Right to information and Good Governance

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Lecture No. 21

Salient Features of the RTI - III

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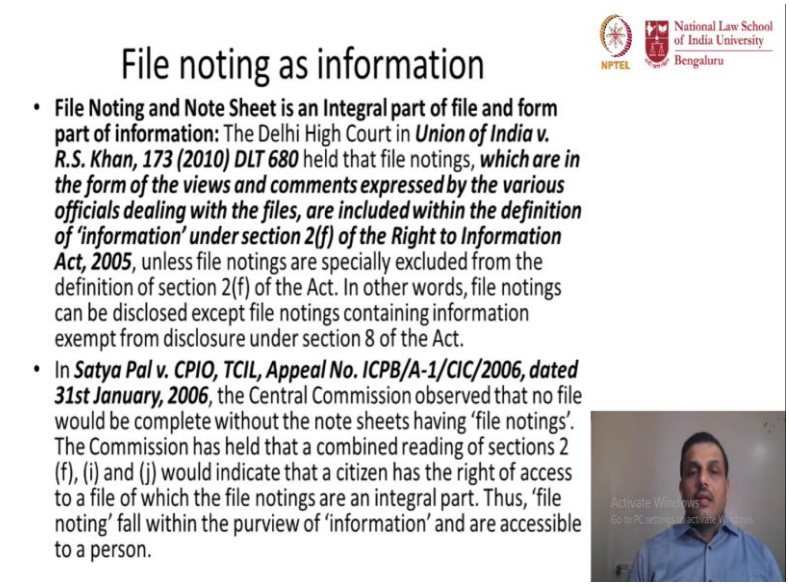

Friends, the next aspect for us to discuss under the definition of information, is on file notings. File notings has been quite a contentious aspect, topic in terms of the Right to Information Act. During the early stages of the implementation of RTI Act 2005, there were some discrepancies about whether file notings can be disclosed or not. And hence, you will notice that when we talk about file notings and note sheets in a government organization they are an integral part of a file. And they form part of the information as we look at the definition of the same under the RTI Act.

The Delhi High Court in Union of India versus R. S. Khan, a case decided in 2010 held that file notings, which are in the form of the views and comments expressed by the various officials while dealing with the file are included within the definition of information under Section 2(f) of the Right to Information Act, 2005. Thus, the court said that it should be provided unless the file notings are specially excluded from the definition. In other words, file notings are to be disclosed unless they are exempted under section 8 of the Act. Which means if the file notings concerns any of the exempted grounds or provision then they can be excluded, however, being an integral part of any file.

Because what is there in file notings and note sheets are the comments of offices, the views of officials who are dealing with the file. And their views become very important for one to understand and appreciate how the decision making process in any government organization or within the file has actually undertaken. And hence, by this Delhi High Court decision of 2010, it has been abundantly clear that file notings are to be shared as information under the Right to Information Act.

You will also notice that like any other information there is always the balance between what should be disclosed and what cannot be done so is something that will be evaluated by the application of Section 8 of the Right to Information Act. In Satya Pal versus the CPIO, TCIL, it is the central information commission decision of 2006. You will notice that the central information commission observed that no file is actually complete without the note sheets having file notings. A document or record probably does not say much unless one views the note sheets, one views the observation of officers.

And hence, without the access to file notings no document or record is actually complete. The commission held that a combined reading of Section 2(f), (i) and (j) would indicate that the citizen has the right to access a file of which file notings are an integral part. You cannot share the document without the notings of the same document. These are two somethings that have to be shared under the Right to Information Act.

Thus the information commission held that file noting falls within the purview of information and are accessible to a person. So, this clearly depicts the fact that file notings are within the definition of information and they have to be shared under the Right to Information Act.

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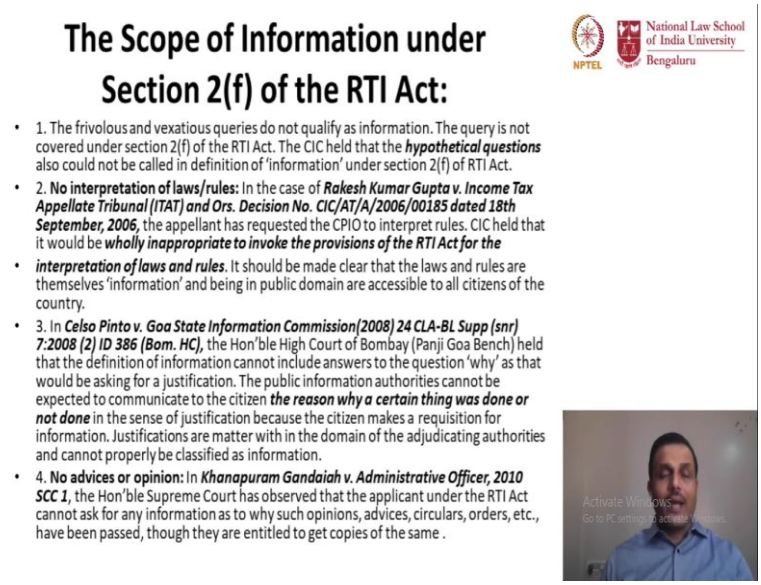

Next let us look at the scope of information under the Right to Information Act. When we discuss the scope of information you must understand that more often than not when a right is granted there are many people who actually misuse this right. Like the RTI Act of 2005, that enshrines the right to know the Right to Information though the right is not absolute there are reasonable restrictions on the same but we would have some people who cross the line in trying to misuse the newly granted right.

You will notice that very often than not citizens under the Right to Information Act ask for frivolous and vexatious queries and this then is a challenge for the public information officer to address. Very often than not this is personally what I believe in when a right is granted by the state there are citizens who try to stretch the right as a rubber band. They want to probably maneuver and try and see how much can this right can be exercised and to what extent can it be exercised. They actually try to go about the unethical practices in exercising these rights. And hence, right now as we speak it is a huge challenge for public authorities and the public information officers.

Not only that, it is a huge challenge to the information commissions also to balance between what is a right and what is abuse of the same. And hence, when citizens file a frivolous and vexatious application in those circumstances I think what is information and what is to be provided by it is something that has to be generally evaluated with the purpose and objective of the Right to Information Act. You will notice that the central information commission often has insisted and has often held that hypothetical questions cannot be called as information.

So, it is not for the citizens to raise a hypothetical situation and seek information from the public authorities. And hence, hypothetical questions cannot be brought within the ambit and definition of

information under the Right to Information Act. So, these are some of the limitations, these are some of the borders that I will have to prescribe in the definition of information and I do not think citizens who raise such hypothetical questions can be given adequate information by any public authority.

Second, very often than not citizens have a tendency to seek from the PIO or request PIO for interpretation of certain rules, laws, circulars and orders. These are those cases in which the citizens is an aggrieved individual by an order of a public authority. And being agreed by an order of a public authority, he has a tendency to get or seek clarifications. He also has a tendency to seek whether the law can be interpreted in his favor or against somebody else. And hence, very often than not you will find applications of citizens in which they are seeking interpretation of laws, rules, orders, regulations and circulars.

Now, if one looks at this interesting case of Rakesh Kumar Gupta versus Income Tax Appellate Tribunal. A decision again given by the central information commission in 2006. It very clearly says that if such a request is received by a public information officer, a request to interpret rules, then it will be wholly inappropriate to involve the provisions of the Right to Information Act for such kinds of actions. This is a clear transgression from the application of the Right to Information Act and the purpose of Right to Information Act is not for interpretation of laws and rules. The purpose of Right to Information Act is only to seek information and nothing greater than that.

You will appreciate that the public information officer is only a liaison officer between his authority and the citizen is neither an expert in law, nor somebody who can interpret the law. He can only provide the information if the same can be done so. And hence, asking any public information officer for clarification and interpretations of laws and regulation is something that the RTI Act does not apply to. And hence, the central information commission as early as in 2006 has clarified the position and has very clearly held that it is not the business of the public information officer to interpret the law.

And hence, the citizens are actually cautioned from misusing the RTI Act. Citizens have been warned saying that please do not use the Right to Information Act in such a manner. And any such use will be inappropriate. This I think is a very important message that the central information commission actually communicated in the early days of the implementation of Right to Information Act. You will notice that the interpretation of law is purely the domain of the courts, the constitutional courts, the High Court, and the Supreme Court. It is for the courts to interpret the law,

apply the law and also ensure its adequate implementation.

Finally, a public authority as the executive wing of the government is only there to implement the law and not to give its own interpretation of the same unless the same interpretation is required in case of adjudication of disputes. And hence, those kinds of interpretations that are already in public domain, those kinds of interpretation that have been stated in a record or a document can be accessed. However, the citizen cannot force a public information officer to generate that interpretation just because he has made an application for the same. This is probably one of the most important boundaries within which a citizen will have to exercise his Right to Information.

The third is probably the most important one according to me. A case that probably puts across to citizens, their ability to seek information and what is permissible and what is not permissible. The High Court of Bombay, the Goa bench in Celso Pinto versus the Goa State Information Commission. This is the judgment of the Bombay High Court, Goa Bench in 2008 did put across and they did put across a very important proposition and the proposition that was laid down was if I may put it like this. The why, what and how of the judgment.

In Celso Pinto case, the basic issue that was to be addressed was can questions be answered by the public information officer? As you noticed that very often than not citizens have a tendency to put forward a query to ask a thing or to raise a question that seems to be some kind of a curiosity that seems to be justified by the citizen. However, you will notice that seeking questions on why, what and how are challenging aspects of public information officer to answer. Kindly note, the public information officer may have answers to questions that have been raised by the citizen.

However, if a public information officer goes about answering these questions then he would probably be generating a new set of information. A public information officer is not responsible to generate information. He is not there to answer questions. You will notice that the public information officer is not a spokesman of his department. He is not addressing a press meeting over there. He is just facilitating the information that is already available in a public authority and sharing the same with the citizens. And hence, under the definition of information the High Court held that this cannot include answering of any questions and why as a justification cannot be sought by the citizen.

You will notice that the public information authority cannot be expected to communicate to the citizens. The reason why a certain thing was done or not done in the sense of justification because

the citizen making a requisition for the information, I do not think it is the business of public information officer to justify why a particular decision has been taken and why a decision was not taken. So, answering queries, and questions or asking why, what and how are completely inappropriate and beyond the scope of the application of Right to Information Act.

Justifications are matters within the domain of the adjudicating authorities and cannot be properly classified as information is what the Bombay High Court had to say in Celso Pinto versus Goa State information commission. So, if you look at this case, this is the case that clarifies that whenever the applications are starting with why, what and how, the public information officer may refuse to answer the why, what and how. He may refuse to give justification for why, what and how. He is there only to provide the information that is already available, existing at the public authority. And he is not supposed to generate any further information as may be required.

The fourth point on the limitation of the scope of information is advice and opinions. In this case of 2010 which is a very important Supreme Court case. Khanapuram versus the Administrative Officer of an organization. You will notice this is 2010 Supreme Court judgment that said that you know while advice and opinions are part of information, it is not the duty of PIO to generate those advice and opinions once the citizen makes an application. And hence, a citizen cannot ask for any information as to why an opinion, an advice or circular or order has been passed.

They are entitled to get a copy of the opinion and advice but he cannot then further inquire as to why that opinion was sought and why that advice was sought. This is not within the purview of the Right to Information Act and hence it is the priority of the government, it is the priority of public authority to seek opinions and advice. A copy of the opinion and advice is information and that can be accessed but why an advice was sought? Why an opinion was sought? Why a circular was issued? Are things that citizens cannot exercise under the Right to Information Act.

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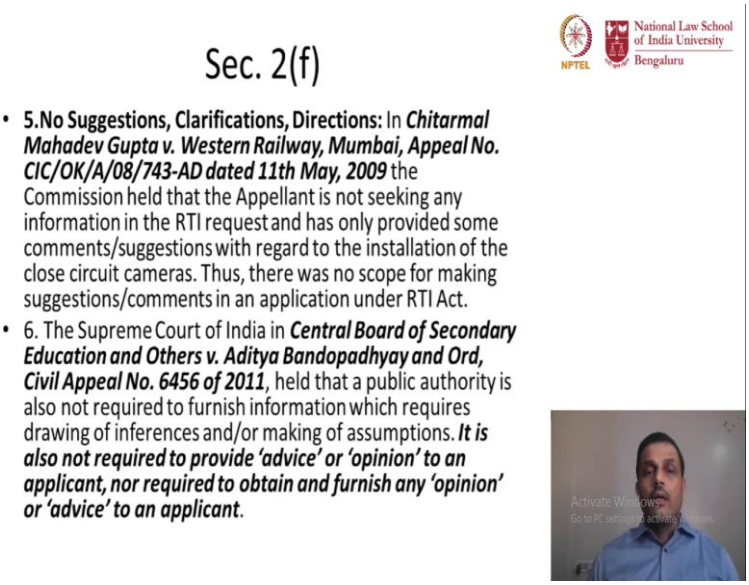

Continuing the same we will try and understand some more limitations to the scope of information under the Right to Information Act. Another limitation is that no suggestions, clarifications and directions can be made in the right to information space. In Chitramal Mahadev Gupta versus Western Railways Mumbai is the case decided by the central information commission in the year 2009.

The commission held that the appellant that is the citizen is not seeking any information under the Right to Information Act. He has unfortunately, he has been looking for suggestions on installation of close circuit cameras. He has been making suggestions in terms of those aspects that may improve the functioning of the railways. And hence, when citizens make suggestions, when citizens provide certain comments these are something that the citizen does from the duty that a citizen has towards the state.

Generally the comments that are made, the suggestions that are made by the citizens do not come within the purview of the Right to Information Act. These are beyond the purview of the RTI Act. Kindly note, right to information is not the mother of all the solutions and communications between the citizen and the state. It is only a law and the statute that provides you access to information. And hence, accessing information is something that you can definitely do. Providing comments and suggestions is not necessarily within the purview of the RTI act.

That is something that you can do under probably public hearing concept or whenever those comments or suggestions are invited by the concerned public authority. And hence, to deal with comments and suggestions is not the domain of the information commission. For example, a citizen may have a grievance that his suggestions were not taken seriously or implemented. These are not

disputes that can be brought within the scope of the Right to Information Act. Or a citizen may have a grievance saying that he was not permitted to make comments.

Again this is not within the domain of the Right to Information Act. So, citizens are free to provide comments and suggestions but those comments and suggestions are not necessarily within the scope of the application and the Right to Information Act. And the most important case on the limitation of the right and the misuse or abuse of this right and what public authority should and should not do. Is the case of Central Board of Secondary Education versus Aditya Bandopadhyaya.

It is the case decided in 2011 and in this case the Supreme Court held that our public authorities are not required to furnish information which requires the public authority to draw inferences or make certain assumptions. Very important judgment which clearly says that it is not the duty of the public authority to provide any opinion or advice to an applicant though a citizen may require it and it would be probably in his utmost interest to get such an opinion and advice which will probably clarify to the applicant or the citizen of what is the next course of action.

However, please note the public authority through the PIO is not bound to provide such opinions and advice under the Right to Information Act. So, the RTI Act is not going to facilitate all redressal of grievances. It is not going to facilitate clarification of doubts. It is not going to facilitate a kind of an advisory role that a public authority or a PIO ought to claim.

I think those aspects are something that the RTI Act is not bound to be used for and I do not think based on assumptions and inferences the public authority can facilitate the right to information. So in the Aditya Bandopadhyay case, the Supreme Court very clearly says, drawing inferences and making assumptions are something that the public authority need not do under the Right to Information law.

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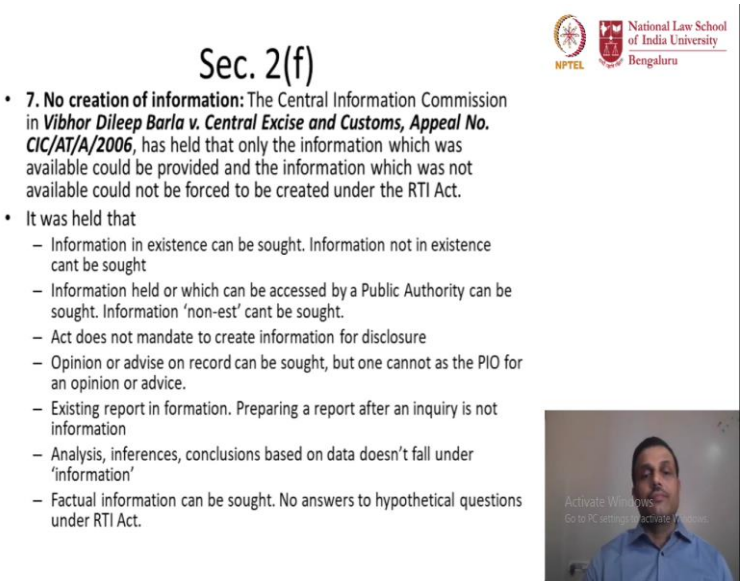

Point number 7, point number 7 on the limitation of the application of information is no creation of information. In Vibhor Dileep Barla versus Central Excise and Customs. The Central Information Commission in 2006 has said that only information which was available could be provided. An information which was not available cannot be enforced, re-created under the Right to Information Act. Which means the information that is existing and available under the public authority domain is something that can be sought under the Right to Information Act.

And hence, information cannot be generated, information cannot be created, information cannot be made available just because citizen has asked for the same. Only those information that exists in a material form, in a record form, in a document form can be sought. Just because a citizen has applied that information cannot be brought about, cannot be created so as to facilitate the same to be provided to the citizen. So, very clearly, generation and creation of information after the information applicant has made that application cannot be done so under the Right to Information Act.

So, I think this is very clearly the position that has been taken by public authorities and it is the consistent position that has been taken by public authorities over a period of time. It was held in this case that information that is existing can be sought, information not in existence cannot be sought. It was also held in this case that information non-est cannot be sought.

That is what is not there cannot be sought and cannot be brought forward to. What is there can be given and what is not there cannot be given. Very clearly the Central information commission has said that the Act does not mandate to create information for disclosure. So, that is something clearly

beyond the scope of the Right to Information Act. So, we cannot seek creation of information at all.

Opinion and advice on record can be sought but one cannot ask the PIO for an opinion and advice. This is again a repetition however this was also recreated in this Dileep Barla case. Existing reports are information, preparing a report after an inquiry is not an information. Analysis, inference, conclusions based on data does not fall within the purview of information.

So, I think data analysis cannot be sought under the Right to Information Act. If the data is existing you can ask for the copy of the data but you cannot ask for inferences and conclusion of the data in the public information office. Factual information can be sought. No answer to hypothetical questions under the RTI Act.

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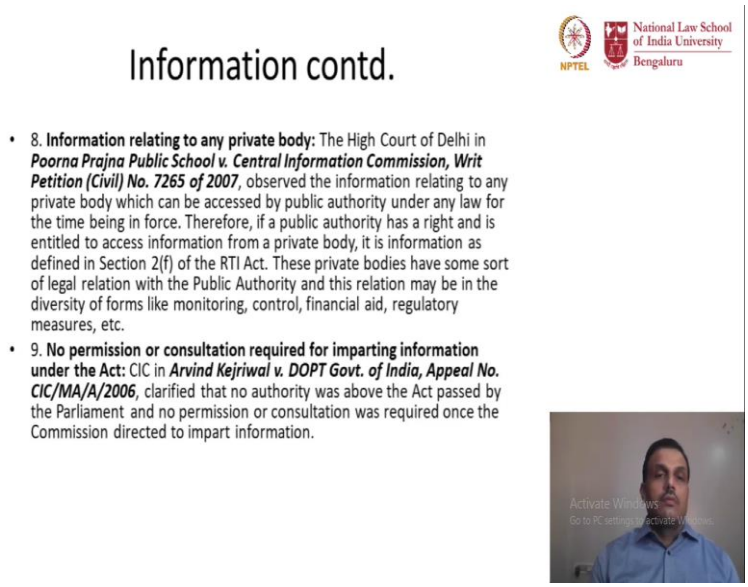

Let us go further and look at point number 8. Again very important in terms of the limitations to the Right to Information Act. Especially in terms of what information can be sought and what cannot be sought. In the Poorna Prajna Public School versus Central Information Commission, a very important case decided by the Delhi High Court in 2007. It was observed that the information relating to any private body which can be accessed by the public authority under any law for the time being and force can be provided under the Right to Information Act.

Therefore, if a public authority has a right and is entitled to access information from a private body., it is falling within the definition of Section 2(f) of the Right to Information Act. This is interesting which means apart from the definition of information which includes records, logbooks, contracts, file notings, emails, samples, models, these are all within the definition of information. But apart from that Section 2 (f) of the Right to Information Act also defines the information which is those

that a public authority can access from a private body.

So, private bodies are those that are regulated by a public authority. For example, in this case suppose we say that there is public university that provides affiliation and degree to a private college. Now, this public university can access information from the private body because it is providing a degree, it is providing recognition and affiliation. And such kinds of information of a private body which are accessed by public authorities also fall within the definition of information.

And hence, when the director general of Civil aviation which is a public institution accesses this information from a private body called Jet Airways. When I say private body it means it is not the state, it is not public authority defined under Section 2 (h) of Right to Information Act. It is neither substantially funded or financed by the state. Then DTCA may provide information that they have about the private body.

And hence, under the definition of information under Section 2(f) it is not only government information but government held information that can be accessed under the Right to Information Act. So, wherever the government has information about private bodies they do have the right to seek this information and they do have the duty to provide the said information to the citizens. You will notice that private bodies have some sought of legal relationship with public authorities. This is very often the interlink between private body and public authority.

Because the public authority may be either a regulator, it may be somebody who is monitoring the private bodies actions, or businesses or functions. And hence, public authorities are in access to a lot of information that actually belong to private bodies and private organizations. It could be information that are in terms of financial aid that is being provided. It may be information in terms of the measures that are required to be taken by private bodies so as to facilitate public functions. Or any other information that public authorities usually share with such private bodies.

And hence, all private body information that is within the domain of public authority can be sought under the Right to Information Act and this is not a record, this is not a document, this is not a contract, this is not a logbook, these are not information that are the government information. But these are information that are held by the government of a private body. It could be about the licenses the health department gives to private hospital. It could be about licenses given to doctors to practice. It could be about licenses given to restaurant to run its business.

So whenever, such license is granted, privileges, permissions have been granted by public authority to do business in any sector, there are documents that are filed by these private bodies. And these licensers are subject to renewals as well and all this information that are stored in public authorities before the licenses are granted can be accessed under the Right to Information Act. You will notice that even the pollution control board for that matter has information about industries. What raw material is being utilized, what is the pollution that is taking place? What is the load?

These are some aspects that are generally regulated by pollution control boards. And hence, the pollution control boards probably has information about industries and their industrial activities. And these are primarily those kinds of information that a public authority has in relation to private body. And please note under Section 2(f) this is also covered within the definition of information.

Point number 9, what is the functioning of PIO? Or how does PIO go about functioning? Does he have independent powers or before he shares information should he seek permission? Or should he consult anybody before he shares this information? Probably post RTI scenario, Arvind Kejriwal had a case against Department of Personnel and Training, Government of India. This is a case decided by CIC in 2006 in which the CIC clarified that no authority was above the Act which was passed by the parliament.

And hence, the law is supreme and hence when the RTI law expects the public information officer to liaison and act on behalf of public authority, the public information officer does not have to seek any further permission or any further consultation as required before he passes with the same information. A PIO can act independently, a PIO can apply his or her own mind and go about deciding whether the information is permissible and can be disclosed or if it is not permissible why and provide the reasons for its non disclosure.

And hence, the PIO while applying section 2(f), while checking whether the information can be provided and whether it falls within this definition, acts as an independent autonomous agency that is empowered under the Right to Information Act. And hence, all other office procedures which were there before 2005 need not be followed after the enactment of the Right to Information Act. So, the PIO is not bound or duty bound to take any further permission before disclosing information under Section 2(f).

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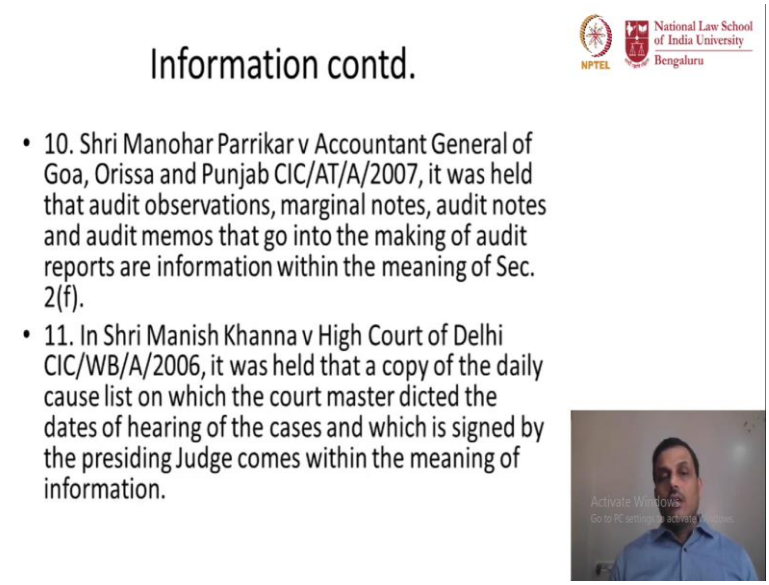

Again celebrity, unfortunately the late Chief Minister of Goa and Former Defense Minister of India also was involved in a case before the Central Information Commission. This was Manohar Parrikar versus the Accountant General of Goa, Orissa and Punjab. A case decided by the Central Information Commission in 2007. It was held in this case that audit observation, marginal notes, audit note and audit memos that go into making if an audit report are also information within the meaning of Section 2(f).

Kindly note, though the word audit does not appear it is information, it is document, it is a record and audit report are an important integral part of ensuring transparency and accountability of government organization. And hence, what documents go to make audit report? The audit observation, the marginal motes, the audit notes, the audit memo all of these are attributed to come within the definition of Right to Information Act. And hence, a citizen has a right to seek the same. Once the audit report is finalized, once the audit report is submitted any back notes or any background information that was relevant and important to prepare that audit report can also be part of Right to Information.

That is the case, CIC case of 2007 which also brings the audit department, audit organization and the documents within this audit organization within the purview of Right to Information Act. In Manish Khanna versus High Court of Delhi. This was the case about whether information can be asked from the judiciary? Interestingly, the classes of information that the judiciary maintains are not the same that the executive maintains.

And hence, if one looks at Section 2(f), it tries to define those sets of information that are normally

dealt in an executive of or in an executable department or in public authority that is executive in nature. And hence, in the Manish Khanna case, the CIC had to hold whether a class of information within the judiciary or the High Court can also be categorized as information under the Right to Information Act. For example, the judiciary has a cause list that is generally updated and maintained every day. And suppose the copy of the cause list is asked under the Right to Information Act, Sis it the duty of the court master to actually disclose the same? Or is it the duty of the public information officer to disclose the same under the RTI Act? It was decided in this 2006 case.

It was held that the copy of the daily cause list in which the court master dictates the terms, the date of the hearing of the cases and which is signed by the presiding judge comes within the meaning of information. So, which means information that is held in the judiciary, the different classes of information that are held in the judiciary also come within the purview of the Right to Information Act.