exceeds the limitations of previous proposed information regimes and opens the legislation to assessment on the yardstick of good governance. It also provides for the establishment of Central and State Information Commissions to facilitate access to information.

B. Extent

The extent and commencement clause applies the Act to the whole of India except Jammu and Kashmir (J & K). This is because of the special status the Indian Constitution accords to J & K⁵⁸. In the State of J & K access to information law is already operational.

⁵⁴ Right to Information Act, 2005, § 8(1)(j).

⁵⁵ *Id.* § 8(3).

⁵⁶ *Id.* §§ 12, 15.

⁵⁷ A. Thangal Kunju Musaliar, AIR 1956 SC 246, ¶ 63; Burrakur Coal Co. Ltd., AIR 1961 SC 954, ¶ 17; Arnit Das, (2000) 5 SCC 488, ¶ 22.

⁵⁸ INDIAN CONST., art. 370.

It was passed by the Government of J & K in January 2004. However this legislation is not as progressive as the RTIA⁵⁹.

C. Commencement

The commencement of the RTIA is an important issue, one which has created controversy in the past. Ordinarily, legislations come into force “at once” after they are passed by both Houses of Parliament and receive Presidential assent. Some legislative enactments also specify the date on which they come into effect; such as, “it (the Act) shall come into force on the hundred and twentieth day of its enactment”. However, some laws allow a further delay in the commencement clause by not specifying a time-bound period of implementation and leaving the matter up to the discretion of the Central Government. Typically, such provisions read thus: “it shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint”. This is a method to delay the commencement of a law and is referred to as a deferment clause. It is becoming more frequent in Indian legislations that the government finds difficult to implement and is an important indication of political will. If certain provisions of a law are not suitable to the government or require certain infrastructure before being operationalised, the legislation may provide for certain provisions of the Act to come into effect on different dates, or on notification which is another, more problematic deferment clause.

Deferment clauses that allow executive discretion *sans* any mandatory time-bound period for implementation are detrimental to governance. They also erode the confidence of citizens in the political will of their elected governments. For instance, the Freedom of Information Law in England was passed by the legislature in 2001 but came into effect only on 1 January 2005. This led the opposition to mount an uncomfortable campaign by claiming that there was a systematic shredding of documents which could embarrass the government in the four years while preparing for the law to take effect⁶⁰. Although there has been no such accusation on the previous government, it certainly casts doubts on its political will. The more crucial issue which affects Indian citizens is that there is no judicial remedy when the Central Government chooses which clauses to bring into effect and which to defer. The Supreme Court cannot order the government to bring the Act into effect⁶¹, and hence in such a situation, despite there being legislation, citizens are helpless.

The FOIA was to come into effect on notification, but was never notified for over a year and half. To ensure the government did not renege on its duty to provide access to information, a public interest petition was filed by Mr. Prashant Bhushan. The Supreme Court asked the government to take a decision on the notification of the Act for

⁵⁹ Section 1(3) of the Jammu and Kashmir Right to Information Act, 2004 states that the Act will come into force by government notification. Rules under J & K RTIA have been published on June 20, 2005, after a lapse of almost eighteen months.

⁶⁰ *Right to Information Becomes Law*, available at http://news.bbc.co.uk/1/hi/uk_politics/4139087.htm.

⁶¹ See *A K Roy v. Union of India*, AIR 1982 SC 710.

implementing it or giving interim orders to the administration by September 15, 2004⁶². By this time, the new UPA government had decided to improve on the weak FOIA with a new legislation and the case became infructuous. The commencement clause has been improved in the RTIA to make certain provisions take effect immediately and all other provisions after a certain period⁶³.

The provisions that come into effect immediately are those regarding the duties of public authorities; the designation of public information officers in each public authority; the constitution of Central and State Information Commissions; the appointment, terms and conditions of service of Central and State Chief Information Commissioners; the limited exclusion provided to intelligence agencies; and, the power to make rules by appropriate governments. The remaining sections of the Act came into effect on the one hundredth and twentieth day of enactment, on October 12, 2005.

D. Scope

The Act applies to both the Central and the State Governments for accessing information from public authorities established, constituted, owned, controlled or substantially financed by funds provided directly or indirectly by the Central or State Governments⁶⁴. The scope of 'public authorities' has been increased in the RTIA to include authorities constituted under the Constitution, by the Central or State Governments or by notification. This means that a range of new bodies have been brought within the purview of the Act including *Panchayati Raj* institutions, local bodies and all other bodies, including non-governmental organisations (NGOs), that are established, constituted, owned, controlled or substantially financed by both Governments⁶⁵. However, the RTIA is lacking due to its exclusion of private bodies. Best practices in access to information laws provide for all private bodies or, in case of difficulty in implementation, at least private bodies in the public domain to disclose information⁶⁶. In fact, the Promotion of Access to Information Act, 2001 of South Africa⁶⁷ allows both individuals and governments to access information from private bodies when necessary to enforce people's rights. In a time of increased public-private partnerships and especially international private bodies working in the public domain, it is necessary that they be made subject to an access to information regime to make the RTIA more effective.

⁶² Centre for Public Interest Litigation, WP(C) 637/1998, order dated July 20, 2004.

⁶³ Section 1(3) of the RTIA states — "The provisions of sub-section (1) of section 4, sub-sections (1) and (2) of section 5, sections 12, 13, 15, 16, 24, 27 and 28 shall come into force at once, and the remaining provisions of this Act shall come into force on the one hundred and twentieth day of its enactment."

⁶⁴ Right to Information Act, 2005, § 2(h).

⁶⁵ *Id.*

⁶⁶ Model Freedom of Information Law, § 6 (World Bank), available at <http://www1.worldbank.org/publicsector/legal/freedom.htm>.

⁶⁷ Promotion of Access to Information Act, 2000 (South Africa), § 50.

E. Information

The right to information includes the right to inspect, take notes, extracts, or certified copies and samples of materials. RTIA has an inclusive definition for ‘information’⁶⁸ ranging from documents and memos to samples and models; and defines ‘record’ to include documents manuscripts, facsimile and images etc.⁶⁹.

Therefore, the scope of the right to information is fairly broad in the Act. However, difficulties arise because the definition of information and record only entails what it includes. What about information that is not recorded or stored? The government has no uniform policy on how much of the information generated by public authorities must be maintained and the period and manner in which is to be maintained. Hence, public authorities may shred documents they do not want to disclose while citizens only have access to the ‘records’ and ‘information’ already available with the authority. To put it simply, the government only has an ‘access policy’ but does not have an ‘information policy’⁷⁰.

The only law contributing to our weak information policy is the Public Records Act, 1993 which was enacted for the creation, strengthening, maintenance, retirement of and access to public records of the Central Government. It was a feeble attempt towards the maintaining and developing of information systems to strengthen access to information. As its name suggests, it is used more to record and archive information than to maintain and update current information to ensure its accessibility. The Public Records Act has detailed provisions enumerating the powers of the government to create records and the duties of its officers to preserve them. The entire exercise is to keep documents secret even after thirty years, and only to record history as opposed to collecting information for access⁷¹. Even unclassified records can be made available only to a ‘*bona fide* research scholar’ after a period of thirty years⁷². Therefore, the information regime that is so desperately required in a country with such a large government is not fulfilled by the RTIA and a new look needs to be taken towards strengthening an information regime before the government can successfully provide accessibility.

⁶⁸ Section 2(f) — Information means any material in any form, 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 and information relating to any private body which can be accessed by a public authority under any other law for the time being in force.”

⁶⁹ Section 2(i) — Records means :

- (a) any document, manuscript and file;
- (b) any microfilm, microfiche and facsimile copy of a document;
- (c) any reproduction of image or images embodied in such microfilm; and
- (d) any other material produced by a computer or any other device.

⁷⁰ Dhavan, *supra* note 30.

⁷¹ Rajeev Dhavan, *Public Records Act, A Critique*, (unpublished working paper) (on file with PILSARC, No. 20, 2000 Series).

⁷² Public Records Act, 1993, § 12.

F. Suo Moto Disclosure

Suo moto disclosure or a proactive disclosure policy of the government is one of the most important aspects of an access to information law. It means the information which the government makes public *suo moto* or automatically without any requests. It puts the onus on the government to provide routine information so that citizens do not have to ferret it out. The *suo moto* provision in the RTIA is more detailed and wide when compared to the FOIA. Section 4(1)(a) of the RTIA makes it a duty of every public authority to maintain information. Section 4(2) of the RTIA lists the information that the government is bound to disclose *suo moto*.

In addition, Section 4 also makes it mandatory for the government to publish “all relevant facts while formulating important policies or announcing the decisions which affect public” as well as its “reasons for its administrative or quasi-judicial decisions to affected persons”. The duty to publish information includes the duty to do so regularly in a wide form and manner and after taking into local language and barriers into consideration⁷³.

The first part of this disclosure policy deals with maintaining and indexing, but the RTIA requires the public authorities to not only document but also computerise the information to be later connected to a network accessible all over the country. This is a major step in moving towards forming an information policy. Also as the documentation and networking progresses the government wants to move towards electronic governance as promised in the Common Minimum Program.

The second part of this provision deals with publishing different kinds of information. One such group is routine information⁷⁴ which includes the particulars of any department or agency including the its budget and planned expenditure; powers and duties of its officers and employees; the procedure of work; the categories of documents held by it; all electronic information; its officers and employees and their salaries; the means and procedure whereby a citizen can access information; and, the names and other details of its Public Information Officers.

The other kind of the information to be published deals with specific programmes and policies for the public. This is governance-oriented information and includes the duty to publish any arrangement for public consultation in matters of policy; statements of all bodies constituted for the purpose of advice; details of the meetings of these bodies; details of subsidies; and, all facts relevant to the formulation of important policies and the reasons for administrative or quasi-judicial decisions. The provisions for the mandatory publishing of information relating to subsidies is important in the background of constant allegations of corruption in subsidy programmes and should aid better governance and transparency in the expenditure of public funds.

⁷³ Right to Information Act, 2005, §§ 4(2), 4(3), 4(4).

⁷⁴ *Id.* § 4(1)(b).

The third and most important of the *suo moto* disclosure provisions is the clause dealing with dissemination which is not spelled out as clearly as required⁷⁵. The dissemination clause requires the government to provide information at regular intervals through various means, including the internet, so that the public have minimum resort to the use of the Act to obtain information. The dissemination of information must be wide and carried out in a manner easily accessible to the public after taking into consideration the cost, local language and the most effective method of communication in that local area and the information should be easily accessible and to the extent possible in an electronic format. Despite its potentially vast scope, this clause remains problematic because of its vagueness and must be supplemented by rules which the Governments and competent authorities must prescribe⁷⁶. Hopefully, after reviewing the implementation of the Act, the Information Commissions at the Centre and the States will frame clearer rules regarding dissemination. Updating information is one of the most important aspects of a responsive disclosure policy and different types of information need to be updated at different intervals. In this regard, norms for the updating of information are desperately required for implementation and use. Without such a clear policy, more and more people will be forced to use the law to access information, which is clearly contrary to the intention of the government.

There are a few other areas where the disclosure policy is lacking. A further list of information to be published *suo moto* has been suggested⁷⁷ to minimise the number of

⁷⁵ *Id.* §§ 4(3), 4(4).

⁷⁶ *Id.* §§ 27, 28.

⁷⁷ Harsh Mander & Abha Joshi, *The movement for right to information in India: People's power for the control of corruption*, a paper presented at the Conference on Pan Commonwealth Advocacy held in Harare, Zimbabwe in Jan. 1999, available at <http://www.humanrightsinitiative.org/programs/ai/rti/india/articles/The%20Movement%20for%20RTI%20in%20India.pdf>. They suggested a list of types of information which must be disclosed *suo moto*. The list includes:

- a. Rules for the imposition of taxes, copies of tax returns and reasons for the imposition of a particular level of tax in any specific case;
- b. Copies of all land records;
- c. Statements of revenue, civil and criminal case work disposal;
- d. Details of forestation works in areas to be disclosed including the expenditure incurred on such projects;
- e. Lists of children enrolled and attending schools, and those availing of scholarships and other facilities;
- f. Per capita food eligibility and allotments under nutrition supplementation programmes in hospitals, welfare and custodial institutions;
- g. Allotments and purchase of drugs in hospitals;
- h. Rules relating to the award of permits, licences, house allotments, gas, water and electricity connections, contracts and the like including the conditions of licence;
- i. All estimates, sanctions, bills, vouchers, muster rolls and statements indicating attendance and wages paid to all daily wage workers for all public works.
- j. Procedures for referral from employment exchanges and the details of demands from prospective employers;
- k. Rules relating to the criteria for admissions to educational institutions including all lists of applicants selected persons;
- l. Copies of monthly crime reports;
- m. Details of registration and disposal of crimes against women, *adivasis*, *dalits* and other vulnerable groups subject to systemic discrimination, and also of crimes committed during communal riots and corruption cases;

requests and move towards system where all information is available without citizens having to go out of their way to access it.

G. Exemption from Disclosure

The best practices of access to information laws prove that minimal exclusions with maximum disclosures make for better governance. The exclusion provisions of the RTIA, while not as overreaching as those that were prescribed under the FOIA, damage the intent of the legislation due to their wideness and require closer interrogation. They are contained in a *non obstante* clause in Section 8 of the RTIA.

The first type of exclusion relates to the State. Any disclosure which would prejudicially affect the sovereignty and integrity of India; the security, strategic, scientific or economic interests of the State; relations with foreign States; or information received in confidence from a foreign Government is exempt from access by the public⁷⁸. This exemption is considered necessary in almost every freedom of information law and is not very controversial. However, the RTIA sustains the twenty-year period of de-classification necessary for sensitive documents to be made accessible to the public⁷⁹.

The second type of exclusion exempts information whose disclosure might constitute contempt of court or impede the process of an investigation or hinder the apprehension or prosecution of offenders or which might lead to the incitement of an offence. This is a law and order based exemption that is duplicated in many other jurisdictions and so escapes controversy⁸⁰.

The third type of exclusion protects privacy and trade secrets, commercial confidence and intellectual property, the disclosure of which would harm the competitive position of a third party, or where such a request for providing access would involve an infringement of copyright subsisting in a person other than the State⁸¹. Also, information available to a person in a fiduciary relationship; personal information, the disclosure of which has no relation with any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual is also exempt⁸². This exclusion is accompanied by a limited public interest override, which means that the information may be accessed if there is a greater public interest in its disclosure. The public interest override is extremely important in exclusions relating to intellectual property especially

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- n. Number and list of persons in police custody, including the period of and reasons for custody;
 - o. Number and list of persons in custodial institutions including jails, reasons for and length of custody, and the details of their productions before magistrates and courts;
 - p. Air and water emission levels with regard to industrial units, and the environmental standards declared safe by government authorities;
 - q. Government contracts and tenders and details relevant to them.

⁷⁸ Right to Information Act, 2005, §§ 8(1)(a), 8(1)(f).

⁷⁹ *Id.* § 8(3).

⁸⁰ *Id.* §§ 8(1)(b), 8(1)(h).

⁸¹ *Id.* § 8(1)(d).

⁸² *Id.* § 8(1)(e).

in developing countries depending on foreign research for pharmaceuticals to provide the right to public health and affordable medicines.

The fourth type of and more controversial exclusion exempts the disclosure of information which would cause a breach of privilege of Parliament or State Legislatures and Cabinet papers including records of deliberations of the Council of Ministers, Secretaries and other officers⁸³. However, the reasons for the decisions taken are not exempt. This provision can be easily misused by claiming that the controversial documents of a department are Cabinet papers with the help of the senior bureaucrats and hence exempt from public access. To make matters worse, this information is also exempt from de-classification after 20 years. This is nothing but a loophole in the law to bypass requests for information that would embarrass the government, and the provision should be removed.

The last type of exclusion exempts the disclosure of information which would endanger the life or physical safety of any person or identify the source of assistance given in confidence for law enforcement or public security⁸⁴. While this provision may have been made to protect whistleblowers, some commentators feel that this is just another provision to reduce access, as there are more effective ways of protecting the identity of individuals. Model laws prescribe a different legislation to protect whistleblowers and not merely make it an exemption clause in an access to information law. Merely excluding such information from public access does not correspond to proactive measures to protect the identity of such sources. Therefore this clause does not really protect whistleblowers and could be easily misused to deny access.

All exclusions other than the ones regarding Cabinet papers and public safety and security are subject to declassification after twenty years⁸⁵. This period is too long; legal norms prescribe a standard ten-year period of restriction, as followed in the British freedom of information law. The RTIA also allows information sources to be severed to restrict the access of parts of certain records and documents. Retaining the concept of severability⁸⁶ will result in access being provided to parts of information sources which do not contain any information.

One of the weakest aspects of the Act is the blanket exclusion from disclosure given to intelligence and security agencies.⁸⁷ There are currently eighteen organisations listed for exemption, but this number will increase as both the Central and State Governments start adding organisations to this list by way of notification. While on the face it, national intelligence agencies should be provided a limited cover from mandatory public access to their information, the RTIA's blanket exclusion is odd considering the first exclusion relating to the safety and security of the State which, *prima facie*,

⁸³ *Id.* §§ 8(1)(c), 8(1)(i).

⁸⁴ *Id.* § 8(1)(f).

⁸⁵ *Id.* § 8(3).

⁸⁶ *Id.* § 10.

⁸⁷ *Id.* § 24

privileges strategic State secrets will operate to protect intelligence agencies⁸⁸. However, other information about intelligence agencies and security organisations, especially that relating to corruption and human rights violations, will not be exempt from disclosure. But to access this information, a public request must first be approved by the Information Commissioner, a procedure which can take up to forty five days. This limitation makes it cumbersome to exercise the right to information and must be removed⁸⁹.

H. Third Party Information

The provision to obtain third party information is also weak, in fact much weaker than some State laws. Since third parties are involved with local bodies for projects and schemes on a contractual basis, this provision may be used to deny vital information concerning governance. Under the RTIA, if a request is made relating to a third party and has been treated as confidential by that third party, the Information Officer must give a written notice to such third party of the request and invite the third party to make a submission in writing or orally, regarding whether or not the information should be disclosed⁹⁰. This provision considerably weakens the RTIA. It is imperative that private bodies working with public authorities be made subject to public transparency. The RTIA has safeguards for the privacy of individuals and also for trade secrets; hence, there is no basis for weakening the provisions regarding third party information. Third party information has not been specifically excluded even in the State laws of Delhi, Karnataka and Maharashtra. However, this provision is subject to a limited public interest override only on the discretion of the Information Officer.

VII. PROVISIONS TO ACCESS INFORMATION

A. Designating Public Information Officers

To process the requests made for access to information every public authority has to designate some of its officers as Central and State Public Information Officers (PIOs) and also designate Assistant Central and State Public Information Officers (APIOs) at the sub-district level. These PIOs will deal with the requests for information and assist citizens in accessing information. They may seek assistance of other officers to fulfil the requests⁹¹.

B. Request for Obtaining Information

Any person seeking information must make a written request to the concerned PIO of APIO and if the person is unable to make a request in writing the officer must entertain an oral request and reduce it to writing. No reasons need to be given for seeking information. If the information sought is not available with the authority, it must either

⁸⁸ *Id.* § 8(1)(a).

⁸⁹ *Id.* § 24(4).

⁹⁰ *Id.* § 11.

⁹¹ *Id.* §§ 5(1), 5(2).

transfer the request within five days or request information from the authority which may have it. Information sought must usually be made available in the form requested⁹².

C. Time Limit

A PIO shall as expeditiously as possible after receiving a request for information, 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. When the request has been made to an APIO the time limit is thirty five days. Where a further fee is charged, the time taken for computing such fee must be excluded from the time period. But where the information sought for concerns the life or liberty of a person, the same shall be provided within forty eight hours of the receipt of the request. If no information or decision is given within the specified time, it is a deemed refusal⁹³.

Thirty days is a very long and relaxed time period and should be reduced to twenty days. Most of the information sought is routine or very specific personal information and hence does not require much processing. And increasing the time limit by another five days in case of APIOs is just a way to delay access. Since a PIO has been created in every public authority with an APIO, the number of requests each PIO would have to deal with would not be large enough to justify such delay. The United Kingdom has prescribed a time limit of just twenty days. However, a progressive provision of the Act is the forty eight hours limit for information concerning life and liberty.

D. Fee

Where access to information is sought in a printed or any electronic format, the applicant shall pay a reasonable fee as may be prescribed. No such fee shall be charged from persons who are below the poverty line as may be determined by the appropriate Government⁹⁴. The person making the request for the information shall be provided the information free of charge where a public authority fails to comply with the time limits specified.

A commendable proposition of the RTIA is to charge no fee for people below the poverty line. Ideally, no fee should be charged in the exercise of a fundamental right. The fee must not be a method of recovering the cost of the exercise of providing access, as large resources are bound to be spent. The fee must merely contribute towards the printing or making copies of information sought and not as a revenue measure. This is vital for the successful implementation of the RTIA especially in poor or rural areas.

E. Refusal

⁹² *Id.* § 6.

⁹³ *Id.* §§ 7(1), 7(2), 7(3).

⁹⁴ *Id.* § 7(5).

Where a request has been rejected the PIO shall communicate to the person making the request, the reasons for such rejection; the period within which an appeal against such rejection may be preferred; and, particulars of the appellate authority⁹⁵. No response within the prescribed time period is a deemed refusal⁹⁶.

VIII. INFORMATION COMMISSIONS

With the constitution of State and Central Information Commissions, the RTIA has conformed to the best practices and prescriptions of various model laws in this regard. The demand for an independent body to implement and review the RTIA has been a longstanding demand of public advocacy groups in India. The establishment of Commissions is what makes the RTIA stronger than all State laws; it is one of the better features of the RTIA.

Under the RTIA, the Central Government has to constitute a Central Information Commission consisting of a Chief Information Commissioner assisted by up to ten Information Commissioners. The Chief Information Commissioner and Information Commissioners must be persons of eminence in public life with a wide knowledge and experience in law, science and technology, social service, management, journalism, mass media or administration and governance. They will be appointed by the President upon the recommendation of the Prime Minister, Leader of the Opposition and other Union Cabinet Ministers. While the NAC draft sought to inject a level of judicial stringency in this exercise by proposing that the recommendations of the Chief Justice of India also be sought, the RTIA has returned the recommendatory powers to the political establishment. This is a way for the government in power to influence the composition of the Commission. Ironically, the political establishment showed a rare unity in collectively removing the judicial element and, to some extent, diluting the apolitical credibility of the Commission. The general superintendence, direction and management of the Central Information Commission vests in the Chief Information Commissioner⁹⁷.

The Chief Information Commissioner will hold office for not more than five years but in no circumstance over the age of sixty five. The office will be parallel to the position of the Chief Election Commissioner. Similarly, Information Commissioners shall hold office for five years or until they are sixty five years old. Information Commissioners may become the Chief Information Commissioner. The Chief Information Commissioner or any Information Commissioner can be removed from his office only by order of the President⁹⁸.

In a similar manner, the State Information Commissions will be constituted by the State Governments to consist of a State Chief Information Commissioner assisted by up to ten Information Commissioners. The State Chief Information Commissioner and Information Commissioners must be persons of eminence in public life and will be

⁹⁵ *Id.* § 7(8).

⁹⁶ *Id.* § 7(2).

⁹⁷ *Id.* § 12.

⁹⁸ *Id.* §§ 13, 14.

appointed by the Governor upon the recommendations of the Chief Minister, Leader of the Opposition and another Cabinet Ministers of the Legislative Assembly. They shall hold office for five years and can be removed from office only by the Governor⁹⁹.

A request can be forwarded to the Central Information Commission on a disability to make a request to a PIO. Requests to the Central Information Commission may also lie if there is refusal to disclose information at the lower level, or if no response to a request is forthcoming or if the information provided is misleading or false. Both the Central and State Information Commissioners may initiate an inquiry into any matter pertaining to the disclosure or otherwise of information¹⁰⁰. They may also inquire into any record held by any public authority even if it is exempt from disclosure. Most importantly, the Central and State Information Commissions have been vested with the powers of a civil court trying a suit under the Code of Civil Procedure, 1908 in respect of their functions under the RTIA¹⁰¹.

IX. APPEALS

For the functional implementation of any right to information law, there must be an independent appellate authority. The system of appeals prescribed in the RTIA is much better than the systems in the State laws. There are different kinds of appellate authorities in the various laws operating in India. The first type is an internal appeal system where the complaint is made to a superior officer in the same department. The second type of appeal is where a single appeal may be made to an independent authority or tribunal. The third type is a system of two appeals, one internal appeal to the superior officer and a second appeal to an independent authority.

The internal appeal system is followed in Tamil Nadu¹⁰² and Madhya Pradesh¹⁰³ where the aggrieved person can appeal to a superior officer within the same department. A system of independent appeals is followed in Goa to be made to the State Administrative Tribunal,¹⁰⁴ and in Delhi to the Public Grievances Commission¹⁰⁵. A system of two appeals is followed in Rajasthan, which allows for one internal appeal¹⁰⁶ and a second appeal to the District Vigilance Commission or the State Administrative Tribunal¹⁰⁷. This has been replicated in the Karnataka Act, where the second appeal can be made to a special Appellate Tribunal¹⁰⁸. In Maharashtra, the first is an internal appeal and a second appeal can be made to the *Lokayukta* whose decision is final¹⁰⁹. Each of these systems has varied in their efficacy, but the general consensus is that an

⁹⁹ *Id.* §§ 15, 16, 17.

¹⁰⁰ *Id.* § 18(1).

¹⁰¹ *Id.* § 18(3).

¹⁰² Tamil Nadu Right to Information Act, § 4.

¹⁰³ Madhya Pradesh Right to Information Act, § 7(1).

¹⁰⁴ Goa Right to Information Act, § 6(1).

¹⁰⁵ Delhi Right to Information Act, § 7.

¹⁰⁶ Rajasthan Right to Information Act, § 6.

¹⁰⁷ *Id.* § 7.

¹⁰⁸ Karnataka Right to Information Act, § 6.

¹⁰⁹ Maharashtra Right to Information Act, § 11.

independent authority is required in an appellate system and the internal appeal does not work well in most government departments.

Under the RTIA, appeals may be preferred on the grounds of non-response within the specified time, refusal to disclose information or incomplete information, to an officer senior to the concerned PIO within thirty days. An appeal may also be made against the decision of the PIO regarding third party information. A second appeal can be made against the decision of the first appellate authority within ninety days of such decision or non-response. In all appeal proceedings, the burden of proving the denial of information was justified, lies on the PIO that denied the information. The appeal must be disposed of within thirty days of its receipt or an extended period not exceeding forty five days and must be accompanied by reasons to be recorded in writing. Such decisions of the Central Information Commission or State Information Commissions, as the case may be, shall be binding. Hence, the Information Commissions are apex appellate authorities with the final word to decide appeals and issue appropriate orders to PIOs¹¹⁰.

In deciding appeals, the Central or State Information Commissions have additional powers to:¹¹¹

- (a) require a public authority to take steps to ensure compliance with the RTIA, including
 - i) providing access to information, if so requested, in a particular form;
 - ii) appointing a Central Public Information Officer or State Public Information Officer;
 - iii) publishing certain information or categories of information;
 - iv) making necessary changes to its practices in relation to the maintenance, management and destruction of records;
 - v) enhancing the provisions for training its officials on the right to information;
 - vi) providing an annual report
- (b) compensate a complainant for any loss or other detriment suffered;
- (c) impose any prescribed penalty; and
- (d) reject applications for information.

The independence exercised by the Information Commissions will determine how functional the RTIA is at the implementation stage. The Commissions are empowered not just to review and monitor but also decide appeals and make rules. The Central Information Commission can order any PIO or State Commission to comply with certain rules or procedure and the State Information Commissions can similarly order PIOs and other officials in its State. Being a statutory authority, there is a lot the Commissions can do towards the realisation of the right to information in a meaningful and participatory manner. There are fears that mismanagement and scarce budgets allocated by the States will make these Commissions ineffective or just large unmanageable bureaucracies in charge of other bureaucracies. The fear at the Central

¹¹⁰ *Id.* § 19.

¹¹¹ *Id.* § 19(8).

level is that that the posts created in the Central Information Commission will serve merely to extend the service period of friendly retired bureaucrats already accustomed to the usual inefficiencies of the administration. For the effective working of these Commissions comparable, perhaps, with the Election Commissions, these fears must be avoided. The constitution and working of the Information Commissions will determine, to some extent, whether the law will be empowering only on paper or otherwise.

X. PENALTIES

When a PIO has, without any reasonable cause, refused to receive an application for information or has not furnished information within the time specified or denied a request for information *mala fide* or knowingly given incorrect, incomplete or misleading information or destroyed information which was the subject of the request or obstructed the furnishing of information, he may be penalised by the Central or State Information Commissions. The RTIA prescribes a fine of two hundred and fifty rupees per day on the concerned public authority till the application is received or the information is furnished. However, the fine cannot exceed twenty five thousand rupees. In addition, disciplinary action against the PIO may also be recommended by the relevant Commission¹¹².

The penalty mentioned above is imposed only when information sought is not furnished. But, there is no penalty if the PIO does fulfil the duty to publish information in compliance with the *suo moto* disclosure provision of the RTIA. The absence of such a penalty will severely hamper the operation of the *suo moto* disclosure provisions and allow errant PIOs to function with impunity. Similarly, there is no punishment prescribed for the failure to update and maintain information systems, electronic or otherwise. For any penal provision to be successful, it should be simple to implement and strong enough to deter. By and large, these objectives are met by the RTIA's penal clause, which imposes a monetary penalty on the public department that may work better as a deterrent. However, the absence of liability for *suo moto* requirements must be rectified.

XI. MONITORING AND REPORTING

The Central Information Commission and State Information Commissions shall, at the end of each year, prepare respective reports on the implementation of the provisions of the RTIA during that year and forward a copy to the appropriate Government. Each Ministry or Department is required to collect and provide necessary information in this regard, a duty that will be made possible by their compliance with the RTIA's requirements regarding the keeping of records for the purposes of this section. This report has to be laid before each House of Parliament or State Legislature, as the case may be¹¹³. Each report must state in respect of the year to which the report relates¹¹⁴ and certain details must be included in the reports according to the law.

¹¹² *Id.* § 20(1).

¹¹³ *Id.* § 25(1).

¹¹⁴ *Id.* § 25(3).

XII. PROMOTION AND TRAINING

Subject to resources, the appropriate government may develop and organise educational programmes to advance the understanding of the public, especially of disadvantaged communities, on how to exercise the rights contemplated under the RTIA and encourage public authorities to participate in these programmes. Under the RTIA it must also make the effort to train Central Public Information Officers or State Public Information Officers of public authorities and produce relevant training materials for use by the public authorities themselves. More importantly the government, within a certain time, has to compile a guide¹¹⁵ containing easily comprehensible information for any person who wishes to exercise any right specified in this Act and it must update and publish guidelines.

This promotional effort is essential for the success of RTIA. Often, the lack of knowledge of laws and their procedure prevent the exercise of rights by citizens. The promotion campaign must be sustained, sensitive to local language, and especially target marginalised and underprivileged communities and rural areas. To succeed in this venture, the appropriate governments must make available the resources to educate, promote and train its officers to make RTIA implemental. Public officers must also be made strictly aware of their obligations under the RTIA, especially those appointed to carry out functions under the RTIA. Unless an officer is trained to understand and implement the RTIA it would serve no purpose to impose penalties on the bureaucracy.

XIII. IN THE FUTURE

A. Whistleblower Protection

The RTIA lacks a provision to protect whistleblowers. Whistle blowing is a term used to refer to the process by which insiders make public claims of malpractice by, or within, organisations – usually after failing to remedy the matters from the inside, and often at great personal risk to them¹¹⁶. Individuals should be protected from any legal, administrative or employment-related sanctions for releasing information on wrongdoing. In some countries, protection for whistleblowers is conditional upon a requirement to release the information to certain individuals or oversight bodies¹¹⁷.

The Model Law formulated by the World Bank prescribes provision to protect whistleblowers¹¹⁸. The United States has a Whistleblower Protection Act, 1989 and a

¹¹⁵ *Id.* § 26.

¹¹⁶ Aditi Dutta, *Whistleblowers in East & West*, HINDU, Feb. 3, 2004 available at <http://www.hindu.com/op/2004/02/03/stories/2004020300381500.htm>.

¹¹⁷ Principles on Freedom of Information Legislations, A Model Freedom of Information Law, Principle 9 (1999, Article 19), available at <http://www.article19.org/pdfs/standards/modelfoiaw.pdf>.

¹¹⁸ Section 47 of the Model Freedom of Information Law published by the World Bank, available at <http://www1.worldbank.org/publicsector/legal/freedom.htm>. Section 47 — “No one may be subject to any legal, administrative or employment-related sanction, regardless of any breach of a legal or employment obligation, for releasing information on wrongdoing, or that which would disclose a serious threat to health, safety or the environment, as long as they acted in good faith and in the reasonable belief that the

False Claims Act, 1986 to protect whistleblowers. The United Kingdom's Public Interest Disclosure Act, 1998 provides similar protection in both public and private bodies. Even South Africa now has Disclosures Act, 2000 for the same purpose. It is essential that a separate provision for protecting whistleblowers is made either within the RTIA or as a separate legislation.

B. Rules

Rules for the implementation of the RTIA are to be prescribed by the 'appropriate government' or 'competent authority'. This means the Central or State Government department, as the case may be, may prescribe rules. The President, Governor or the Administrator of a Union Territory also has power to prescribe rules. This power also vests with the Speakers of the Lok Sabha and Legislative Assemblies and the Chief Justices of the Supreme Court and High Courts. Currently, the Central and State Governments are in the process of formulating rules that should, before their notification, be circulated for participatory debate and consultation. A large part of the success of the RTIA will depend on how the rules are formulated and how simple and uniform they are across departments and states.

C. Implementation

The implementation of the Right to Information Act will require resources, infrastructure and, most importantly, political will. The government must be proactive and use its power to remove difficulties within the first year of the implementation of the Act on the basis of the annual report of the Information Commission. In the first two years of the enactment of the Act, Central Government must extend full support to states in their budget, infrastructure, training and promotion programmes. And as we look ahead, the government must formulate a clear information policy without which its access policy cannot be implemented very well.

To make the RTIA functional, a huge budget would have to be set aside by the Central and State Governments in the seminal years of its implementation. Once the system is in place, the costs would reduce. But never must a fee be charged with the intention of collecting revenue to finance the costs of implementation. This would make the RTIA an instrument only the rich can use, as the fee then charged would be high.

XIV. CONCLUSION

The RTIA may well be the first step in breaking out of the cycle of corrupt and bad governance India has become accustomed to. However, to achieve this objective, several changes must be made to the Act. These include:

Strengthening the access to information regime by:

information was substantially true and disclosed evidence of wrongdoing or a serious threat to health, safety or the environment."

1. allowing citizens to access information affecting the public interest from private bodies;¹¹⁹
2. reinforcing the public interest override for the disclosure of information relating to intellectual property for the purpose of public health;¹²⁰
3. lessening the current twenty years period of secrecy before certain sensitive documents can be made public;¹²¹
4. preventing public authorities from evading the disclosure of controversial documents by misrepresenting them as Cabinet papers or breaches of privilege;¹²²
5. removing the clause that apparently protects whistleblowers as it has no place in an access to information law;¹²³
6. removing the blanket exemption that is provided to intelligence agencies since sensitive information of these agencies is already protected;¹²⁴
7. removing the cumbersome procedure prescribed to access information relating to corruption and human rights from security organisations;¹²⁵
8. strengthening and clarifying the provisions for accessing information from third parties;¹²⁶
9. reducing the time limit given to a PIO to provide requested information from thirty days to twenty days;¹²⁷
10. specifying that the fee charged on every information request is merely administrative and not for underwriting the working of the Act¹²⁸.

Expanding the disclosure of information regime by:

1. increasing the scope of the mandatory list of information to be disclosed *suo moto*;¹²⁹
2. clarifying the duty of dissemination by specifying what information is to be disseminated, the mode of dissemination and fixing regular intervals for such dissemination;¹³⁰
3. prescribing penalties for PIOs who do not comply with the *mandatory suo moto* disclosure requirements;¹³¹

Strengthening the information maintenance regime by:

1. minimising the possibility of political manipulation in the Information Commissions by seeking the recommendations of the concerned Chief Justice in the matter of appointments;¹³²

¹¹⁹ Right to Information Act, 2005, § 2(h).

¹²⁰ *Id.* § 8(10(d)).

¹²¹ *Id.* §§ 8(1)(a), 8(1)(c), 8(1)(i) read with § 8(3).

¹²² *Id.* § 8(1)(c), 8(1)(i) read with § 8(3)

¹²³ *Id.* § 8(1)(g).

¹²⁴ *Id.* § 24 read with § 8(1)(a).

¹²⁵ *Id.* provisos to §§ 24(1), 24 (4).

¹²⁶ *Id.* § 11.

¹²⁷ *Id.* § 7(1).

¹²⁸ *Id.* § 6, 7(5).

¹²⁹ *Id.* 4(1).

¹³⁰ *Id.* § 4(2), 4 (3), 4 (4).

¹³¹ *Id.* § 20.

¹³² *Id.* §§ 12(3), 15(3).

2. prohibiting public and private authorities from destroying information before it can be disclosed *suo moto* or upon demand;¹³³
3. prescribing penalties for public authorities for the failure to update and maintain information.¹³⁴

The RTIA is a clear beginning towards bringing greater accountability and transparency in governance in India. If certain changes are undertaken and the implementation of the Act is constantly monitored India is not far from fulfilling Justice Brandeis's prophecy.

¹³³ *Id.* § 4(1).

¹³⁴ *Id.* §§ 4(1)(a), 20.