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# Right to Information vs Right to Privacy

## Judicial Approach to Exemption from Disclosure of Information

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### ABSTRACT

*Right to privacy is recognized as fundamental right by virtue of Article 14, 19 and 21 of the Constitution of India. Therefore, when revealing information under RTI Act, it must be ensured that it does not jeopardize and individuals' liberty or dignity. In a number of cases, the Apex court has held that the most important value for the functioning of a healthy and well-informed democracy is transparency. The competent authorities under RTI regime have to harmonize the conflicting interests of information seekers and information providers. The rights of third parties and prayers for disclosure of information have also attracted considerable attention of Central and State Information Commissions, Appellate authorities and higher judiciary since the introduction of Information Act which provides that where the Central or State Public Information Officer intends to disclose any information or record which relates to third party and has been treated as confidential by the third party, a written notice has to be issued to the third party. It is now well-established fact that the scheme of Information Act is premised on disclosure being the norm and refusal the exception.*

Enacted The provisions relating to exemption from disclosure under Right to Information Act-2005 have been a subject of debate for various reasons since the day law came into force. Particularly Section 18 which deals with such exceptions on specific grounds namely (a) the information, disclosure of which would prejudicially affect the sovereignty and integrity of India, the security, strategic, scientific or economic interests of the State, relation with foreign State or lead to incitement of an offence; (b) the 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 the court; (c) information, the disclosure of which would cause a breach of privilege of Parliament or the State Legislature; (d) information, including commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party, unless the competent authority is satisfied that larger public interest warrants the

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disclosure of such information; (e) information available to a person in his fiduciary relationship, unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information; (f) information received in confidence from foreign government; (g) information, the disclosure of which would endanger the life or physical safety of any person or identify the source of information or assistance given in confidence for law enforcement or security purposes; (h) information which would impede the process of investigation or apprehension or prosecution of offenders; (i) cabinet papers including records of deliberations of the Council of Ministers, Secretaries and other officers: Provided that the decisions of Council of Ministers, the reasons thereof, and the material on the basis of which the decisions were taken shall be made public after the decision has been taken, and the matter is complete, or over: Provided further that those matters which come under the exemptions specified in this section shall not be disclosed; (j) information which relates to personal information the disclosure of which has not relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the Central Public Information Officer or the State Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information: Provided that the information, which can not be denied to the Parliament or a State Legislature shall not be denied to any person.

The issue with respect to rights of third parties and prayers for disclosure of information was thoroughly discussed in *Vijay Prakash Vs Union of India (2009 SCC, Del 1731)* where the court took exhaustive review of precedents and held that:

*“The scheme of Information Act no doubt is premised on disclosure being the norm, and refusal the exception. Apart from the classes of exceptions, they also appear to work at different levels or stages, in enactment. Thus, for instance, several organizations-security and intelligence agencies are excluded from the regime, by virtue of Section 24, read with the Second Schedule of the Act. The second level of exemption is enacted in Section 8 which lists 11 categories or classes [Clauses(a) to (j)] that serve as guidelines for non-disclosure. Though by Section 22, the Act overrides other laws, the opening non obstante clause in Section 8 (“notwithstanding anything contained in this Act”) confers primacy to the exemptions, enacted under Section 8(1). Clause (j) embodies the exception of information in the possession of the public authority which relates to a third party. Simply put, this exception is that if the information concerns a third party (i.e. a party other than the information seeker and the information provider), unless a public interest in disclosure is shown, information would not be given; information may also be refused on the ground that disclosure may result in unwarranted intrusion of privacy of the*

*individual. Significantly, the enactment makes no distinction between a private individual third party and a public servant or public official third party.”*

The court further observed that:

“A bare consideration of the right of individuals, including public servants, to privacy would seem to suggest that privacy rights, by virtue of Section 8(1) (j) whenever asserted, would have to prevail. However, that is not always the case, since the public interest element, seeps through that provision. Thus, when a member of the public requests information about a public servant, a distinction must be made between ‘official’ information inherent to the position and those that are not, and therefore affect only his/her private life. This balancing task appears to be easy; but is in practice, not so having regard to the dynamics inherent in the conflict. Though it may be justifiably stated that protection of the public servant’s private or personal details as an individual, is necessary, provided that such protection does not prevent due accountability, there is a powerful counter argument that public servants must effectively waive the right to privacy in favor of transparency. Thus, if public access to the personal details such as identity particulars of public servants, *i.e.* details such as their dates of birth, personal identification numbers, or other personal information furnished to public agencies, is requested, the balancing exercise, necessarily dependent and evolving on case by case basis may take into account the following relevant considerations, *i.e.*

- (i) Whether the information is deemed to compromise the individual’s private details, unrelated to his position in the organization, and,
- (ii) Whether the disclosure of the personal information is with the aim of providing knowledge of the proper performance of the duties and tasks assigned to the public servant in any specific case;
- (iii) Whether the disclosure will furnish any information required to establish accountability or transparency in the use of public resources.

Elaborating further on the concept of ‘public interest, the Court observed that:

“An important and perhaps vital consideration, aside from privacy is the public interest element, mentioned previously. Section 8(1)(j)’s explicit mention of that concept has to be viewed in the context. In the context of the right to privacy, Lord Denning in his *What next in Law*, presciently said that: “English law should recognize a right to privacy. Any infringement of it should give a cause of action for damages or an injunction as the case may require. It should also recognize a right of confidence for all correspondence and communications which expressly or impliedly are given in confidence. None of these rights

is absolute. Each is subject to exceptions. These exceptions are to be allowed whenever the public interest in openness outweighs the public interest in privacy or confidentiality. In every instance, it is a balancing exercise for the Courts. As each case is decided, it will form a precedent for others. So, a body of case-law will be established.

*In Thalappalam Ser.Coop. Bank Ltd and others Vs. State of Kerala and others*, Supreme Court had held that exemption from disclosure of personal information and as such public authority is not legally obliged to give or provide information even if it is held, or under its control, if that information falls under Section 8 (1)(j). The case focused on the determination of whether cooperative societies under the administrative control of the Registrar of Cooperative Societies, Kerala could be considered public authorities under Section 2(h) of RTI Act and bound to provide information sought by a citizen. The Apex Court held that such a society did not fall within the definition of ‘public authority’ under RTI law observing that society could neither be categorized within the meaning of ‘State’ under Article 12 of the Constitution, nor did it fall under any of the categories referenced in Section 2 (h). The Court observed that the disclosure of personal information which had no nexus with any public activity nor served any larger public interest was not warranted under RTI Act and would violate the right to privacy of the concerned person. The Court further observed that the right to privacy and information were not unbridled and could be restricted where they impinged on each other. Delhi High Court in *UPSC Vs R.K.Jain [2012(282)ELT161(Del)]* dealt with the question of ‘personal information’ as defined in Section 8(1)(j) and observed:

“19. The term ‘personal information’ under section 8(1)(j) does not mean information relating to the information seeker, or the public authority, but about a third party. The section exempts from disclosure personal information, including that which would cause “unwarranted invasion of the privacy of the individual”. If one were to seek information about himself, the question of invasion of his own privacy would not arise. It would only arise where the information sought relates to a third party. Consequently, the exemption under section 8(1)(j) is as regards third party personal information only.

20. Further, the personal information can not be that of a ‘public authority’. No public authority can claim that any information held by it is personal to it. There is nothing ‘personal’ about any information held by a public authority in relation to itself. The expression ‘personal information’ used in section 8(1)(j) means information personal to any “person”, that the public authority may hold. For instance, a public authority may, in connection with it functioning require any other person to provide information which may be personal to that person. It is that information, pertaining to that other person, which the public authority may refuse to disclose,

if the information sought satisfies the conditions set out in clause(j) of section 8(1) of the Act, i.e., if such information has no relationship to any public activity(of the person who has provided the information, or who is the source of the information, or to whom the information pertains), or to public interest, or which would cause unwarranted invasion of the privacy of the individual (unless larger public interest justifies disclosure). The use of the words ‘invasion of the privacy of the individual’ instead of ‘an individual’ shows that the legislative intent was to connect the expression ‘personal information’ with the word ‘individual’.

21. Merely because information that may be personal to a third party is held by a public authority, a querist does not become entitled to access it, unless the said personal information has a relationship to a public activity of the third person (to whom it relates), or to public interest. If it is private information (i.e. it is personal information which impinges on the privacy of the third party), its disclosure would not be made unless larger public interest dictates it. Therefore, for example, a querist can not seek the personal or private particulars provided by a third party in his application made to the passport authorities in his application to obtain a passport merely because such information is available with the passport authorities, which is a public authority under the Act. The querist must make out a case (in his application under Section 6 of the Act) justifying the disclosure of the information sought on the touchstone of clause (j) of Section 8(1) of the Act.

Elaborating on the expressions “public activity”, “public interest” and “privacy of the individual” used in Section 8(1)(j) of the Act, the court observed that:

23. “Public activity” qua a person are those activities which are performed by the person in discharge of a public duty, i.e. in the public domain. There is an inherent public interest involved in the discharge of such activities, as all public duties are expected to be discharged in public interest. Consequently, information of a person which is related to, or has a bearing on his public activities, is not exempt from disclosure under the scheme and provisions of the Act, whose primary object is to ensure an informed citizenry and transparency of information and also to contain corruption. For example, take the case of a surgeon employed in a Government hospital who performs surgeries on his patients who are coming to the Government hospital. His personal information relating to discharge of his public duty, i.e. his public activity, is not exempt from disclosure under the Act. Such information could include information relating to his physical and mental health, his qualifications etc, as the said information has a bearing on the discharge of his public duty, but would not include his other personal information such as his taste in music, sport, art, his family, his family background etc which has no bearing/relation to his act of performing his duties as a surgeon.

24. 'Public interest' is also a ground for taking away the exemption from disclosure of personal information. Therefore, a querist may seek personal information of a person from a public authority in public interest. The second half of the first part of clause (j) of section 18(1) shows that when personal information in respect of a person is sought, the authority concerned shall weigh the competing claims i.e., the claim for the protection of personal information of the concerned person on the one hand, and the claim of public interest on the other, and if 'public interest' justifies disclosure, i.e., the public interest outweighs the need for protection of personal information, the concerned authority shall disclose the information.

25. For example, a querist may seek from income tax authorities the details of income tax returns filed by private individual/juristic entity if the querist can justify the disclosure of such personal information on the anvil of public interest. The authorities would, in such cases, be cautious to ensure that the ground of 'public interest' is not routinely used as a garb by busy bodies to pry on the personal affairs of the individual, private citizens/entities, as it would be against public interest (and not in public interest) to permit such personal information of third parties to fall into the hands of anybody or everybody.

Highlighting the relevance of Section 11 of RTI Act, the court observed that whenever the querist applicant wishes to seek information, the disclosure of which can be made only upon existence of certain special circumstances, for example, the existence of public interest, the querist should in the application (moved under Section 6 of the Act) disclose/plead the special circumstances, so that the PIO concerned can apply his mind to it, and, in case he decides to issue notice to the concerned third party under Section 11 of the Act, the third party is able to effectively deal with the same. Only then the PIO/appellate authority/CIC would be able to come to an informed decision whether, or not, the special circumstances exist in a given case.

Elaborating further on 'public interest' the court observed that public interest does not mean that which is interesting as gratifying curiosity or love of information or amusement; but that in which a class of the community have a pecuniary interest, or some interest by which their rights or liabilities are affected. The expression 'public interest' is not capable of a precise definition and has not a rigid meaning and is elastic and takes its colors from the statute in which it occurs, the concept varying with the time and the state of the society and its needs.

Central Information Commission (CIC) had with regard to applicability of Section 8(1)(j) of RTI Act for non-disclosure of the third party bank details and income tax return referred to Supreme Court decision in *Girish Ramchandra Deshpande Vs. CIC (2013)ISCC212*, observing that the opening words of Section 11 of RTI Act are "*CPIO intends to disclose*" which indicate

that the procedure of Section 11 has to be followed only if CPIO intends to disclose the third party information. The bench deduced that the CPIO is expected to follow the procedure of Section 11 when he 'intends to disclose any information on record'. Since the CPIO found no merit in disclosure, hence Section 11 was not invoked. In the given case, the applicant had moved an application to CPIO, Income Tax Department seeking information about income tax returns filed by his spouse which was refused on the ground that information sought related to third party. The Commission observed that- "Since filing of the Income Tax Returns by an individual with the Income Tax Department is not a public activity and rather it is in the nature of an obligation which a citizen owes to the State viz. to pay his taxes, this information could not be disclosed to the appellant in the absence of any larger public interest." The case involved the legal issue whether the appellant claiming to be the legally wedded husband is entitled to seek information regarding his wife's bank account details and income tax returns? To answer this question, the commission referred to the decision of Delhi High Court in *Vijai Prakash Vs. Union of India* (mentioned above) wherein it was clarified that in a private dispute between husband and wife, the basic protection afforded by virtue of the exemption from disclosure enacted under Section 8(1)(j) can not be lifted or disturbed unless the petitioner is able to justify how such disclosure would be in 'public interest'. Recently, Karnataka High Court (Dharwad bench) ruled that a woman can not unilaterally access her husband's Aadhar data solely based on marital relationship. The woman had approached concerned authority seeking her estranged husband's Aadhar data. In her application under RTI Act, she cited difficulties in enforcing a family court's maintenance order against her husband who was not traceable. whereabouts were not known. Her application was rejected citing Section 33 of Aadhar Act. She moved to High Court where a single bench directed UIDAI to issue notice to her husband. UIDAI contested the order and later a division bench instructed UIDAI to hear the husband and then consider wife's application under RTI Act observing that- "*The relationship by marriage, which is a union of two partners, does not eclipse the right to privacy, which is the right of an individual and the autonomy of such an individual's right stands recognized and protected by the procedure of hearing contemplated under Section 33. Marriage by itself does not do away with the procedural right of hearing conferred under Section 33 of Aadhar Act*", the division bench said.

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